Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-036

BalanceCo

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, May 3, 2013

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on April 9, 2013, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated July 19, 2012, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

BALANCECO **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 9, 2013
Tribunal Member:	Pasquale Michaele Saroli, Presiding Member
Counsel for the Tribunal:	Nick Covelli Laura Little
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representatives**
BalanceCo	Christopher J. Cochlin Andrew M. Lanouette Mark A. Zekulin David K. Wilson Anna Turinov
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Paul Battin
Intervener	**Counsel/Representatives**
J Cheese Inc.	Richard A. Wagner Jessica Allen Donald Kubesh

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by BalanceCo with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 67(1) of the *Customs Act*[1] from a decision by the President of the Canada Border Services Agency (CBSA), dated July 19, 2012, made pursuant to paragraph 60(4)(*b*).

2. The decision affirmed an advance ruling under paragraph 43.1(1)(*c*) of the *Act* that shredded Mozzarella cheese (coated with cellulose powder) and sliced pepperoni, packaged together, imported by J Cheese Inc. (JCI)[2] (the goods in issue), are classifiable under tariff item No. 1601.00.90 of the schedule to the *Customs Tariff*[3] as a food preparation. As a result of such classification, the goods in issue are not subject to Canada's tariff rate quotas (TRQs) on dairy imports.

3. BalanceCo, a not-for-profit corporation whose members are Canada's 10 provincial milk marketing boards, acknowledges having requested the advance ruling for the purpose of ensuring the effective enforcement of the TRQs.[4] To this end, BalanceCo contends that the shredded Mozzarella cheese should be classified under tariff item No. 0406.90.61 as "Mozzarella and Mozzarella types" (*within access* commitment) and under tariff item No. 0406.90.62 (*over access* commitment), while the sliced pepperoni should be classified under tariff item No. 1601.00.90 as other "[s]ausages and similar products, of meat, meat offal or blood; food preparations based on these products."

4. A preliminary issue that arises in this appeal is whether the Tribunal has jurisdiction to review the matter. In particular, if the advance ruling was invalid because BalanceCo was a non-eligible applicant, the ruling could not be the subject of a request for review under subsection 60(2) of the *Act* or of a resulting decision of the CBSA under section 60(4). In such circumstances, there would be no valid tariff classification decision for the Tribunal to review.

PROCEDURAL BACKGROUND

5. The jurisdictional issue was first raised by JCI.[5] In its written intervention, JCI submitted as follows:

> The Tribunal should dismiss this appeal because BalanceCo is not an importer and therefore could not request or be given an advance customs ruling under the *Tariff Classification Advance Ruling Regulations*, SOR/2005-256. As a result, there is no valid decision under the *Customs Act* before the Tribunal and the Tribunal therefore has no jurisdiction in this case . . . .[6]

---

1. R.S.C. 1985, (2d Supp.), c. 1 [*Act*].
2. JCI, the intervener in this appeal: is a Canadian importer and distributor of food (including dairy) products; created the goods in issue with/for a particular customer (i.e. "Pizza Pizza", which is Canada's largest pizzeria, with an estimated 690 outlets across the country); and entered into what it described as an arrangement with a U.S. firm for the production of the goods in issue exclusively for JCI, a claim that was uncontroverted. See Tribunal Exhibit AP-2012-036-18A at paras. 6, 12.
3. S.C. 1997, c. 36.
4. Tribunal Exhibit AP-2012-036-04A at para. 5; Tribunal Exhibit AP-2012-036-29A, tab 3 at para. 2; *Transcript of Public Hearing*, 9 April 2013, at 91, 156.
5. The Tribunal's decision to grant leave to intervene was made in response to JCI's notice of intervention dated December 7, 2012.
6. Tribunal Exhibit AP-2012-036-18A at para. 5(i).

6. The Tribunal invited the parties to respond to JCI's submission and, meanwhile, decided to bifurcate the hearing of the appeal, with the April 9, 2013, session confined to the preliminary issue of jurisdiction.[7] The hearing on the merits of the appeal was adjourned *sine die*.

7. The parties filed their submissions between March 25 and 27, 2013. On April 4, 2013, pursuant to rule 6 of the *Canadian International Trade Tribunal Rules*,[8] the Tribunal determined that it was fair and equitable to accept additional authorities which had been filed late by JCI.

8. At the hearing, the Tribunal allowed BalanceCo to place further authorities on the record, considering that these were in direct response to the additional authorities contained in JCI's late filing.[9]

CAN THE TRIBUNAL CONSIDER THE JURISDICTIONAL ISSUE RAISED BY JCI?

