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By Email

Anti-Dumping Commissioner
Anti-Dumping Commission
Melbourne

Attention: Mr Gavin Crooks
Assistant Director, Anti-Dumping Commission Investigations 1

Dear Mr Crooks,

RE: Continuation Inquiry 588 – Exports of A4 Copy Paper from Indonesia – Draft Verification Report – Submission - APRIL

I refer to your email of 26 November 2021 attaching a draft verification report (**Draft Report**), including export price calculations, for PT Riau Andalan Kertas (**RAK**) and APRIL Far East (Malaysia) Sdn. Bhd. (**AFEM**) (collectively, **APRIL**), for review by APRIL.

You advised in your email that if APRIL disagreed with any findings in the Draft Report, these should be addressed in a submission filed with the Anti-Dumping Commission (**Commission**) subsequent to publication of the finalised verification report. Hence this submission.

APRIL notes that the Draft Report confirmed that information submitted by AFEM in its response to the Commission's Exporter Questionnaire was complete and accurate and that all issues identified during verification had been addressed to the satisfaction of the Commission.

APRIL makes the following observations and submissions regarding the Draft Report and accompanying export price calculations.

1. Exceptions report

APRIL was advised by the verification team at the commencement of the verification that the verification report would be in the nature of an 'exceptions' report. It was confirmed that this would be similar to an 'exceptions report' in a legal due diligence, that is, only 'exceptions', being, unresolved issues, remaining at the conclusion of the verification would be recorded in the report.

As all issues that arose during verification were resolved to the satisfaction of the verification team during verification and that there were no outstanding issues, as the Commission subsequently

confirmed, the Draft Report should contain no 'exceptions' and should state that all issues raised during verification were satisfactorily resolved.

APRIL submits that this should be accurately reflected in the final version of the Draft Report and that the Draft Report should not extend to other matters, including 'findings' extraneous to the verification of the accuracy and completeness of data submitted to it.

2. Section 9 – Adjustments to Normal Value

The Draft Report does not include a normal value determination or calculation and, consequently, a dumping margin calculation because the Commission is considering whether:

- the market in the country of export is such that sales in that market are not suitable for use in determining a normal value under section 269TAC(1) of the *Customs Act 1901*; and
- RAK's records reasonably reflect competitive market costs associated with the production or manufacture of like goods.

In light of this, Section 9 of the Draft Report has been incorrectly included and should be or should have been deleted. Until it is determined whether sales by RAK in the country of export are suitable for use in the determination of a normal value or, if not, some other method is required to determine the normal value, it is not legally or factually possible to determine what adjustments to the normal value may be required. To do so, arguably prematurely determines and pre-empts the determination of what adjustments in what amount may be required, although it is noted that the Commission is looking to address this in the final draft of the report that should make it clear that this is not the case.

Further, if as contended below 'export prices' have been incorrectly determined and calculated, then, again, what adjustments to the normal value may be required cannot be determined until such errors or shortcomings in the determination of 'export prices' have been corrected. Again, additional adjustment to the normal value determination may be required, as well as those set out in the Draft Report being altered or removed.

Finally, setting out in the Draft Report what adjustments may be required and in what amounts extends, as noted above, beyond verifying whether information provided by AFEM in its response to the Exporter Questionnaire was complete and accurate. As such, this section of the Draft Report should be or should have been removed for that reason alone with, a note in the Draft Report to the same effect as the determination of a normal value having been referred to case managment for consideration and determination.

3. Export Prices – Determination of 'exporter'

APRIL disagrees with the Commission's finding that the 'exporter' of A4 Copy Paper to Australia was RAK and not AFEM. For the reasons set out in submissions made by APRIL in Review 551, which submissions are incorporated and form part of this inquiry, APRIL disagrees with this finding by the Commission, and reiterates that, for the reasons given in submissions made by APRIL in Review 551, AFEM, not RAK, is the 'exporter'.

In addition, the Commission continues to fail to appreciate the distinction between an 'export trading company' (**ETC**) and an export management corporation (**EMC**), which is:

(i) an ETC is an intermediary that purchases the goods in the exporting country and resells them to a customer in the importing country to the following effect: the ETC takes title to the goods in the exporting country, making that transaction a domestic transaction in the exporting country for the exporter, that is, the ETC, and then transfers title to the importer in the importing country. In such transactions, the goods' foreign origin is not of concern to the buyer in the importing country and the sale of the goods abroad is of no concern to the seller in the exporting country; and

(ii) an EMC is a different type of intermdiary as it operates as an export-oriented manufacturer's representative for the producer/exporter and, as such, it does not take title to the goods being sold for export but, rather, takes a commission on the sale. Because an EMC acts as an agent, the producer/exporter is more involved in transactions with overseas buyers. For example, it will be responsible for the shipping of the goods to the buyer in the overseas destination, invoicing the buyer in the overseas destination and collecting payment from the buyer. The EMC merely facitiltates these transactions.[1]

While both ETCs and EMCs are 'intermediaries', they are different kinds of 'intermediaries' both legally and factually with an ETC being the 'exporter' of the goods from the exporting country, and the producer being the 'exporter' where an EMC is involved . Clearly, AFEM is an ETC, not an EMC.

In any event, the indicia referred to in Section 7.2 of the Draft Report to support the Commission's 'finding' that RAK is the 'exporter' are not relevant to that issue. They neither indicate who is or may be the exporter, nor factors involved in the 'exportation' of the goods from Indonesia or their exportation to Australia. Like 'importation', which is a process as well as an event (*Wilson v Chambers* (1925-1926) 38 CLR 131 (copy **attached**)[2]), so is 'exportation' (*Henty v Bainbridge-Hawker* (1963) 36 ALJR 354[3]. Delivery to a port in accordance with an FOB contract does not result in the 'exportation' from the country in question, nor to the country in question, and neither does it indicate that the entity that produced and/or delivered the goods to that port had any control over the goods following delivery to the buyer as to the removal from the country in question, that is, 'exportation', or to the country in question in the absence of any agency or similar arrangement.

For example, the Draft Report refers to the certificates of origin as being one of the indicia as to who is the exporter. However, as the Commission would be aware, a certificate of origin merely certifies the country of origin of the product in question. It does not certify who is the exporter. That a

[1] P. David, '*International Logistics, The Management of International Trade Operations*', Cicero Books, 6th Ed., 2021, Berea, USA., pp.123 – 124.

[2] This is the leading High Court of Australia case on this issue, but there are subsequent High Court endorse this case that can be provided if required. It does not seem to be mentioned in the Commission's Dumping and Subsidy Manual.

[3] See also: *Australian Trade Commission v. Goodman Fielder Industries Ltd* (1992) 36 FCR 517, at page 523 and *Wesley-Smith v. Balzary* (1976-77) 14 ALR 681 at page 688.

certificate is obtained by an entity in the country in which the product originated is explicable as it being unlikely and unnecessary that it be obtained by an entity in another jurisdiction. Similarly, all of the other indicia refer to matters that relate to events and circumstances occurring prior to the removal of the goods from Indonesia and do not involve the carriage of the goods from Indonesia to anywhere outside of Indonesia, let alone to Australia or to a customer in Australia.

Similarly, the assertion that AFEM never took possession of the subject goods is factually and legally incorrect and displays an ignorance of relevant concepts in international trade:

> "*The third function of the bill of lading in its capacity to operate as a document of title under common law in the sense that it can operate to transfer possession of the goods.*"[4]

The references to such indicia in the Draft Report is to be contrasted with the indicia referred to in Section 7.1 of the Draft Report, which is indicative of the fact that AFEM is the entity responsible for all of the A4 Copy Paper exported to Australia and it is the 'exporter'. For example, the bills of lading, which are documents of title as well as contracts of carriage, have AFEM shown as the 'shipper'. Not only is it responsible for the contract of carriage for the goods to Australia but it also is in possession of the goods the subject of the carriage by being in possession of the bill of lading[5]. This is consistent with AFEM being the 'exporter' and consistent with the 'sale of goods contract between RAK and AFEM whereby title to the goods, which include the complete bundle of property rights in the goods[6], passing to AFEM in Indonesia and before departure from Indonesia. Facts such as these have not to have been taken into account in the Draft Report.

In this context, what is meant by the statement in the Draft Report that RAK 'sold all of the goods it exported to Australia to AFEM'? Why would RAK sell to AFEM all of the goods that it, RAK, exported to Australia? What is or would be the commercial rational or basis for it doing so? What is the commercial benefit in having fragmented contracts of sale in the supply chain? This is not explained in the Draft Report.

Further, would the price payable by the Australian customer have been any different if RAK had sold and exported the goods directly to those customers? Would the identity of the seller in the APRIL group made any difference to the price payable by the Australian customer and what evidence is there that it would have? This also is not considered in the Draft Report. This issue is addressed further below.

Even if RAK is the 'exporter', the price payable by AFEM to RAK for the purchase of A4 Copy Paper subsequently exported to Australia is irrelevant. Regardless of how that price is calculated, it has no

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[4] Burnett & V. Bath, *'Law of International Business in Australia*', The Federation Press, Sydney, Aust, 2009., page and case cited, namely: *Lickbarrow v Mason* (1794) 101 E.R. 380.

