Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-031

Grodan Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, June 1, 2012

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on February 21, 2012, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision made by the President of the Canada Border Services Agency, dated June 6, 2011, with respect to a request for further re-determinations pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

GRODAN INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member

Gillian Burnett
Gillian Burnett
Acting Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 21, 2012
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Georges Bujold Nick Covelli
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representative**
Grodan Inc.	Martha Kirby
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Abigail Martinez

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
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

BACKGROUND

1. This is an appeal filed by Grodan Inc. (Grodan) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision by the President of the Canada Border Services Agency (CBSA), dated June 6, 2011, made pursuant to subsection 60(4) with respect to the tariff classification of plastic plant clips and rings designed to support plant stems (the goods in issue), imported by Grodan.

2. Grodan is challenging the CBSA's decision on the basis that the CBSA did not have the authority to further re-determine the tariff classification of the goods in issue. Grodan asks that the Tribunal allow the appeal, which would in effect entitle Grodan to refunds that had previously been granted under section 74 of the *Act*.

3. A preliminary jurisdictional matter that arises in this appeal is whether the Tribunal has the authority to examine the issue raised by Grodan.

PROCEDURAL HISTORY

4. Grodan imported the goods in issue between November 16, 2004, and December 8, 2004, and paid duty on them, on the basis of the tariff classification declared by Grodan at the time of importation. That declaration constitutes a deemed tariff classification determination pursuant to subsection 58(2) of the *Act*.

5. In 2008, Grodan requested refunds of the duties on the basis that the goods in issue should have benefited from duty-free treatment under tariff item No. 9903.00.00 of the schedule to the *Customs Tariff*.[2]

6. The CBSA issued various decisions under paragraph 74(1)(*e*) of the *Act* between December 10, 2008, and January 14, 2009, resulting in refunds of the duties. Pursuant to subsection 74(1.1), the granting of these refunds are to be treated as re-determinations made under paragraph 59(1)(*a*).

7. On October 29, 2009, however, the CBSA made re-determinations pursuant to paragraph 59(1)(*b*) of the *Act*. The Detailed Adjustment Statements (DASs) by which those decisions were communicated to Grodan stated that the CBSA had determined that the goods in issue were not, after all, classifiable under tariff item No. 9903.00.00. As a result, the refunds were cancelled and Grodan was again liable for the payment of duties.

8. The Tribunal notes that these DASs were issued more than 48 months after the date of the deemed determination under subsection 58(2) of the *Act*.

---

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.

9. On November 26, 2009,[3] Grodan applied to the Federal Court for judicial review of the decisions made under paragraph 59(1)(*b*) of the *Act* on the ground that they were time-barred.[4] On January 21, 2010, Grodan also asked the CBSA for a further re-determination pursuant to subsection 60(4). At the outset of this request, Grodan argued that the decisions under subsection 59(1) were made too late for duties to be assessed.[5] Grodan also asked the CBSA to hold its process in abeyance pending the judicial review.

10. Grodan withdrew its application to the Federal Court in January 2011.[6]

11. On June 6, 2011, pursuant to subsection 60(4) of the *Act*, the CBSA issued four further re-determinations that the goods in issue were not entitled to duty-free treatment under tariff item No. 9903.00.00. These decisions made no reference to the validity of the underlying decisions made pursuant to paragraph 59(1)(*b*).

12. On September 4, 2011, Grodan filed the present appeal.

13. Further to a request by Grodan, the Tribunal decided to hear the appeal in conjunction with another appeal that Grodan had filed, in early September 2011, in respect of contemporaneous tariff classification decisions of the CBSA, dated June 3 and 7, 2011, concerning other greenhouse products (Appeal No. AP-2011-030).[7]

14. On February 21, 2012, the Tribunal held a public hearing in Ottawa, Ontario, for both appeals.

15. Grodan did not call any witnesses. The CBSA called a witness, but he did not testify in respect of the matters in issue.

Legislative Framework

16. Subsection 58(2) of the *Act* provides that, if tariff classification is not determined by the CBSA under subsection 58(1) (by any officer or class of officer designated by the CBSA—which was not the case here), then it is deemed to be determined as declared by the person accounting for the goods (this is what occurred in this instance).

17. Irrespective of whether there was an actual determination made by any officer or class of officers designated by the CBSA or a deemed determination made by the person accounting for the goods, as in this case, subsection 58(3) of the *Act* provides that a determination under section 58 is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by sections 59 to 61, which is a privative clause provided for in the legislative scheme of the *Act*.