9. BalanceCo contends that, by raising the question of jurisdiction, JCI (a) is inappropriately expanding the issues that BalanceCo and the CBSA have placed before the Tribunal in this appeal, and (b) is exceeding the scope of the matters in respect of which it was permitted to intervene.[10]

10. It is uncontested that the jurisdictional issue was not among the issues placed before the Tribunal by BalanceCo or the CBSA and that it was first raised by JCI in its intervention. In addition, the Tribunal granted JCI leave to intervene on issues of law and legal interpretation bearing upon the tariff classification of the goods in issue, with no explicit reference to the matter of jurisdiction.[11]

11. The Tribunal agrees that interventions must generally be limited to the subject matter of the appeal, with interveners not being entitled to widen or add to the points in issue before the Tribunal.[12] However, this limitation on the scope of interventions relates to legal arguments and factual claims in relation to the substantive merits of an appeal and cannot be taken as extending to the overarching jurisdictional issue of whether or not the Tribunal has the requisite statutory authority to hear the appeal in the first place. Before the Tribunal is able to delve into the merits of an appeal, it must be satisfied that it possesses the requisite jurisdiction[13] to act under subsection 67(1) of the *Act*. Indeed, an administrative tribunal can dismiss an appeal for lack of jurisdiction at any time during the course of a proceeding,[14] whether on application by a party thereto, or on its own initiative.

---

7. Tribunal Exhibit AP-2012-036-27.
8. S.O.R./91-499.
9. While JCI did not object to BalanceCo's filing of additional authorities at the outset of the hearing, the CBSA expressed its concern about the lack of time afforded to review these authorities. The Tribunal gave the parties an extended lunch break to review the materials and stated that, should the CBSA, after hearing BalanceCo's oral argument, have any residual concerns regarding the additional authorities, then the Tribunal would reconvene the following day to allow the CBSA an opportunity to fully present its case. *Transcript of Public Hearing*, 9 April 2013, at 74-75. However, the CBSA did not request additional time and made its oral submissions directly following BalanceCo's oral argument.
10. Tribunal Exhibit AP-2012-036-25B at para. 2(a).
11. Tribunal Exhibit AP-2012-036-11.
12. *R. v. Morgentaler*, [1993] 1 S.C.R. 462 at paras. 1-2; Tribunal Exhibit AP-2012-036-25D, tab 11.
13. In *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585 at para. 44, the Supreme Court of Canada unanimously concluded that the term "jurisdiction" is simply "*. . . shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment*" [emphasis added].
14. *Newman's Valve Limited* (10 October 1997), AP-96-121 [*Newman's Valve*] at 4.

12. The overarching character of jurisdiction was underscored in *Dunsmuir v. New Brunswick*,[15] where the Supreme Court of Canada stated as follows:

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.[16]

13. In short, the Tribunal cannot appropriate to itself jurisdiction that has not been conferred to it by its enabling legislation. The Supreme Court of Canada stated as follows: "The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction . . . ."[17]

14. Turning next to BalanceCo's claim that JCI's intervention was outside the scope of the matters in respect of which JCI was permitted to intervene, the Tribunal, in its delineation of the specific parameters of allowable interventions by JCI, stated as follows:[18]

> . . . the Tribunal considers it appropriate to limit JCI's intervention on issues of fact to relevant information within JCI's own knowledge relating to the similarity of the goods in issue in this appeal to those goods imported by JCI that are the subject of the [advance] customs ruling referred to in its Notice of Intervention; an issue that bears directly upon the weight that will ultimately be accorded by the Tribunal to the submissions of JCI.
>
> As concerns issues of law and legal interpretation, insofar as:
>
> a. the goods imported by JCI which are the subject of the [*advance*] *customs ruling*, are identical/similar to the goods in issue;
>
> b. tariff classification is inherently an issue of mixed fact and law (e.g., *CBSA v. Decolin Inc.*, 2006 FCA 417 (CanLII), para. 41), with the proper classification of goods in issue being effected by applying the provisions of the *Customs Tariff* to the goods in issue as factually described at the time of their presentation for importation into Canada (e.g., *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366; and *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21); and
>
> c. the tariff classification of the goods in issue in the present appeal could potentially impinge on the tariff classification of JCI's future imports of identical/similar goods,
>
> JCI will be allowed to make submissions on the legal interpretation of the *Customs Tariff* including the manner in which relevant provisions of the *Customs Tariff* were interpreted for purposes of the tariff classification of JCI's imports of allegedly identical/similar goods, and the issue of whether that interpretation is relevant to the tariff classification of the goods in issue in this appeal.

15. The parameters established by the Tribunal, by their own terms, circumscribe JCI's intervention on issues of law and legal interpretation to those that bear upon the tariff classification of the goods in issue. For reasons already discussed, however, these limitations on interventions in relation to the substantive merits of the appeal cannot be taken as extending to the overarching issue of jurisdiction under subsection 67(1) of the *Act*.

---

15. [2008] 1 S.C.R. 190.
16. *Ibid.* at para. 29.
17. *Ibid.* at para. 59.
18. Tribunal Exhibit AP-2012-036-11.