[5] op cit.,pages 97ff; M. Dockray, '*Cases and Materials on the Carriage of Goods by Sea*', Professional Books. United Kingdom, 1987, Chapters 14 to 16; R. Goode, '*Commercial Law*', 3rd Ed, Penguin Books, London, U.K, pages 880 – 892.

[6] Such bundle of property rights includes the exclusive right of possession and disposal of the goods in question, as well as use. It is to be contrasted with, for example, an equitable assignment of some such rights, which obviously is not relevant here. References to the applicable law can be provided if required.

causal nexus with the price at which the A4 Copy Paper enters into the domestic commerce of Australia because, as verified in this inquiry, that price is negotiated at arm's length with the Australian customers who are unrelated to APRIL. There is no evidence to the contrary.

APRIL notes the recommendations and reasons for the recommendations made to the Minister by the Anti-Dumping Review Panel (**ADRP**) in Review 138. Obviously, there are matters in that report that APRIL does not agree with.

APRIL also notes that the ADRP is an administrative body established as part of the Executive Government and, consequently, the reasoning and recommendations do not have the same legal standing as those of a court, although the quality of its reasoning may be persuasive. At this time APRIL is not persuaded to a different view that AFEM is not the 'exporter' of the A4 Copy Paper to Australia notwithstanding ADRP's position on this issue.

Finally, for completeness, attention is drawn to the following statement of His Honour Barton J. in *Lyons v Smart (No 1)* [1908] HCA 34; (1908) CLR 143 (High Court of Australia), which seems apposite in this issue:

> "*Now, we know what is the meaning of "import" and of "export," and the word "convey" is a word employed very frequently in Imperial and American legislation for the purpose of designating the introduction of goods into, or the taking of goods out of, a country.*"[7]

Here, AFEM, not RAK took the goods in question out of Indonesia and conveyed them to Australia. This is a question of fact supported by verified evidence.

4. Export price - methodologies

APRIL notes that notwithstanding that the nature and structure of APRIL's export transactions to Australia have not materially changed since the original investigation[8], the Commission has adopted a number of different methodologies in the original investigation, Review 551 and this inquiry in relation to the determination of 'export prices'.

In each case, APRIL considers that the methodology adopted by the Commission was and is erroneous. For example:

- in the original investigation a deductive export price methodology was adopted. This was because APRIL's then Australian importer and distributor of A4 Copy Paper sold A4 copy paper sourced from APRIL in the Australian market at a loss, thereby, giving rise to the (unfounded) inference that APRIL was reimbursing the Australian distributor, Edwards

[7] For information, many of the concepts contained within the original *Customs Act 1901*, which continue to subsist, were based on concepts and jurisprudence then present in Imperial (i.e., British) and American legislation as reflected in Dr Wollaston's annotated text on the *Customs Act 1901, 'Customs Law and Regulations' (1904)*, Dr Wollaston being the first Permanent Head of the Department of Trade and Customs and Comptroller-General of Customs.

[8] The only substantive change has been the substitution of AFEM for APRIL International Enterprise Pte Ltd as the ETC.

Dunlop Office Products, a division of BJ Ball Pty Ltd, for such losses. There was, however, no evidence to that effect, and the audited reports of each neither recorded any such reimbursement nor indicated the presence of any reimbursement. Further, at the time the Australian distributor, Edwards Dunlop Office Products, was being acquired by Australian Paper, which was public knowledge especially given that Australian Competition and Consumer Commission (**ACCC**) approval of the acquisition was required and public notice of the proposed acquisition had been given. For APRIL to be reimbursing the Australian distributor's losses would effectively mean it was subsidising the purchase price Australian Paper, a competitor of APRIL, was paying for APRIL's Australian distributor, which is and would have been commercially absurd on analysis. Nevertheless, the Commission persisted with the unfounded assumption that APRIL was reimbursing the Australian distributor;

- in Review 551 the export price was determined to be the price payable between an Indonesian company (RAK) and a Malaysian company (AFEM) in Malaysia for sales in Indonesia, which were essentially domestic sales in Indonesia. In any event, such sales had no necessary legal or factual nexus with Australia, including the price paid in such transactions not being the price at which the A4 Copy Paper exported to Australia actually entered the commerce of Australia. Consequently, there was no finding in that review that the actual price at which exports by APRIL entered into the commerce of Australia were 'dumped prices'. There is nothing in ADRP Report 138 that contradicts this in APRIL's opinion; and
- in the Draft Report, while similar to Report 551 in that the verification team considers that RAK is the exporter and that the export price in the majority of transactions is the price paid in transactions between RAK and AFEM, the verification process has determined for the purposes of this inquiry that the price in the transactions between RAK and AFEM 'appears to have been influenced' by the relationship between the parties and, consequently, not at arm's length. This 'finding' has been made notwithstanding that there has been no change in the transactional arrangements between RAK and APRIL since Review 551.

The reasons for these changes in export price determination by the Commission can be speculated on, but, it is submitted, unnecessary as it is self-evident. Nevertheless such lack of consistency in administration given the relatively unchanged circumstances of APRIL's transactional arrangements for its exports to Australia over the past five years and more is of significant concern.

Specifically, if, in APRIL's opinion, the actual price payable by the Australian customers on importation of the product into Australia, that is, the import price, is the 'export price' as contemplated by section 269TAC(1)(a) of the *Customs Act 1901* and Article 2.1 of the WTO Anti-Dumping Agreement, the result is a negative dumping margin. This was the case in the original investigation until the methodology in determining the 'export price' was altered on internal review by the Commission. APRIL is of a similar view in respect of the dumping margin calculations for its exports in Review 138 notwithstanding the conclusions of the ADRP in its Report 138. In other words, it was the methodology adopted in determining 'export prices' and not 'actual' prices at which the product was imported into Australia that resulted in a dumping margin.

It would seem likely that this will continue to be the case in this inquiry.

5. Export price and transfer pricing arrangments

APRIL disagrees with the Commission's findings regarding the pricing arrangements between RAK and AFEM. APRIL notes that the Commission acknowledged that, for the purposes for which it is intended, the price between RAK and AFEM is an arms' length price, based on transfer pricing rules in Indonesia, which, in turn, are based on the *OECD Transfer Pricing Guidlines*.[9]

Yet, the Commission has found that such arrangements are not considered to be arm's-length transactions under section 269TAB(1(b) of the *Customs Act 1901*. This appears to be simply because it took the view that *'… the price has been influenced*' by the relationship between RAK and AFEM, that is, by their being related bodies corporate.

However, the nature and extent of such influence that renders the price as not being an 'arm's length price' under section 269TAB(1(b) of the *Customs Act 1901* is not set out in the Draft Report, nor the criteria for determining how and to what extent a 'commercial or other relationship appears to have relevantly influenced' the price in question to the extent that such a price is not an arms' length price for the purposes of section 269TAB(1(b) of the *Customs Act 1901*. The Commission is reminded that the exercise of statutory discretions is subject to the usual administrative law principles, including those set out in section 5 of the *Administrative Decision (Judicial Review) Act 1975*, which have been (partially and therefore incorrectly) transcribed in the Foreword to the Commission's Anti-Dumping Manual[10].

In relation to some of the transactions being at a loss, as the Commission was advised during verification, OECD Transfer Pricing Guidlines expressly recognise that sales may be at a loss for a variety of reasons. However, sales at a loss would be an issue under such rules only if there was evidence that they were systemic. Here, the reasons for the loss were explained to the verification team, particularly that such losses were exceptional and unexpected, being due to the effect of the pandemic on supply chains and logistics, especially freight and container charges. This was neither questioned nor disputed by the verification team.

The magnitude of those freight and container price increases and their frequency was exceptional and unexpected not only by APRIL but globally, as has been publicly recognised and is common knowledge. The Commission would be aware of this from its other investigations, inquiries and reviews as well. However, overall, the export transactions to Australia by APRIL were profitable as verified by the verification team. Hence, the few sales at a loss, due to exceptional circumstances, did not and could not have had the effect claimed. In any event, APRIL's compliance with transfer pricing rules was so certified by an independent, qualified expert as the Commission is aware and has verified, and as the Draft Report acknowledged.

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[9] Transfer pricing - OECD

[10] Applying the same standard used by the Commission in Review 551, such erroneous transcription renders the Manual unreliable and must be disregarded. If transcription of a section in a Federal Government statute is not reliably done, then how can the remainder of the Manual be regard as reliable?

Further, that reference in the Draft Report to "30%" of such transactions being at a loss is, in the context of the low volume of exports, at best, a meaningless statistic, if not misleading. If there are two transactions and one is at a loss, then 50% of the transactions were at a loss. What does that signify if anything? Without considering the reasons why one transaction was at a loss and why the other was profitable, and whether this was likely to continue and, if so why, the statistic of itself is meaningless and not indicative of anything. To refer to it without an accompanying explanation is misleading. Similarly, recording in the Draft Report that a percentage of sales by RAK were at a loss without more is not indicative of anything and arguably misleading.