16. BalanceCo argued that, in the context of this case, the jurisdiction issue should not be divorced from a consideration of the merits of the appeal itself.[19] If, however, the Tribunal finds, as a preliminary matter (i.e. before turning to the substantive issues in the appeal), that it lacks jurisdiction to hear the appeal, BalanceCo has no right to a hearing on the merits.[20]

17. On the basis of the foregoing analysis, the Tribunal finds that it can consider the jurisdiction issue raised by JCI in this appeal.

WHAT IS THE BASIS OF THE TRIBUNAL'S JURISDICTION?

18. As a creature of statute, the Tribunal derives its general authority from its enabling statute, the *Canadian International Trade Tribunal Act*,[21] which provides as follows:

> 16. The duties and functions of the Tribunal are to
>
> . . .
>
> (c) hear, determine and deal with all appeals that, *pursuant to any other Act of Parliament or regulations thereunder*, may be made to the Tribunal, *and all matters related thereto* . . . .
>
> [Emphasis added]

19. Subsection 67(1) of the *Act* specifically allows for recourse to the Tribunal from decisions of the CBSA under subsection 60(4) in respect of a request under subsection 60(2) for the review of an advance ruling:

> 67.(1) *A person aggrieved by a decision of the President made under section 60* or 61 *may appeal from the decision to the Canadian International Trade Tribunal* by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.
>
> [Emphasis added]

20. In this respect, section 60 of the *Act* provides for the review of advance rulings, with the CBSA having the authority to affirm, revise or reverse the ruling:

> 60.(1) . . . .
>
> (2) A person may request a *review of an advance ruling made under section 43.1* within ninety days after it is given to the person.
>
> (3) A request under this section must be *made to the President* in the prescribed form and manner, with the prescribed information.
>
> (4) On receipt of a request under this section, the President shall, without delay,
>
> . . .
>
> (*b*) *affirm, revise or reverse the advance ruling*; or
>
> . . .
>
> (5) The President shall without delay give notice of a *decision made under subsection (4)*, including the rationale on which the decision is made, to the person who made the request.
>
> [Emphasis added]

---

19. *Transcript of Public Hearing*, 9 April 2013, at 84.
20. *Newman's Valve* at 5.
21. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

21. Subsection 67(3) of the *Act* provides that, in appeals under subsection 67(1), the Tribunal "*. . . may make such order, finding or declaration as the nature of the matter may require . . . .*"

22. The Tribunal has previously stated that, on the basis of subsection 67(3) of the *Act* and section 16 of the *CITT Act*, it is clear that Parliament intended to confer upon the Tribunal broad appellate jurisdiction.[22] On this basis, the Tribunal found, in *Grodan*, that its authority under section 67 of the *Act* was not confined to the narrow substantive issues of correct tariff classification, origin or value for duty *per se*.[23] More specifically, the Tribunal was of the view that it "*. . . has the authority under section 67 of the Act to determine not only the correctness of a decision made under section 60, but also its validity . . .*" since "*. . . correctness and validity go hand in hand.*"[24]

23. The Federal Court of Appeal has confirmed that the Tribunal's authority under section 67 of the *Act* is not limited to issues relating to the substantive merits of an appeal but extends to questions of jurisdiction as well, such as the validity of a decision made by the CBSA under section 60.[25]

24. Therefore, the Tribunal finds that the attribution of validity to a decision of the CBSA under subsection 60(4) of the *Act* in respect of a purported advance ruling under subsection 43.1(1) is a *sine qua non* to the Tribunal's assertion of jurisdiction in appeals from such decisions under subsection 67(1).

IS THE ADVANCE RULING VALID?

Legislation[26]

25. Paragraph 43.1(1)(*c*) of the *Act* limits eligibility to apply for an advance ruling in respect of the tariff classification of goods to members of any of the prescribed classes of persons:

> 43.1(1) Any officer, or any officer within a class of officers, designated by the President for the purposes of this section *shall*, before *goods* are imported, *on application by any member of a prescribed class . . . give an advance ruling* with respect to
>
> . . .
>
> (*c*) *the tariff classification of the goods*.
>
> [Emphasis added]

22. *Grodan Inc. v. President of the Canada Border Services Agency* (1 June 2012), AP-2011-031 (CITT) [*Grodan*] at paras. 29-31. See, also, *Walker Exhausts Division of Tenneco Canada Inc.* (6 July 1994), AP-93-063 (CITT) at 4.
23. In *Grodan* at para. 30, the Tribunal contrasted the wording of subsection 67(3) of the *Act* with the narrower wording of subsection 60(4), which states that, when the CBSA receives a request for re-determination or further re-determination under subsection 60(1), it shall "*. . .* (*a*) re-determine or further re-determine the origin, tariff classification or value for duty . . . ."
24. *Grodan* at para. 33. That being said, at para. 32, the Tribunal noted that its authority under section 67 of the *Act* does not extend to all questions of law that arise in an appeal, e.g. it does not extend to administration and enforcement matters.
25. *Fritz Marketing Inc. v. Canada*, [2009] 4 F.C.R. 314 at paras. 10, 36. See, also, *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII) at paras. 33, 48-49.
26. For convenience, the term "legislation" is used when referring to both the *Act* (as it pertains to the advance ruling program) and the *Tariff Classification Advance Rulings Regulations* made pursuant thereto, which together establish the advance ruling program.

26. Section 2 of the *Tariff Classification Advance Rulings Regulations*[27] in turn prescribes the classes of persons that can apply for an advance ruling. It also confirms that the "goods" referred to in subsection 43.1(1) of the *Act* are the goods that the applicant is proposing to import:

> 2. An application for an advance ruling *in respect of goods proposed to be imported* may be made by any member of the following classes of persons:
>
> (*a*) *importers of goods in Canada*;
>
> (*b*) persons who are authorized to account for goods under paragraph 32(6)(*a*) or subsection 32(7) of the Act; and
>
> (*c*) exporters or producers of those goods outside of Canada.
>
> [Emphasis added]

27. On the basis of a plain reading of subsection 43.1(1) of the *Act*, an advance ruling in respect of the tariff classification of goods would be invalid if the applicant was not a member of one of the classes of persons prescribed in section 2 of the *Regulations*.

28. BalanceCo acknowledges that it was not a member of the classes of persons referred to in paragraphs 2(*b*) and (*c*) of the *Regulations*. The jurisdictional issue in this case, distilled down to its essence, is therefore whether BalanceCo falls within the class of persons, "importers of goods in Canada", prescribed in paragraph 2(*a*).

29. With BalanceCo being duly incorporated under Part II, "Corporations Without Share Capital" of the *Canada Corporations Act*,[28] and domiciled in Canada,[29] the "in Canada" requirement of paragraph 2(*a*) of the *Regulations* is clearly satisfied. The issue before the Tribunal can therefore be further reduced to the question of whether BalanceCo was an "importer of goods", within the meaning of paragraph 2(*a*) of the *Regulations*.

Positions of the Parties

30. JCI submitted that, in order to qualify as an "importer" under section 2 of the *Regulations*, a person must be an actual importer, or at the very least, intend to be an importer of the goods to which the advance ruling pertains. In this regard, it contended that BalanceCo was neither and therefore did not qualify as an "importer", within the intended meaning of that term in paragraph 2(*a*) of the *Regulations*.[30] Rather, and as was acknowledged by BalanceCo,[31] the application for an advance ruling was submitted as a means to ensure the effective enforcement of Canadian TRQs on cheese imports.[32] According to JCI, the advance

27. S.O.R./2005-256 [*Regulations*].
28. R.S.C. 1970, c. C-32.
29. Subsection 24(1) of the *Canada Corporations Act* provides as follows: "*The company shall at all times have a head office in* the place within *Canada* where the head office is to be situated in accordance with the letters patent or the provisions of this Part, *which head office is the domicile of the company in Canada*; and the company may establish such other offices and agencies elsewhere within or outside Canada, as it deems expedient" [emphasis added]. While subsection 24(1) falls under Part I, "Companies With Share Capital", that provision also applies to Part II, "Corporations Without Share Capital", by virtue of paragraph 157(1)(*c*), which provides as follows: "157.(1) The following provisions of Part I apply to corporations to which this Part applies, namely: . . . (*c*) sections 21 to *24* . . ." [emphasis added]. In this regard, the record indicates that BalanceCo's registered head office is located in Ottawa, Ontario. Tribunal Exhibit AP-2012-036-18A, tab C.
30. Tribunal Exhibit AP-2012-036-18A at para. 32.
31. Tribunal Exhibit AP-2012-036-04A at para. 5.
32. Tribunal Exhibit AP-2012-036-18A at para. 31.

ruling purported to have been given to BalanceCo under subsection 43.1(1) of the *Act* was therefore a legal nullity and, as such, could not have been the subject of an appeal to the CBSA under subsection 60(2) of the *Act*. Given that there was no valid appeal under subsection 60(2) of the *Act*, there was no valid decision that could be the subject of an appeal to the Tribunal under section 67 of the *Act*.[33]

31. During the hearing, JCI also argued that BalanceCo's application for an advance ruling was not made before the goods in issue were imported, as required by subsection 43.1(1) of the *Act* and section 3 of the *Regulations*.[34] In this regard, JCI advised that it had imported the goods in issue almost two months prior to BalanceCo's request.