All commercial relationships between a buyer and a seller influence prices for the purchase and sale of products between the parties, whether they are related or unrelated, in any number of ways. All such relationships not only 'appear' to have influenced the price but actually do influence the price, without exception. The issue is in what manner and to what extent is the price so influenced or appears to have been so influenced in a manner and to an extent that renders the transactions as not being at arm's length under section 269TAA of the *Customs Act 1901*. This is not addressed in the Draft Report, nor at all.[11] This renders this finding as unreliable, including on administrative law principles.

Determining prices between related bodies coporate that are based on principles of transfer pricing rules of itself recognises that, and is because, the parties are related bodies corporate and that relationship may have influenced prices in some way to some extent. Transfer pricing rules address the possibility that the relationship between the parties could influence the price in a manner and to an extent that alters the tax-paying entity's income and, therefore, liability for income tax in a manner and to an extent that the taxing authority considers disadvantageous to it. That is, such rules are designed around and for the purposes of income tax. To overcome this transfer pricing rules provide a mechanism whereby a price may be determined that reflects a market price having regard to the obligations and risks each party is incurring in the transactions. Prices so determined and certified as being determined in accordance with transfer pricing rules by an independent and qualified expert provide the taxpayer with a 'safe harbour' regarding its income tax obligations in respect of such transactions.

Independent and qualified experts have so certified the transactions between RAK and AFEM, amongst others, as having achieved this in the pricing arrangements. This was verified by the verification team. It is unclear, therefore, how prices determined in accordance or not with transfer pricing rules for income tax purposes is relevant in determining whether prices have been relevantly

[11] Such criteria also is not set out in the Commission's Dumping and Subsidy Manual, although, if it were, due regard would need to be given to the principles of administrative law applying to the exercise of statutory discretions including, amongst others, taking into account irrelevant considerations and failing to take into account relevant considerations, failure to exercise of a statutory power such as adopting an inflexible policy rule, acting under dictation and exercising a discretion on no evidence: see S.D. Hotop, '*Cases and Material on Review of Administrative Action*', The Law Book Company, Sydney, Aust., 1979, pages 280ff and cases cited therein.

influenced by a relationship between the parties for the purposes of section 269TAA of the *Customs Act 1901*. No explanation of such relevance is provided in the Draft Report.

Of more concern is the fact of such losses being referred to in the Draft Report and the manner in which these were reported when the Commission was fully aware and had verified why the losses had occurred, that they had nothing to do with the relationship between RAK and AFEM. In particular, that they were due to events beyond either party's control, in common with others similarly affected by the disruptions to supply chains by the pandemic. This is of more fundamental concern to APRIL.

Hence the findings in this regard as set out in Draft Report are unreliable and must be set aside.

6. Export Prices - Calculation

Without derogating from the comments in the proceeding section, APRIL notes that 'export prices' have in the main been calculated from the prices paid by AFEM's Australian customers. Such an approach is in APRIL's view correct being consistent with section 269TAC(1)(a) of the *Customs Act 1901*, which emphasises that an 'export price' is the price payable by the 'importer'. It also is consistent with Article 2.1 of the WTO Anti-Dumping Agreement, that is, it is the price at which the goods enter into the commerce of Australia, being the price upon importation into the importing country.

While commencing with the prices paid by the Australian customers is correct, the subsequent calculation of 'export prices' is not. The only deductions from that price should be for charges for overseas freight and insurance and other similar post-exportation expenses.

In particular, they should not include, for example, AFEM's 'profit'. If, as has been contended by the Commission, AFEM is no more than an 'intermediary' of some description commensurate with being an 'agent' of RAK, who is considered to be the 'exporter', then the amounts AFEM receives in the transaction consequent to the transfer pricing arrangements are equivalent to a 'commission'. As such, it is and properly should be included in the 'export price'. In other words, on the Commission's position, the transfer pricing arrangements do no more than allocate between RAK and AFEM the proceeds of the price (i.e., 'export price') paid by an Australian customer, which allocation is reflected in the manner in which the price between RAK and AFEM is worked out. Hence, 'export prices' should be calculated from the prices paid by the Australian customers less overseas freight and insurance charges only.

In other words, using similar criteria that the Commission has used to determine that RAK, as opposed to AFEM, is the 'exporter', to the transactions with the Australian customers makes the Australian customer the importer, not AFEM. For example, the Australian customer is aware that the goods it has contracted with AFEM to supply will be sourced from overseas and brought to Australia for delivery to it pursuant to its contract with AFEM; it is named as consignee in the relevant commercial documents, etc. That AFEM may be the 'owner' of the goods at the time of importation is irrelevant and confuses two concepts 'owner' and 'importer'. Under the *Customs Act 1901* the term 'owner' has an expansive definition and under that Act and the *Customs Tariff Act*

1995, the 'taxing' Act, an 'owner' is liable for customs duties imposed upon the importation of goods. This also applies to dumping duty which is a special duty of customs imposed under section 8(3) of the *Customs Tariff (Anti-Dumping) Act 1975*.

Under customs law, customs duties are imposed on the importation of goods but they are not imposed upon a person importing goods. They are not a personal tax liability like income tax. Rather, they are imposed upon a good upon its importation into Australia and consist of a charge on that good that remains charged on the good until paid. The effect of this is that each successive 'owner' of the goods on and from importation until the cutoms duties charged on the good is paid is jointly and severally liable for payment of that duty.[12]

Consequently, the 'owner' for customs duty liability purposes need not be and may not be the same person as the 'importer'. It is ultimately a question of fact, as is who is the 'exporter'. If AFEM is merely an 'intermediary' for RAK and, therefore, not the 'exporter', then equally it is the 'intermediary' for the Australian customer who, on the Commission's analysis is the 'importer'. If the DDP terms of contract render AFEM the importer, then they equally render it the 'exporter'.

Importantly, if AFEM is the 'importer' on the Commission's analysis in the relevant transactions, then its re-selling of the imported A4 Copy Paper to its Australian customers must be domestic sales in Australia as set out in the Commission's diagram of the Australian A4 Copy Paper market. As such, they would be subject to sale of goods legislation in Australia, such as, for example, the *Sale of Good Act 1923 (NSW)* and *Sale of Goods (Vienna Convention) Act 1986 (NSW)* unless expressly excluded, and AFEM arguably could be contravening the prohibition contained in section 601CD of the *Corporations Act 2001 (Cth)* against a foreign corporation doing business in Australia unless registered under that Act[13]. None of these matters has been taken into account by the Commission in its analysis in the Draft Report.

Additionally, the deduction of AFEM's 'profit' is inconsistent with the verification team's own reasoning and is illogical. If the transactions between RAK and AFEM were not at arm's length, then how can AFEM's 'profit' from the purchase price it receives from an Australian customer after it pays to RAK the purchase price for the goods purchased from RAK be a 'profit' from arm's length transactions and be suitable for use in the calculation of 'export prices'? Either the transactions, pricing and consequent profits are acceptable or they are not. That is, the profits realised by both RAK and AFEM in their respective sales to their customers in these 'export transactions'.

Notwithstanding this, in relation to those few transactions in which the goods are sold to the Australian customer on a DDP Incoterms basis and AFEM is determined to be the 'importer', the manner in which the verification team has calculated the 'export price' in such circumstances is illogical and incorrect.

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[12] *Wing On Co Ltd v Collector of Customs (NSW)* [1938] HCA 71; (1938) 60 (CLR) 97; and *Malika Holdings Pty Ltd v Virginia Stretton* [2001] HCA 14

[13] Foreign companies | ASIC - Australian Securities and Investments Commission

Assume for the sake of argument that RAK had sold directly to the Australian customers on a DDP basis and, therefore, was the 'importer' as well as being the 'exporter', would the Commission have deducted RAK's 'profit' when calculating an 'export price' and, if not, what would it have deducted as representing the 'importer' component of any profit realised on the transaction and on what basis? Would such deductions be consistent with past practice by the Commission in respect of DDP export transactions? Is such an approach consistent with, for example, CIF export transactions?

More importantly, it also must be noted in such a hypothetical example, the price payable by the Australian customers to RAK on a DDP basis would be the same if not identical to that actually payable and paid by those customers to AFEM. Whether the seller is RAK or AFEM would be of no consequence to such purchasers. The prices that they agree with AFEM are the prices they are willing to pay on the relevant commercial terms regardless of who within APRIL is the seller. There is no evidence to the contrary. That would, on the Commission's analysis render the price payable in sucy transactions as being the 'export price'. Hence the outcome would be different and the inconsistency self-evident.