32. BalanceCo countered that seeking advance rulings on tariff classification, as well as subsequent review decisions and findings on appeal to the Tribunal for purposes of enforcing TRQs, is entirely legitimate, given that the application of TRQs turns entirely on a proper classification of the imported products.[35]

33. BalanceCo added that its eligibility to request an advance ruling on the tariff classification of the goods in issue derived from its falling squarely within the class of persons, "importers of goods in Canada", in paragraph 2(*a*) of the *Regulations*.[36] Specifically, BalanceCo argued that any individual or legal entity authorized to act as an importer of goods in Canada could request and obtain an advance ruling on the tariff classification of goods pursuant to paragraph 43.1(1)(*c*) of the *Act* and the *Regulations*, with nothing in section 2 of the *Regulations* making the receipt of advance rulings conditional on proof of prior importation of the goods in question or other goods, or of an intent to import the goods subject to the request for an advance ruling.[37] In particular, BalanceCo submitted that it was an importer because it was as a legal entity "established for import activity", namely, to ensure the integrity of Canada's TRQ system,[38] and was authorized pursuant to its corporate objects to act as an importer of goods in Canada.[39]

34. The CBSA, for its part, submitted that JCI's entire argument was based upon a narrow interpretation of the word "importer", which was contrary to the spirit and goal of the advance ruling provisions in section 43.1 of the *Act* and the *Regulations*. The CBSA added that the *Interpretation Act*[40] and the modern approach to statutory interpretation, as espoused by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*,[41] required the Tribunal to ascribe a large and liberal interpretation to that term so as not to frustrate Parliament's intent.[42] In this regard, the CBSA contends that the basis of the advance ruling regime is to allow individuals interested in importing goods into Canada (including future or potential importers) to know the tariff classification and associated duty rate that would be applied upon importation.[43] The CBSA added that, from a practical standpoint, a requester's intentions should not matter because customs officers have no easy way of testing whether the requester intends to import the goods.[44]

35. In reply, JCI acknowledged that the advance ruling program was also intended to benefit prospective importers of the goods by providing them with advance notice of the tariff treatment that would be accorded to the goods that they were proposing to import. An "importer", therefore, could be either an

33. *Ibid.* at para. 34.
34. *Transcript of Public Hearing*, 9 April 2013, at 8, 58-60.
35. *Ibid.* at 102.
36. Tribunal Exhibit AP-2012-036-25B at para. 11.
37. *Ibid.* at para.13.
38. *Ibid.* at para. 18; *Transcript of Public Hearing*, 9 April 2013, at 89-90, 155-56.
39. Tribunal Exhibit AP-2012-036-25B, tab B; *Transcript of Public Hearing*, 9 April 2013, at 89-91.
40. R.S.C. 1985, c. I-21.
41. [2002] 2 S.C.R. 559 [*Bell ExpressVu*].
42. Tribunal Exhibit AP-2012-036-28A at paras. 13, 14.
43. *Ibid.* at paras. 6, 10.
44. *Transcript of Public Hearing*, 9 April 2013, at 174.

established or a prospective importer of the goods proposed to be imported in an advance ruling application. JCI submits that, either way, BalanceCo was not an "importer" because there is no evidence that it was in the import business and—by its own admission—it had no intention of importing the goods in issue.[45] JCI argues that BalanceCo, therefore, did not request the advance ruling to potentially import the goods in issue, but rather to restrict their importation.[46]

Analysis

Correct Approach to Statutory Interpretation

36. It is well established through a line of Supreme Court of Canada decisions that the correct approach to statutory interpretation is the modern contextual approach pursuant to which:

> . . . the words of an Act are to be read in their *entire context* and in their *grammatical and ordinary sense* harmoniously with the *scheme* of the Act, the *object* of the Act, and the *intention* of Parliament.[47]
>
> [Emphasis added]

37. In *65302 British Columbia Ltd. v. Canada*,[48] the Supreme Court of Canada, while reaffirming the modern contextual approach to statutory interpretation, noted as follows: ". . . this Court has also often been cautious in utilizing tools of statutory interpretation in order to stray from clear and unambiguous statutory language."[49]

38. The Supreme Court of Canada, in *Canada Trustco Mortgage Co. v. Canada*,[50] provided further clarification on the interplay of ordinary meaning with context and purpose in the application of the modern contextual approach to statutory interpretation:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada* . . . [1999] 3 S.C.R. 804, at para. 50. *The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words [plays] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role*. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[51]
>
> [Emphasis added]

39. Finally, and most recently, the interplay of ordinary meaning and purpose was given succinct expression in *Celgene Corp. v. Canada (Attorney General)*,[52] where the Supreme Court of Canada, per

45. Tribunal Exhibit AP-2012-036-18A at para. 31; *Transcript of Public Hearing*, 9 April 2013, at 51-53.
46. *Transcript of Public Hearing*, 9 April 2013, at 52, 53.
47. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.
48. [1999] 3 S.C.R. 804.
49. *Ibid.* at para. 51.
50. [2005] S.C.R. 601 [*Canada Trustco Mortgage*].
51. *Canada Trustco Mortgage* at para. 10.
52. [2011] 1 S.C.R. 3 [*Celgene*].

Abella J., stated as follows: "The words, if clear, will dominate, if not, they yield to an interpretation that best meets the overriding purpose of the statute."[53]

Grammatical and Ordinary Sense

40. The term "importer" is not defined in the *Act* or the *Regulations*. In accordance with the modern rule of statutory interpretation, the Tribunal will first attempt to give meaning to this term by having regard to its grammatical and ordinary sense.