Further, based on the Commission's methodology for determining 'export prices' as set out in the Draft Report, it will be necessary to add back the actual deductions in deriving such 'export prices' to determine the actual prices at which APRIL's exports of A4 Copy Paper enter into the commerce of Australia and compete with the Australian industry's products. The 'export prices' so determined are not the prices at which APRIL's exports of A4 Copy Paper enter into the commerce of Australia and compete with the Australian industry's products. Nor are the prices at which APRIL's exports of A4 Copy Paper enter into the commerce of Austraia and compete with the Australian industry's products determined to be 'dumped' prices, nor can they be affected by 'dumping' given how they are derived, as the verification team verified, nor can they be taken to be 'dumped' prices because a causal connection between those prices and the prices payable in the transactions between RAK and AFEM has effectively been broken by the deductions made by the Commission. That is, there is no analysis, nor evidence, that because an upstream price (that is, the price payable by AFEM to RAK) is determined to be a 'dumped export price', that the downstream price (that is, the price payable by an Australian customer to AFEM) is a 'dumped price'. To assume it is a 'dumped price' would be mere speculation and illogical.

Accordingly, for a consistent approach, 'export prices' in the circumstances should commence with the prices payable by Australian customers from which are deducted charges for overseas freight and insurance, Australian customs duties, port charges in Australia and any inland freight in Australia to derive a notional FOB 'export price' payable by the Australian importer. Such a determination of 'export prices' has regard to all of the circumstances of the transactions as required by section 269TAC(1)(c) of the *Customs Act 1901.*

Fundamentally, the flaw with the methodology used in the determination of 'export price' is that it fails to recognise the substance of the transactions. Specifically, the transactions with APRIL's Australian customers are overall profitable and there is no evidence of 'hidden dumping' where the importer sells at a loss in the importing country and is reimbursed for such losses by the exporter, which is what a 'deductive export price' is intended to address. Obviously, that is not the case here.

Here, however, the revenue derived from sales by APRIL to its Australian customers is precisely the same regardless of whom between RAK and AFEM is taken to be the 'exporter' and how 'export prices' are determined. The method by which 'export prices' are determined essentially only addresses how revenues from sales to Australian customers are allocated between members of the APRIL group, in this case, RAK and AFEM, based on principles of transfer pricing but which the Commission is effectively reallocating due to it finding that transactions between them are not at arm's length. The prices to the Australian customers are unaltered, the prices at which the A4 Copy Paper enters into the Commerce of Australia remain unaltered and the revenue derived by APRIL from the transactions remains unaltered.

As indicated at the outset, it has only been the Commission's methodology used in determining 'export prices' that has resulted in findings of 'dumping', not the actual prices at which APRIL's A4 Copy Paper enters into the commerce of Australia to which Article 2.1 of the WTO Agreement refers and which Article Australia's legislation is intended to give effect to[14].

Determination and calculation of export prices in the Draft Report and accompanying spreadsheet need to be amended to correctly reflect this.

Finally, it is noted that if the determination of 'export price' in this manner is persisted with, it will, of course, be necessary to add back the amounts actually deducted to establish the amount by which the goods in question actually enter into the commerce of Australia, which, of course, would not be a 'dumped' export price because of how the 'export price' was calculated. The 'export price' is different from the 'import price', which 'import price' need not be a 'dumped' price. There would in fact be no determination that the 'import price' is a 'dumped price', especially given the effect that the deductions may have on this.

However, what this points to is a 'health check' on the margin calculation. The outcome of any dumping margin calculation should be identical in the present circumstances regardless of whether the 'export price' is taken to be the price between RAK and AFEM or the price between AFEM and its Australian customers. A comparison with prices in domestic sales with appropriate adjustments to effect a 'fair comparison' should produce the same outcome given that the only differences would essentially be the deductions from the actual import price paid by the Australian customers to derive the price between RAK and AFEM. 'Fair comparison' adjustments should have a neutral effect on the calculations.

Consequently, if there is a difference in outcome, especially if it is material, this indicates that something has gone awry. That is, there is a problem with the methodology used in one or both calculations.]

This obviously is also relevant to assessing whether the expiry of the anti-dumping measures will lead to or be likely to lead to the continuance or recurrence of material injury to the Australian industry caused by a continuation or recurrence of dumping.

[14] *GM Holden Limited v Commissioner of the Anti-Dumping Commission* [2014] FCA 708 and cases cited therein.

7. Conclusion

As APRIL disagrees with the majority of the findings of the Commission set out in the Draft Report, the Draft Report as published should have included a statement to the effect that APRIL reviewed the Draft Report and advised that it disagreed with findings contained in that report, including:

- the method of determining 'like goods' but not the actual finding as noted in the draft verification report;
- the determination of which APRIL entity is the 'exporter' in the export transactions to Australia for the reasons set out above and in Review 551;
- the determination that prices between RAK and AFEM were or appeared to have been influenced in some unspecified relevant maner and extent by the relationship between the parties so as to render them as not being at arm's length; and
- consequently,the determination and accompanying calculation of 'export prices', and
- that these matters would be addressed in a submission by APRIL to the Commission, beng this submission.

Accordingly, APRIL reiterates that it disagrees with the above findings in the Draft Report.

Please contact me if you have any queries or concerns.

Yours sincerely,

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[HIGH COURT OF AUSTRALIA.]

WILSON . . . . . APPELLANT;
INFORMANT,

AND

CHAMBERS AND COMPANY PROPRIETARY LIMITED . . . . . } RESPONDENT,
DEFENDANT,

AND

LAWRENCE CHAMBERS . . . . . RESPONDENT,
DEFENDANT,

AND

WILLIAM CHAMBERS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1925-1926.

SYDNEY, *Nov.* 17, 18, 1925.

MELBOURNE, *June* 8, 1926.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Customs Duties—Offence—Entry of imported goods—When duty to enter arises—"Imported," meaning of—Goods brought in ship into port—Goods not landed but taken away in ship—Evasion of payment of duty—"Evade," meaning of—Failure to pay—Interfering with goods subject to control of Customs—"Interfere," meaning of—Physical dealing with goods—Intention to defraud revenue—Customs Act 1901-1920 (*No.* 6 *of* 1901—*No.* 41 *of* 1920), *secs.* 33, 68, 234, 236, 241.

A quantity of paint was shipped in England and consigned to a consignee in Sydney. The paint would have been dutiable under the *Customs Tariff* if imported into the Commonwealth. The ship did not go to Sydney but entered another port in New South Wales. The ship was about to discharge the paint there, and the consignee was willing to take delivery. While the ship was in the port an arrangement was made between C., acting on behalf of

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the consignee, and the captain of the ship, whereby the paint was taken over for the use of the ship. No Customs entry was made in respect of the paint and it was not landed. By permission of the Customs officer at the port, a guarantee having been given by the captain to furnish a list of all dutiable stores consumed on the voyage to Melbourne, the next port of call, the ship left the port with the paint on board. No duty was paid in respect of any of the paint.

Held, (1) that the paint was imported, that the consignee had failed to enter imported goods as required by sec. 68 of the *Customs Act* 1901-1920, and that C. had been directly concerned in that offence within the meaning of sec. 236; (2) that the consignee had not, by reason of the arrangement made for the paint being taken over for the use of the ship, interfered with goods subject to the control of the Customs within the meaning of sec. 33; and (3) that the consignee had not evaded payment of duty which was payable within the meaning of sec. 234.

APPEALS from a Court of Petty Sessions of New South Wales.

At the Court of Petty Sessions at Sydney before a Stipendiary Magistrate nine informations were heard whereby Richard William Wilson, an officer of Customs, charged Chambers & Co. Pty. Ltd., Lawrence Chambers and William Chambers severally with offences against the *Customs Act* 1901-1920. The charges against the Company were that (1) it interfered with goods which were subject to the control of the Customs (sec. 33); (2) it failed to enter imported goods (sec. 68), and (3) it evaded payment of duty which was payable (sec. 234). The charges against each of the individual defendants were that he was directly concerned in the commission of each of the three offences alleged against the Company (sec. 236). All the offences charged—those against the Company and those against the individuals—were alleged to have been committed with intent to defraud the revenue (sec. 241). The whole of the informations were heard together. The material facts proved at the hearing are stated in the judgments hereunder. The Magistrate dismissed all the informations.

From his decision in each case the informant now, by way of case stated, appealed to the High Court, and the appeals were heard together.

E. M. Mitchell K.C. (with him *Bathgate*), for the appellant. There is an importation of goods for the purposes of sec. 68 of the *Customs*

Act 1901-1920 if goods are brought into a port in the Commonwealth for the purpose of being landed there, that is, for the purpose of the goods becoming part of the commerce of the country (*The Schooner Mary* (1)); and on the evidence the paint in question was imported in that sense. The obligation under sec. 68 to enter the goods arose immediately upon importation. The Company did not get rid of its obligation to enter the goods by the arrangement which was made with the captain or by the fact that the ship left the port with the goods on board before the time for making the entry expired. The fact that the goods were, pursuant to that arrangement, taken out of the port without an entry having been made, constituted an interference with them within sec. 33, the goods being, by sec. 30, under the control of the Customs as soon as they were imported. What the Company did amounted to an evasion of payment of duty under sec. 234. If the Company committed any of the offences alleged against it, the individual respondents were directly concerned in the commission of them. The evidence shows an intention on the part of the respondents to defraud the revenue (sec. 241).

Flannery K.C. (with him *H. E. Manning*), for the respondents the Company and Lawrence Chambers. Due importation is not completed until goods are entered and unshipped in accordance with sec. 49 (3) (see *Wollaston's Customs Law*, p. 32, note). The provisions of sec. 64 have the effect of casting upon the shipowner the duty of paying the duty. Sec. 68 only applies to goods which have been unshipped. Goods which are brought in a ship to an Australian port and taken away again are not imported goods. Sec. 132 shows that duty is not payable until goods are entered for home consumption, and the person who so enters them imports them. Ships' stores are not dutiable merely because they are brought into a port (see sec. 127). If the consignee in Australia of goods permits the captain to take them away again, no duty is payable on them (see *Wollaston's Customs Law*, p. 91). [Counsel also referred to secs. 72-75.]

[STARKE J. referred to *Attorney-General* v. *Ansted* (2); *Algoma*

(1) (1812) 1 Gallison 206.

(2) (1844) 12 M. & W. 520.

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Central Railway Co. v. *The King* (1); *Canada Sugar Refining Co.* v. *The Queen* (2).]

As to the charge under sec. 234 of evading payment of duty, the word "evade" connotes a wilful avoidance of payment, and does not include a mere failure to pay. Sec. 33, which makes it an offence to "interfere" with goods subject to the control of the Customs, is directed to physical acts of interference, and does not apply to making a contract in respect of the goods.

Brissenden K.C. and *Treatt*, for the respondent William Chambers. [During the argument it was conceded that the appeal in respect of this respondent could not be supported.]

E. M. Mitchell K.C., in reply, referred to *Simms* v. *Registrar of Probates* (3); *Yorkshire Railway Wagon Co.* v. *Maclure* (4); *Stephens* v. *Robert Reid & Co.* (5); *Irving* v. *Gallagher* (6).

Cur. adv. vult.

June 8, 1926.

The following written judgments were delivered:—

KNOX C.J. These were appeals from determinations of a Stipendiary Magistrate dismissing a number of informations for alleged offences against the *Customs Act* 1901-1920.

The respondent Company was charged with offences against sec. 33, sec. 68 and sec. 234, and the respondents William Chambers and Lawrence Chambers were charged with offences against sec. 236 of that Act.

The relevant facts on which these charges were founded were, so far as disclosed by the evidence, as follows, namely:—The Company was the consignee of 7½ tons of paint shipped on board the Steamship *Nauru Chief* in England and consigned to Sydney. The ship went from England to Nauru, and thence to Port Kembla, omitting to call at Sydney. She arrived at Port Kembla on 6th or 7th of September 1922 and remained there for thirteen hours for the purpose of bunkering. The respondent Lawrence Chambers and one Vogil,

(1) (1903) A.C. 478, at p. 481.
(2) (1898) A.C. 735.
(3) (1900) A.C. 323.
(4) (1882) 21 Ch. D. 309.
(5) (1902) 28 V.L.R. 82; 23 A.L.T. 242.
(6) (1903) S.R. (Q.) 121.

an employee of the shipowners, the British Phosphate Commission, went to Port Kembla to meet the ship, and Chambers told Vogil that there was paint on board the ship for him and he was going to land it there. Port Kembla is a proclaimed port and a Customs officer is in attendance there. Lawrence Chambers had been engaged by the Phosphate Commission to clear the ship on its behalf. While the ship was lying at Port Kembla he arranged with the captain and chief officer of the ship to buy the whole of the paint on the terms that it was to remain on the ship to be used as required and to be paid for as used. The ship left Port Kembla with the paint, some of which was afterwards used in Melbourne in painting the ship. The paint was dutiable under the *Customs Tariff*, but no duty was paid on it nor was any entry made in respect of it.

On these facts the respondent Company was charged with the following offences, namely, (1) failing to enter the goods (sec. 68); (2) evading payment of duty (sec. 234); (3) interfering with goods which were subject to the control of the Customs (sec. 33). The respondents Lawrence Chambers and William Chambers were charged with aiding, abetting or being concerned in the commission of the offences alleged to have been committed (sec. 236). All the offences charged were alleged to have been committed with intent to defraud the revenue.

On the hearing of the informations no evidence was called for the respondents and the Magistrate dismissed all the informations, being of opinion that the evidence given for the prosecution failed to support, and in fact disproved, the averments of the informant. The question for us is whether his determination was erroneous in law. The charges against respondent William Chambers are not now pressed, and the case may be dealt with as if the charges were against the Company and Lawrence Chambers alone.

In my opinion the evidence given for the prosecution was sufficient to establish the charge of failing to enter the goods. Sec. 68 of the Act provides that all imported goods shall be entered either for home consumption or for warehousing or for transhipment. The only question is whether these goods were "imported," within the meaning of that section. According to the bill of lading the goods were consigned to the Company at Sydney. The evidence shows

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that Lawrence Chambers on behalf of the Company was willing and intended to have the goods landed at Port Kembla and to take delivery of them there. The ship actually came into the port and remained there for some hours, and the only reason alleged why the goods were not landed there was that Lawrence Chambers agreed while the ship was in the port to sell them to the owner of the ship. Presumably on this agreement being made the bill of lading was held by Lawrence Chambers as the person authorized by the shipowners to act for them in clearing the ship. The Act contains no definition of the meaning of the word "imported" but I think Mr. *Mitchell* was right in the view he put forward that goods are imported whenever they are brought into port for the purpose of being discharged there. So far as the ship is concerned the goods have at that time arrived at their destination, and their character as goods imported into Australia cannot, I think, be affected by an agreement subsequently made under which they are not in fact landed at the port at which the ship arrived. In the circumstances of this case I think it is clear that the paint in question was imported when the ship arrived in Port Kembla and that the obligation to make an entry arose at that time.

The second charge was that of evading payment of duty (sec. 234). The distinction in meaning between the words "evade" and "avoid" is well established, and a charge of evading payment is not made out by evidence which proves no more than that the person charged failed or omitted to pay an amount payable by him. There was nothing to suggest that the agreement to sell the paint to the ship was other than a genuine agreement, nor did the evidence tend to show that the respondents did not honestly believe that in the circumstances it was not necessary to enter the goods or to pay duty in respect of them, or that their intention in selling the goods was to escape payment of duty. In fact the evidence proved no more than an omission to pay duty which was legally payable. In my opinion the Magistrate was right in dismissing the informations founded on sec. 234.

With regard to the charge of interfering with goods which were under the control of the Customs, I think the Magistrate's decision was right. Sec. 33 of the Act provides that no goods subject to the

control of the Customs shall be moved, altered or interfered with without authority. There was clearly no evidence that the goods in question were moved or altered, but it is said that the agreement made by Lawrence Chambers to sell them to the ship constituted an interference within the meaning of the section. I am unable to accept this contention. I think the expression "interfered with" in the context in which it is found should be construed as connoting some physical dealing with the goods, something in the nature of a movement of the goods or an alteration of their character.

For these reasons I am of the opinion that the Magistrate's determination on the information against the Company and Lawrence Chambers founded on sec. 68 of the Act—failure to enter the goods — was erroneous, but that his determinations on the other informations were correct.

ISAACS J. This case comprises three appeals by Richard William Wilson, as Customs officer, from the dismissal of informations, under the *Customs Act* 1901-1920, against three several defendants, namely, Chambers & Co. Pty. Ltd., Lawrence Chambers and William Chambers. During the argument it was seen that the facts did not support any charge against William Chambers, and the appeal as to him was dismissed. The other appeals have now to be determined.

The charges laid against the Company were as follows :—(1) Under sec. 234 of the Act for evading payment of duty in respect of certain goods, namely, enamel, varnish, lead and paint, imported into the Commonwealth at Port Kembla on or about 7th September 1922 ; (2) under sec. 68 of the Act for failing to enter the said goods, either for home consumption or for warehousing or for transhipment ; (3) under sec. 33 of the Act for interfering with the said goods as subject to the control of the Customs. Similar charges were made against Lawrence Chambers. All the offences are alleged to have been committed at Port Kembla, which is a very material circumstance. The main facts are that the Company was agent in Australia of Hoyle & Co. of Newcastle-on-Tyne for the sale of goods of the classes referred to. A consignment of those goods about 7¼ or 7½ tons in all was sent by Hoyle & Co. to the Company deliverable at Sydney. The goods were carried in a ship called the *Nauru Chief*,

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which, before calling at Sydney, called in at a small Customs port called Port Kembla, with the goods on board. Lawrence Chambers, who was agent for, and who represented, the Company, visited the ship while in Port Kembla. The ship needed painting, and Lawrence Chambers on behalf of the Company agreed with the ship's officers —and his agreement has since been affirmed and acted on by the Company—to sell all the goods in question to the ship, the goods to remain on board and to be paid for as used by the ship. This arrangement being made, the goods passed into ships' stores. Nothing was done at Port Kembla by way of unshipping the goods or of using them. The Customs officer at Port Kembla allowed the ship to proceed to Melbourne with ships' stores unsealed, a guarantee in the prescribed form being given. At Melbourne some of the goods were used in painting the ship. No duty was paid. The Company has since been paid by the shipowners for the goods. I now consider the charges against the Company in order.