41. As noted by JCI,[54] generally recognized dictionary definitions of the word "importer" refer to persons actually engaged in importing. *The Dictionary of Canadian Law*, for example, defines the word "importer" as follows: "A person engaged in the business of importing goods into Canada."[55] The *Shorter Oxford English Dictionary* defines "importer" as follows: "A person who or thing which imports something, *esp.* a merchant who imports goods from other countries."[56] Finally, *Webster's Third New International Dictionary* defines "importer" as follows: "one that imports; *esp*: one whose business is the importation and sale of goods from a foreign country".[57] Thus, at a minimum, it would seem that an "importer" is someone in the import business.[58]

42. As was explained, however, by the Exchequer Court of Canada, per Jackett J., in *Her Majesty the Queen v. The Singer Manufacturing Company*,[59] "[t]he words 'exporter' and 'importer' are not words of art in the law; they are words that gain the meaning that they have when used in a [particular] context . . . ."[60] The decision in *Celgene*, on which BalanceCo relied, also supports the ascription of a contextual and purposive interpretation to the term "importer" in paragraph 2(*a*) of the *Regulations*.[61]

43. Indeed, the parties agree that the meaning of the word "importer" in section 2 the *Regulations* is broader than the narrow dictionary meaning of the term. For its part, JCI, as mentioned above, conceded that

53. *Ibid.* at para. 21.
54. *Transcript of Public Hearing*, 9 April 2013, at 36.
55. Tribunal Exhibit AP-2012-036-30A, tab 10.
56. Fifth ed., *s.v.* "importer".
57. *S.v.* "importer".
58. That view is arguably supported by the choice of the phrase "importer of goods" rather than "importer of the goods", with the former suggesting one engaged in general import trade, and the latter being suggestive of one involved in the actual or potential importation of particular goods.
59. [1968] 1 Ex.C.R. 129.
60. *Ibid.* at 135-36.
61. In *Celgene*, the Patented Medicine Prices Review Board had requested that Celegene Corp., a New Jersey-based distributor of a recently patented pharmaceutical, provide pricing information dating back to when it began selling the drug to Canadians in 1995. Celgene Corp. refused to provide all the requested information, arguing that under commercial law principles, the medicine was technically "sold" in New Jersey and was therefore outside the Patented Medicine Prices Review Board's price investigation authority under the *Patent Act*, R.S.C. 1985, c. P-4. The Patented Medicine Prices Review Board concluded that Celgene Corp.'s sales to Canadians were sales "in any market in Canada" and fell within its authority for price investigations and related remedial powers. This decision was initially reversed on judicial review but the Federal Court of Appeal and the Supreme Court of Canada agreed with the Patented Medicine Prices Review Board's interpretation of its mandate. In particular, the Supreme Court of Canada found that, while words like "sold" may well have a commercial law meaning in some statutory contexts, accepting a technical commercial law definition in the context of the *Patent Act* pricing investigation regime would undermine the Patented Medicine Prices Review Board's consumer protection mandate by preventing it from protecting Canadian purchasers of foreign-sold patented medicines.

the word "importer" in section 2 is not limited to established importers but also includes prospective importers, such as first-time importers.[62]

44. With the meaning of "importer" not being precise and unequivocal, the Tribunal, in ascribing a meaning to that term, must consider the context of its usage as reflected in the scheme, intent and purpose of the legislation.

45. Having already examined the scheme of the legislation, the Tribunal will turn to a consideration of intent and purpose.

Intent and Purpose

46. The Tribunal agrees with the CBSA's assertion that, in view of the various, diverse areas covered by the *A*ct, the Tribunal, in discerning object (or purpose), ought to confine itself to that portion of the legislation that implements the advance ruling program:

> In [Bell ExpressVu], the Supreme Court made note to the fact that words like people take their colour from their surroundings. It is the CBSA's position that *the surrounding which we should be looking for is not the entire Customs Act as a whole because, as we know, it is quite a detailed Act*. It's almost the equivalent, I would submit, of the Income Tax Act and certain sections are completely different than other sections in certain respects. *Our submission is that the colour and the surroundings which should be applied to importer are found in section 43.1*. The whole purpose of that section is to permit importers to seek an advance ruling before the importation of any product into Canada.[63]
>
> [Emphasis added]

47. Looking first to the intent of Parliament, it is uncontested that the use of the word "shall" in subsection 43.1(1) of the *Act* mandates the issuance of advance rulings to every eligible applicant, with the CBSA having been afforded no statutory discretion in the matter.