(1) *Evading Payment of Duty.*—The offence is constituted by sec. 234 (*a*): "No person shall evade payment of any duty which is payable." The latter part of the paragraph requires that duty is actually and presently payable; and this is the first inquiry. The foundation is naturally the *Customs Tariff* which imposes the duties on "all goods dutiable . . . imported into Australia," &c. "Dutiable goods" by incorporation of the *Customs Act* include "all goods in respect of which any duty of Customs is payable." By sec. 153 duties payable are Crown debts and instantly recoverable. The first essential for this purpose is importation. Importation does not necessarily include landing the goods. They may be transhipped direct from the ship in which they arrive into the ship or aircraft into which they are to be transhipped, and still be "imported goods" (secs. 68 and 75 (*b*)). Sec. 68 says: "All imported goods shall be entered either (*a*) for home consumption; or (*b*) for warehousing; or (*c*) for transhipment." Consequently "imported goods" as there used is an expression not confined to goods landed or even to goods to be consumed in Australia. On the other hand it does not include all goods in fact arriving by ship in an Australian port. A vessel, say, with a cargo destined for New Zealand may call in at Melbourne or Sydney and may continue her voyage without it

being said that the goods it carries are "imported goods" within the meaning of sec. 68. Both these extremes are inconsistent with the working provisions of the *Customs Act*. In my opinion, having regard to the various sections of the Act—and needless to say the question must be solved by reference to that Act and not to other Acts—the expression "*imported goods*," *in sec.* 68, *means goods which in fact are brought from abroad into Australian territory, and in respect of which the carriage is ended or its continuity in some way in fact broken.* The underlying concept appears to me to be as follows: Where, within our territory, some *act* takes place with regard to goods arriving from abroad, whether in fact they are or are not dutiable or prohibited, which in the absence of some new or further arrangement for carrying them away would make the place of arrival their destination and would therefore result in the goods remaining in Australia, then they are "imported goods" and it is the duty of the "owner" to comply with the provisions of sec. 68. I do not think a mere agreement of sale between two merchants in Australia, even though the property passes, is sufficient in itself to constitute importation. If such an agreement were made before the ship arrived in Australian waters, it could not possibly operate as an importation. If afterwards the goods arrived and were allowed to remain en route, for instance to New Zealand or in the other direction to India, with the actual carriage undisturbed, I do not see how the position would be altered. But in this case there are additional circumstances. The agreement was made with the shipowner; the delivery was accelerated; not only the property, but the right to possession also, was transferred. *The contract of carriage was completely ended*, and the shipowner's character in which he held the goods was transformed from that of carrier to that of proprietor. What follows is important *vis-à-vis* the Customs. The goods were, as it is found, taken into ships' stores and were allowed by arrangement, constituted by permission of the Customs and guarantee to the Customs, to be taken on to Melbourne *as ships' stores.* That involved the result that, not only was the character of the shipowner's possession altered *as between the parties*, but the character of the goods themselves was also altered *as regards the Crown.* What was the legal consequence of

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all this? In my opinion this catena of circumstances eliminates, as unnecessary formalities, the manual delivery by shipowner to consignee, and redelivery by consignee to shipowner. It also treats for Customs purposes those formal processes as having for convenience been eliminated, but as having in substance taken place and as having had real commercial effects. The goods only became "ships' stores" in Port Kembla, and, in substance, that is where they were, by the catena of circumstances mentioned, treated by all parties, including the Crown, as having been shipped as such. Otherwise, the Customs permission and the guarantee to the Customs rested on no real transaction so far as these goods were concerned. In the result, the goods were "imported goods" and were necessarily "imported" by the Company, and prior in law to their conversion notionally into ships' stores. The goods should have been entered by the Company under sec. 68, and as they were by the Company intended to be sold and were in fact sold to the shipowner for use as ships' stores and so treated by all concerned, they should, in my opinion, have been entered as for warehousing. My reason is that the operation, if extended, connotes (1) importation into Australia by the Company, (2) possible but no necessary consumption in Australia, (3) immediate delivery to the shipowner as ships' stores. I therefore eliminate from the proper entries by the importer (a) home consumption and (b) transhipment. The only appropriate notional entry is therefore "warehousing," for that is the only thing that could have been done, had the notional formalities been actually performed.

Was there then an instant obligation to pay the duty? The matter depends upon a well-established understanding as to warehousing. The *Customs Act*, in Part V., deals with the warehousing of goods. Sec. 78 enacts "Dutiable goods may be warehoused in warehouses licensed by the Minister." Such goods are *ex necessitate* imported and are within the taxing Act provision quoted. The duty is at once a debt to the Crown. *Hamel on the Laws of Customs*, at p. 100, states the relevant law and quotes the following authorities: *Com. Dig.* "*Debt*," A. 9; *Leaper* v. *Smith* (1); *Anonymous* (2); *Salter* v. *Malapert* (3); *Attorney-General*

(1) (1721) Bun. 79. (2) (1606) Lane 15. (3) (1617) 1 Roll. R. 383.

v. *Weeks* (1), and *Attorney-General* v. *Ansted* (2). In the last-mentioned case *Parke* B., who was in accord with Lord *Abinger* C.B., referring to the *Warehousing Act* 3 & 4 Will. IV. c. 57, which is the prototype of Part V. of the *Customs Act*, in effect stated the law to be that, apart from the warehousing provisions, the duty was payable, and that those provisions when complied with suspended the Crown's remedy by giving time for payment until the happening of events mentioned in those provisions for requiring actual payment. He also held that, where by the importer's own fault those provisions were not complied with, the original liability stood and the time for payment had arrived. The commercial necessities that led to the enactment of the warehousing provisions, and that to some extent at least exist in Australia, are found stated in Sir *George Stephens'* work on *Commerce and Commercial Law* (1853), at pp. 108 *et seqq*. The statement is interesting as supporting practically the principles laid down by the above-mentioned authorities. Applying those principles, confirmed by sec. 153, to the present case, the time for payment had arrived.

Did, then, the defendant evade payment? It depends on what is meant by the word "evade" in the particular context. The word itself is not rigid. As was said by Lord *Hobhouse* in *Simms* v. *Registrar of Probates* (3), "everybody agrees that the word is capable of being used in two senses: one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable. Beyond this, nothing is to be found having much bearing on the construction of the word, which depends entirely upon its use in the Colonial Acts." That is to say, we start with the alternative possible meanings of the word itself and as to anything further we are thrown upon the construction of the statute in hand. Before proceeding to construe the statute for the purpose of ascertaining what precisely is there meant by the word "evade"—a process involving important consequences both to the revenue and to the mercantile community—it is necessary to understand properly the observations of Lord *Hobhouse*. The "something disagreeable" to which he refers may or may not, so

(1) (1726) Bun. 223. (2) (1844) 12 M. & W. 520.
(3) (1900) A.C., at p. 334.

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far as concerns the intrinsic meaning of the word "evade" apart from context, be a legal obligation. Whether in a given statute it connotes guilt or innocence and in what circumstances depends entirely on the true construction of the statute itself. Here the "disagreeable thing" to be avoided is "payment." That is, the person "intentionally avoids payment" in fact of a sum which in law is payable. But whether the "intention" extends so as to make belief in facts constituting liability to pay, or, still further, belief in actual liability to pay, the criterion of the offence is another question and a serious one both for Commonwealth and individual. It would be serious for the Commonwealth, because ignorance of essential facts, by reason (say) of wilful neglect or even unreasonable business carelessness or ignorance of actual liability, would exclude liability for evasion because there would be no actual belief. The first alternative would be serious for honest merchants because, even with full knowledge of the facts, there might be a genuine dispute as to the law supported by strong legal opinion which, however, in the end might be held erroneous. In such case, if *mens rea* be adopted as the test, it would exist, because, as the Privy Council held in *Bank of New South Wales* v. *Piper* (1), "the absence of *mens rea* really consists in an *honest and reasonable belief* entertained by the accused of the existence of *facts* which, if true, would make the act charged against him innocent." Their Lordships went on to hold that the party charged must be presumed to know the law whether he did so or not. (The italics are mine.) The expression "honest and reasonable belief" indicates that facts of which a reasonable man in the given situation would avail himself must be taken into account. That is, for the purposes of *mens rea*. And it establishes that the law accepts in such cases the standard of reasonableness as a test of culpability. If, therefore, sec. 234 (*a*) be construed so as to make every intentional avoidance of a payment actually due an evasion where there is knowledge of the facts, actual or imputed, constituting liability to pay, then there was undoubtedly a contravention of the paragraph in the present case. That is seen at once by a relation of the salient facts. There was importation of all the goods at Port Kembla. The "payment"

(1) (1897) A.C. 383, at pp. 389, 390.