48. It is also uncontested that the reference to prescribed classes of persons in subsection 43.1(1) of the *Act* evinces a clear intention on the part of Parliament to limit the range of persons eligible for advance rulings.[64] Such limitation can, of course, arise from the attribution of a contextual interpretation that is narrower than what would otherwise have been the case, to individual classes of persons listed in section 2 of the *Regulations*, and/or from the omission altogether of particular classes of persons from that listing.[65]

---

62. Tribunal Exhibit AP-2012-036-18A at para. 31; *Transcript of Public Hearing*, 9 April 2013, at 42, 43, 190.
63. *Transcript of Public Hearing*, 9 April 2013, at 169-70.
64. The limitation of eligibility to prescribed classes of persons is consistent with the fact that the issuance of an advance ruling is not a "back-of-the-envelope" exercise. As noted by the CBSA in reference to the 120-day time frame, "[t]here has to be time here for the CBSA to consider the request and review it. In some instances, there are requests made for further information and there are some instances, of course, where samples are required. It's a timeline built in there really to ensure that there is enough time to adjudicate upon the advance ruling." *Transcript of Public Hearing*, 9 April 2013, at 179.
65. For example, while foreign producers of the goods that are the subject of an advance ruling application are covered under paragraph 2(*c*) of the *Regulations*, the class of persons comprised of foreign producers of other goods, whose production facilities could be used to produce goods that are the subject of an advance ruling request, are omitted from section 2.

49. BalanceCo conceded that ". . . the definition of a class was intended to provide some degree of constraint . . .",[66] adding that ". . . the nub of the question is how much constraint . . .",[67] which, in its view, was ". . . not very much . . ."[68] because ". . . (i)t's a broad term and it was intended to be broad . . . ."[69]

50. Turning next to purpose, the *Regulatory Impact Analysis Statement*[70] (RIAS), issued in conjunction with the *Regulations*, provides as follows:

> The new Regulations provide certainty to importers, exporters, producers or persons authorized to account for goods, in advance of goods being imported. . . . *The availability of advance rulings is of key importance to traders, especially small- and medium-sized ones.* It provides for certainty and predictability as to how a given good would be treated by Customs once the importation has taken place. *It also provides advance knowledge, in a competitive marketplace, of how a particular good will be treated [at importation]* . . . . These Regulations assist the CBSA in providing a more effective and efficient service to importers of goods into Canada.
>
> [Emphasis added]

51. The purpose of the advance ruling program, according to the RIAS, is to provide certainty to importers, exporters, producers or persons authorized to account for goods, in advance of goods being imported.[71] This is clearly intended, among other things,[72] to allow importers to make informed decisions on whether or not to follow through on the importation of goods that they are proposing to import, although not yet necessarily committed to importing. The stated purpose of the legislation usefully informs the interpretation of section 2 of the *Regulations*. In particular, it is indicative of the notion of intent being subsumed in the phrase ". . . goods proposed to be imported . . . ." Furthermore, given that this phrase is situated in the chapeau to section 2, it must be taken to condition each of the ensuing classes of persons, including the class described in paragraph 2(*a*), such that "importers of goods in Canada" would be confined to those persons who intend to import the goods, thereby excluding "hypothetical" importers.

52. By way of aside, the Tribunal notes that Memorandum D11-11-3[73] provides as follows:

> 16. There are circumstances where it is not appropriate to issue an advance ruling. These include situations:
>
> . . .
>
> (e) *when the request is hypothetical in nature*;
>
> . . .
>
> [Emphasis added]

66. *Transcript of Public Hearing*, 9 April 2013, at 125.
67. *Ibid.*
68. *Ibid.*
69. *Ibid.* at 125-26.
70. Tribunal Exhibit AP-2012-036-25D, tab 15.
71. JCI ascribed significant importance to the fact that, as stated in the RIAS, the advance ruling program was intended to benefit importers as "traders". The Tribunal notes that accepted definitions of "trader" include the following: "One who makes it his business to buy merchandise, goods, or chattels to sell the same at a profit" (*Black's Law Dictionary*, 6th ed., *s.v.* "trader") and "a person who gets his livelihood by buying and selling for gain" (*Webster's Third New International Dictionary*, *s.v.* "trader"). In the Tribunal's view, however, the word "traders" was likely used as a term of convenience that was intended to encompass each of the classes of persons referred to in section 2 of the *Regulations*. As such, its usage should not be assigned undue significance.
72. An advance ruling on tariff classification (and resulting customs duty liability) would also assist an importer in, for example, the pricing of the goods for commercial resale.
73. "Advance Rulings for Tariff Classification" (23 April 2010).

Given that subsection 43.1(1) of the *Act* affords no discretion to the CBSA, which must issue an advance ruling upon receipt of an application from a member of a prescribed class of persons, the CBSA's view that it can reject "hypothetical requests" would appear to derive from an interpretation of section 2 of the *Regulations* that is narrower than that which it has espoused in these proceedings.

53. The absence of any reference in the RIAS to prior importing experience, together with the explicit recognition of the program's particular importance to small business, suggests that the program was designed for the purpose of providing both established and potential first-time importers with the benefit of certainty and predictability as to how a given good (i.e. the goods to which the advance ruling relates) would be treated on importation, a point that is uncontested.

54. Finally, the reference to the provision of ". . . advance knowledge, in a competitive marketplace, of how a particular good will be treated . . ." is consistent with the issuance of such rulings to both established and potential first-time importers who are interested in importing particular goods but not necessarily prepared to commit thereto pending the issuance of an advance ruling on the tariff classification of the goods proposed to be imported, which establishes the feasibility of their importation into a competitive market.[74]

55. Accordingly, it is the Tribunal's view that an applicant that did not intend, either as an established or potential first-time importer, to import the goods, "proposed to be imported" in its advance ruling application, could not be considered an "importer", within the meaning of that term in the context of its usage in paragraph 2(*a*) of the *Regulations*.

Conclusion

56. In the present case, the evidence clearly indicates that, at the time of its application, BalanceCo had no interest in importing the goods that were the subject of its advance ruling request,[75] with its application having been motivated by considerations extraneous to the purpose of the legislation.[76] Indeed, and as correctly noted by JCI, BalanceCo did not seek the advance ruling to further the proposed importation of the goods in issue, but rather to *restrict* their importation.[77] As such, BalanceCo could not be considered as having been an "importer" in any reasonable sense of the term.

57. Having considered the meaning of "importer" by application of the modern contextual approach to interpretation, the Tribunal finds that the meaning of that word, in the context of its usage in paragraph 2(*a*) of the *Regulations*, is necessarily broader than ordinary dictionary definitions of that term would suggest. However, the Tribunal cannot accept BalanceCo's assertion that nothing in the *Regulations* restricts or

74. While the Tribunal agrees with BalanceCo that the Supreme Court of Canada's decision in *Celgene* is relevant in this case to the extent that the Tribunal finds it appropriate to consider the legislative context and purpose surrounding the usage of the term "importer" in paragraph 2(*a*) of the *Regulations*, it also notes that, unlike *Celgene*, the issue here is not whether the definition of "importer" excludes BalanceCo as a certain class of importer, but rather whether BalanceCo, when it applied for an advance ruling, could have been considered an importer under any sense properly ascribed to that term under paragraph 2(*a*) of the *Regulations*.
75. The record indicates that the goods described in BalanceCo's application for an advance ruling are goods imported by JCI (Tribunal Exhibit AP-2012-036-04B, tabs C, I), with the subject goods being prepared for, and actually imported by, JCI. Tribunal Exhibit AP-2012-036-18A at para. 12.
76. BalanceCo was upfront in restating during the hearing that ". . . [BalanceCo] initiated this process to ensure the integrity of the TRQ regime" and that "[i]t's not something we are hiding from." *Transcript of Public Hearing*, 9 April 2013, at 162.
77. *Transcript of Public Hearing*, 9 April 2013, at 52, 53.

otherwise qualifies the scope of the term "importers of goods in Canada" as used in subsection 2(*a*) of the *Regulations* to prevent the use of advance rulings to seek enforcement of TRQs or for any other purpose.[78] In particular, the Tribunal has regard to the acknowledged legislative intent to limit eligibility for advance rulings and the legislative purpose of the advance ruling program to assist (rather than inhibit) persons interested in importing, by providing them with certainty and predictability as to how given goods will be treated by Customs upon their importation into Canada.

58. While the Tribunal accepts BalanceCo's claim that "[a]ny individual or legal entity authorized to act as an importer of goods in Canada may request and obtain an advance ruling on the tariff classification of goods pursuant to paragraph 43.1(1)(c) of the *Customs Act* and the *Advance Ruling Regulations*",[79] this acceptance is subject, for reasons already discussed, to the *proviso* that such individual or legal entity actually intends to import the goods that are the subject of the request for an advance ruling.[80]

59. The Tribunal is not unsympathetic to the CBSA's concerns on the practical enforcement front. However, while the status of an applicant as an importer of goods may be presumptive, such presumption cannot stand in those rare and unique cases where, as in this case, there is clear and compelling evidence to the contrary. In those instances where an applicant has misled the CBSA as to the purpose of its advance ruling request, which is entirely extraneous to any intent to import the goods that are the subject of the request, the applicant must accept that it runs the risk that the ruling may be overturned in subsequent proceedings.

60. While the Tribunal would prefer to resolve appeals on their substantive merits, it cannot act without the requisite authority. In this regard, given that BalanceCo was not an eligible applicant for an advance ruling, the ruling issued to it under subsection 43.1(1) of the *Act* was invalid, which in turn rendered the decision, purported to have been made by the CBSA under subsection 60(4), a nullity. That being the case, the Tribunal finds that it has no jurisdiction to hear the appeal.

DECISION

61. The appeal is therefore dismissed for want of jurisdiction.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

78. *Ibid.* at 102.
79. Tribunal Exhibit AP-2012-036-25B at para. 13.
80. Indeed, the usage of the phrase "importer of goods in Canada" in lieu of, for example, the phrase "any person authorized to import", in the same manner as immediately follows in paragraph 2(*b*) of the *Regulations*, implies a measure of constraint on the breadth of that class and, is consistent with the subsumption in the definition of "importer" of the notion of intent to import.