was due there *instanter*. All the facts were known to the respondents other than William which constituted in law the instant liability to payment of the duty. The respondents (other than William) unquestionably determined not to pay any duty at Port Kembla but to proceed as above stated. The arrangement included a guarantee. Even apart from the special terms of that guarantee, what was actually done was to remove from Port Kembla without payment of duty goods in respect of which duty was instantly payable and on which there existed by statute a charge or security for the payment of the duty. The constitutive facts being known and the law presumed to be known, what prevents contravention on the interpretation assumed? But the actual arrangement makes the position more acute. It was the intention of the respondents that the duties arising in law at Port Kembla should *never* be paid; and they never have been. The guarantee was "to furnish a list of all dutiable stores consumed on the voyage, and to pay duty thereon at the port of Melbourne." That is, if none of the goods were consumed on the voyage from Port Kembla to Melbourne, there was to be no duty paid at all, and any duty paid was to be in respect of *future* happenings, not of what had taken place at Port Kembla. If, therefore, "evasion" rests simply on knowledge actual or constructive of facts creating liability to pay and on the intention to avoid the payment legally required by reason of that liability, the respondents must be convicted. But in my view of the statute that is not the legislative intention, an intention that would operate frequently to the detriment of the revenue and frequently to the detriment of honest traders. The solution is this:—We begin with the intrinsic neutral meaning of evade as intentional avoidance. Then, by a process of elimination, we can see what the Legislature intended the word to connote. Being erected into an offence by sec. 234 with a maximum penalty of £100, it is manifest that the evasion contemplated is more than mere omission to pay *instanter*. And compare *Ramsden* v. *Lupton* (1). On the other hand, the evasion penalized by sec. 234 clearly does not connote intent to defraud the revenue. That is shown by sec. 241, which doubles the maximum penalty where that intent is charged

(1) (1873) L.R. 9 Q.B. 17, at pp. 28, 30.

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and proved. The position so far is that " evasion " is more serious than mere omission to pay and less serious than attempting to defraud the revenue. At this point one observation is material. Defrauding the revenue is not confined to escaping payment for ever. Escaping for a time with an intention to pay when convenient and in the meantime depriving the Customs of its security is defrauding the revenue, though the moral tint is a shade lighter (see *R.* v. *Naylor* (1)). Now, what is the evasion which the statute places intermediately between simple omission and fraud on the revenue. Any trick or artifice or force which results in obtaining dutiable goods without payment of duty is a fraud on the revenue, and is, therefore, outside simple " evasion." Bringing to the solution what should in a doubtful case always be assumed, a presumption of just intention consistent with safeguarding the Customs revenue, the test must be whether the Crown debtor has acted honestly and reasonably in relation to his public obligations. It is the same test as the Privy Council has stated with regard to *mens rea.* If, legally owing the duty, the importer has not merely omitted to pay, but has omitted without any reasonable grounds for withholding payment, he has " evaded " payment. If, however, he can show any reasonable excuse for omitting to pay, he does not evade payment. He may genuinely and without negligence be unaware of the facts constituting liability ; he may have misunderstood a regulation or a law ; he may, though perfectly cognizant of all necessary facts, be strongly advised that either on construction or constitutionally the law does not reach him. Such a man does not, in my opinion, " evade " payment. On the other hand, if his ignorance of facts arises through his own unbusinesslike conduct, so as to be unreasonable in his case want of knowledge is no reasonable excuse. That, as already shown, is not because of the absence of *mens rea* as ordinarily understood. It is simply because what he ought to know in his situation when his public obligations are in question, he is taken to know. But the only test of what he *ought to know* is what a man in his position *acting reasonably* would know. Consequently, it all comes to a question of honesty and reasonable conduct. The conclusion is that sec. 234 (*a*) is contravened when there is intentional non-payment

(1) (1865) L.R. 1 C.C.R. 4.

without honest and reasonable excuse of duty which is payable. Then, was there an honest and reasonable excuse here? In my opinion there was. The arrangement made was on the mutual basis that no duty should be paid at Port Kembla but that the guarantee arrangement should stand. On that ground, on that only, do I think the charge should fail.

2. *Failure to Enter.*—For the reasons given, I am of opinion there was a contravention of sec. 68, and the appeal as to this should succeed.

3. *Interference.*—With respect to the third charge based on sec. 33 there was, with one exception, no physical act of any kind at Port Kembla which could be said to be an interference with the goods. "Interfere" in sec. 33 is not satisfied by a mere mercantile contract. Contracts between merchants are not prohibited by sec. 33: they do not interfere with goods; they merely affect the right of individuals to interfere with the goods. The one exception referred to is the moving of the goods from Port Kembla in the vessel. But that was done by permission, and there was no breach of sec. 33.

What I have said with regard to the Company applies equally to Lawrence Chambers, who by reason of his agency for the Company came within the statutory definition of "owner" in respect of the goods.

The appeals, respecting the Company and Lawrence Chambers, should, therefore, in my opinion, be dismissed as to the charges under secs. 33 and 234, and allowed as to sec. 68.

HIGGINS J. Nine informations under the *Customs Act* 1901-1923. The Company is charged with three offences; and Lawrence Chambers (one of the principal shareholders) and William Chambers are each charged under sec. 236 with being directly concerned in these offences. By consent, all the nine informations were heard together. The Stipendiary Magistrate found that the Company was not guilty of any of the offences charged against it, and that Lawrence and William Chambers were therefore innocent. The informant has appealed to this High Court. During the argument before us, however, it was conceded by counsel for the informant that the appeals as to William Chambers are not pressed.

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The case involves many details; but I do not think it necessary to linger over them. I propose to deal at once with the three charges against the Company.

There is one charge that the Company did, in New South Wales on or about 7th September 1922, fail to enter either for home consumption or for warehousing or for transhipment six cases of enamel and varnish and 366 drums of lead and paint alleged to have been imported into the Commonwealth at Port Kembla on the *Nauru Chief*. Under sec. 68 of the Act, "all imported goods shall be entered either (*a*) for home consumption; or (*b*) for warehousing; or (*c*) for transhipment."

The facts are that the vessel *Nauru Chief*, containing the goods, entered the harbour of Port Kembla about 6 a.m.; that these goods were consigned to the Chambers Company; that Lawrence Chambers met the vessel at Port Kembla by the instructions of Mr. Vogil, Sydney manager for the owners of the vessel, the British Phosphate Commission; that Lawrence Chambers on behalf of the Chambers Company arranged with the captain and the chief officer of the vessel to keep the paint on board and use it as required, and to supply a list of the paint used so as to enable the Chambers Company to charge up the paint to the British Phosphate Commission; that the vessel left for Melbourne about 5.30 p.m. on the same day without entering the goods at all.

Now, the Chambers Company is not guilty of this offence charged under sec. 68 unless the goods were "imported" goods. There is no definition of the words "import" or "importation" in the Act. Several cases have been cited from the Courts of the United States as to the meaning in United States Acts; but it is for us to find the meaning from the language of our own Act. The appropriate definition found in the *Oxford Dictionary* for "import" is "to bring in or cause to be brought in (goods or merchandise) from a foreign country, in international commerce"; but is it an essential condition under our Act that the goods be landed before entry? Or that they be, at least, unshipped? Sec. 49 with sec. 75 makes it clear that the due order of events contemplated is (1) entry, (2) unshipping, (3) landing or transhipping; and therefore entry is obligatory before unshipping or landing. Under sec. 31 all goods on any ship from parts beyond the seas are subject to the control of the Customs

whilst the ship is within the limits of any port in Australia; and under sec. 64 the master, owner or pilot is under a duty, within one day after arrival at any port, to report the ship and her cargo by delivering an inward manifest of goods for that port. Under sec. 74, (except as prescribed) goods may be unshipped only pursuant to (1) a collector's permit or (2) an entry passed. In the case of *Algoma Central Railway Co.* v. *The King* (1) Lord *Macnaghten* said that if the ship be brought within the country (in that case Canada), no more is required for the meaning of imported. The port is in the country. His Lordship was not referring, of course, to such exceptional cases as that of wrecked ships, or even that of ships destined for other countries, but calling at an Australian port *en route*. In my opinion, the position is the same under our Act; and these goods were "imported" within the meaning of sec. 68. The view taken by the Magistrate was that the (alleged) sale to the master of the ship relieved the Chambers Company of liability to enter the goods. I cannot take that view; I think that the Chambers Company—the consignee—failed to enter these goods, contrary to law, and that the dismissal of the charge was wrong. But there is no evidence whatever that the failure was "with an intent to defraud the revenue" as alleged in the information; this averment in the information is not even prima facie evidence of the intent (sec. 255 (4)). If the Company be convicted, Lawrence Chambers must also be convicted as being directly concerned in the offence (sec. 236).

Another charge against the Chambers Company is that it evaded at Port Kembla payment of duty which was payable in respect of these goods. There is no doubt that the duty payable was not paid at Port Kembla (though it was paid afterwards); but does the word "evade" connote no more than failure to pay, in the words of sec. 234: "No person shall (*a*) evade payment of any duty which is payable"? Where mere *failure* to perform an obligation is meant, the word "fail" is used (as in sec. 268); but the word "evade" seems to mean something more than "fail." According to the dictionary, it means "to escape by contrivance or artifice from (attack, &c.); to avoid, save oneself from (a threatened evil

(1) (1903) A.C., at p. 481.

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or inconvenience); to elude (a blow), avoid encountering (an obstacle)." According to *Simms* v. *Registrar of Probates* (1), a case as to succession duty, the words used were "has incurred or shall incur any debt with intent to evade the payment of duty hereunder"; and, as the Judicial Committee said (2), "Everybody agrees that the word is capable of being used in two senses: one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable." Both of these senses involve will, intention.

To say the least, "evade" would seem to connote the exercise of will in avoiding; whereas a mere failure to pay may be by accident or mistake. Under sec. 241 a person may at the same time be charged with an offence against this Act, and with an intent to defraud the revenue; and, if in addition to such offence he is convicted of such intent, the maximum penalty shall be double that otherwise provided. But this section does not show that the word "evade" must mean merely "fail"; for a person may "evade" the payment of duty by seizing from a vessel goods urgently wanted, although he may show, by paying the duty, that he has no "intent to defraud the revenue." The evidence rather points to an innocent mistake of the Chambers Company and of Lawrence Chambers; and, in my opinion, the information in each case was rightly dismissed.

I cannot, however, accept the gloss on the section proposed by my brother *Isaacs*—that the words "without reasonable excuse" are implied. Indeed, for my part, I think it dangerous to attempt to frame a definition, or to interpose a formula between the section and the facts of each situation: facts vary so infinitely.

Another charge is under sec. 33—that the Chambers Company did, without the authority of an officer of Customs at Port Kembla, interfere with these goods which were subject to the control of the Customs. All that the Chambers Company or Lawrence Chambers did was to make the arrangement which I have stated with the master of the vessel—to keep the paint on board and to use it as required, and to supply a list of the paint used. My opinion is that this does not constitute an "interference" with the goods

(1) (1900) A.C. 323.

(2) (1900) A.C., at p. 334.

under sec. 33. The associated words are " moved altered or interfered with "—" No goods subject to the control of the Customs shall be moved altered or interfered with except by authority and in accordance with this Act." In my opinion, all the three words refer to physical acts—physical moving, physical altering, physical interference. When Lawrence Chambers made the arrangement, he did not even stipulate that the goods should be taken out of Port Kembla; so far as the Chambers Company was concerned, it was immaterial whether the master should take the vessel (with the goods) out of Port Kembla at any time or at all. This charge was also, in my opinion, rightly dismissed—both as to the Chambers Company and Lawrence Chambers.

RICH J. I concur in the conclusions arrived at by the Court. I do not consider it expedient to attempt an exhaustive definition of sec. 234 (*a*). The fact that the Customs officer at Port Kembla, after he had secured a guarantee in the prescribed form, allowed the ship to sail for Melbourne with the ship's stores unsealed, removes the case from the operation of the sub-section.

STARKE J. The defendant Chambers & Co. Pty. Ltd. was charged on information with three offences against the *Customs Act* 1901-1923. One charged that the defendant did not, contrary to the provisions of secs. 68 and 241 of the Act, enter goods imported by it into the Commonwealth, with intent to defraud the revenue. The defendant purchased the goods in England and shipped them on board the ship *Nauru Chief*, consigned to the defendant or its assigns at the Port of Sydney. The ship did not put into the Port of Sydney but into Port Kembla, a port some distance south of Sydney. It did so for the purpose of coaling; but it is clear on the evidence that the ship would not proceed to the port of Sydney, that it intended to land the goods at Port Kembla, and that the consignees were prepared to take delivery there. But before the goods were discharged an arrangement was made between the consignees and the representatives of the ship, whereby the goods were taken over for the use of the ship, and they were never landed.

Duties of Customs are imposed upon goods imported into Australia, but there is no definition in the Act of the word " imported." They

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may be imported by means of a ship or aircraft or through the post (cf. secs. 49 and 35). They may be brought within the territorial limits of Australia, and may indeed be subject to Customs control, and yet not be "imported" in the fiscal sense of the term. Thus goods shipped from England to New Zealand via Australia are not imported into Australia because in the course of her voyage the ship with the goods on board comes within the territorial limits of Australia for commercial purposes. Yet such goods would be subject to the control of the Customs (*Customs Act*, sec. 31). Again, goods coming ashore from wrecks could hardly be classed as imported goods, and the *Customs Act* has made special provisions to meet the case (*vide* secs. 65, 66, 67 and 148).

It cannot, in my opinion, be maintained that the mere act of bringing goods into port constitutes an importation; though unexplained it may be evidence of the fact. If goods, however, are brought into their port of destination for the purpose of being there discharged, the act of importation is complete. On the other hand, the act of importation is not complete if a ship enter some port of call with goods on board which is not the destined port of discharge for those goods. Actual landing is not necessary, as was argued, to constitute an importation for fiscal purposes.

Now, in the present case the goods were not brought to their port of destination but to Port Kembla, where the goods were to be landed with the assent of the consignees. That, in my opinion, was an importation of the goods within the meaning of the *Customs Act*. It is clearly the duty of an "owner" who imports goods into Australia to enter them at the Customs, and that term "owner" includes the consignee of the goods (*vide* secs. 37 and 4, "Owner"). Consequently, in my opinion, the defendant should have been convicted of the offence that it did not enter the goods, but there was no evidence of any intent to defraud the revenue.

Another information charged that the defendant did, contrary to secs. 234 and 241 of the *Customs Act*, evade payment of duty which was payable in respect of the goods with intent to defraud the revenue. A duty was imposed on the goods mentioned in the information under the *Customs Tariff* upon importation into Australia and that duty was payable, in this case, upon the arrival

of the ship in Port Kembla (*Attorney-General* v. *Ansted* (1)). But did the defendant evade payment of that duty? Clearly, in my opinion, the word "evade" in the Act does not necessarily involve any device or underhand dealing for the purpose of escaping duty; but on the other hand it involves something more than a mere omission or neglect to pay the duty. It involves, in my opinion, the intentional avoidance of payment in circumstances indicating to the party that he is or may be under some obligation to pay duty. The circumstances may consist of knowledge, or neglect of available means of knowledge, that the omission to pay is or may be in contravention of the Customs law. This, in my opinion, was not proved. The defendant and its representative acted on an honest but mistaken view that the arrangement with the ship and a guarantee to the Customs by the master thereof to furnish a list of all dutiable stores consumed on the voyage to Melbourne, the next port of call, and to pay duty thereon at that port fulfilled the obligations of the Customs law. Consequently this information was rightly dismissed.

A third information charged that the defendant at Port Kembla, contrary to the provisions of the *Customs Act*, sec. 33, interfered with certain goods subject to the control of the Customs, namely, the goods already mentioned, with intent to defraud the revenue. The proof led was that the defendant made the arrangement with the ship already mentioned. The section, however, points to some physical interference with the goods, and not to some disposition of the goods leaving them still subject to the control of the Customs; and the facts show that the goods were taken from Port Kembla in the ship with the sanction of the Customs and under the guarantee aforesaid. Consequently this information was rightly dismissed.

Three informations were also laid against Lawrence Chambers, based upon secs. 236 and 241 of the *Customs Act*, charging that he was directly concerned in the offences charged against the Company. Lawrence Chambers acted on behalf of the Company at Port Kembla, and the same results follow in his case as in the case of the Company. The information that he was directly concerned in the offence of the Company in failing to enter the goods must be supported, and the other informations dismissed.

(1) (1844) 12 M. & W. 520.

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William Chambers was also charged on three informations in the same terms as in those laid against Lawrence Chambers. William Chambers was not a member or officer of the Company, and took no part in the acts proved against it. It was admitted, on the argument, that the informations laid against him could not be supported on the evidence adduced, and they were therefore all rightly dismissed.

As to the informations against William Chambers :—Appeals dismissed. Appellant to pay costs in Court of Petty Sessions and in High Court.

As to the informations against Lawrence Chambers :—Appeals in respect of informations charging offences under secs. 33 *and* 234 *of the Customs Act dismissed. Declare that the determination of the Magistrate on the information charging the respondent with being directly concerned in the commission of an offence under sec.* 68 *of that Act was erroneous in point of law and that the respondent should have been convicted of being directly concerned in the offence committed by the Company against that section. Remit the case to the Court of Petty Sessions to be dealt with in accordance with this declaration.*

As to the informations against Chambers & Co. Pty. Ltd. : —Appeals in respect of informations charging offences under secs. 33 *and* 234 *of the Customs Act dismissed. Declare that the determination of the Magistrate on the information charging an offence against sec.* 68 *of the Act was erroneous in point of law and that the respondent should have been convicted of failing to enter the goods mentioned in the information but not with intent to defraud the revenue. Remit the case to the Court of Petty Sessions to be dealt with in accordance with this declaration.*

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *Norton, Smith & Co.*

B. L.