---

3. On May 21, 2009, in *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2009 FC 528 (CanLII), the Federal Court found that it had the authority to rule on jurisdictional matters arising from the legislative scheme at issue in the present appeal. The applicant in that case had bypassed the Tribunal. It was in this context that Grodan applied to the Federal Court for a ruling on whether the CBSA's re-determination under paragraph 59(1)(*b*) of the *Act* was time-barred. Subsequently, however, on February 23, 2010, in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII) [*C.B. Powell I*], the Federal Court of Appeal overturned the Federal Court's ruling, holding that the Tribunal had exclusive authority to rule on jurisdictional issues before parties could pursue any recourse to the courts.
4. *Grodan Inc. v. The President of the Canada Border Services Agency*, Court No. T-1976-09.
5. Tribunal Exhibit AP-2011-031-12, appendix at 23.
6. Recorded entries for Court No. T-1976-09 can be found at www.fca-caf.gc.ca.
7. Rule 6.1 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, authorizes the Tribunal to combine two or more proceedings to provide for a more expeditious or informal process, as the circumstances and considerations of fairness permit.

18. However, paragraph 74(1)(*e*) of the *Act* allows for the refund of duties if they were paid or overpaid as a result of an error in the determination of tariff classification under subsection 58(2) and the determination has not yet been the subject of a decision made under sections 59 to 61.

19. As noted above, the granting of a refund under paragraph 74(1)(*e*) of the Act is, pursuant to subsection 74(1.1), to be treated as a re-determination made under paragraph 59(1)(*a*). That paragraph allows the CBSA to re-determine tariff classification within four years after the date on which the determination was made under section 58.

20. Paragraph 59(1)(*b*) of the *Act* allows the CBSA to further re-determine the tariff classification within four years after the date on which the determination was made under section 58, on the basis of an audit, examination or verification that is conducted after the granting of a refund under paragraph 74(1)(*e*) that is treated by subsection 74(1.1) as a re-determination under paragraph 59(1)(*a*).

21. In addition, paragraph 59(1)(*b*) of the *Act* allows a designated officer of the CBSA to make such further re-determination within four years after the date on which the determination was made under section 58 or, if the Minister deems it advisable, within such further time as may be prescribed.

22. In the Tribunal's view, paragraph 59(1)(*b*) of the *Act* is to be read together with section 2 of the *Determination, Re-determination and Further Re-determination of Origin, Tariff Classification and Value for Duty Regulations*,[8] which state that, if the granting of a refund occurs between the first day of the 37th month and the last day of the 48th month after the date on which the determination was made under section 58 of the *Act*, then the CBSA may make a further re-determination under paragraph 59(1)(*b*) within five years from the date on which the determination was made under section 58.

23. As mentioned above, subsection 59(6) of the *Act* provides that a decision made under section 59 ". . . is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61."

24. A decision made under paragraph 59(1)(*a*) or (*b*) of the *Act* can be further re-determined by the CBSA pursuant to section 60 or 61.

25. Subsection 67(1) of the *Act* allows for a person who is aggrieved by a decision made under section 60 or 61 to appeal to the Tribunal, and subsection 67(3) allows the Tribunal to ". . . make such order, finding or declaration as the nature of the matter may require . . . ."

26. Finally, pursuant to subsection 68(1) of the *Act*, decisions of the Tribunal made under section 67 are appealable to the Federal Court of Appeal on questions of law.

Preliminary Matter—Jurisdiction

27. Grodan submits that the Tribunal has the authority to examine the issue that it has raised in this appeal and to grant the requested remedy pursuant to section 67 of the *Act* on the basis that the decision under section 60 that is the subject of the appeal is invalid because the underlying decisions under section 59 were invalid (i.e. because the CBSA was time-barred from making them).[9]

8. S.O.R./98-44 [*Regulations*].
9. Tribunal Exhibit AP-2011-031-12 at 1, 4.

28. The CBSA contends that, while the Tribunal would have jurisdiction to consider the issue of tariff classification, it does not have jurisdiction to deal with the timing of the decisions made pursuant to paragraph 59(1)(*b*) of the *Act* because, pursuant to section 67, it would only have the authority to hear appeals of decisions made under section 60.

29. The Tribunal's jurisdiction is limited by statute, whether explicitly or implicitly.[10] As the Tribunal has stated in the past, it is clear that Parliament intended to confer on the Tribunal broad appellate jurisdiction.[11] In the Tribunal's view, its authority under the *Act* is not limited merely to the narrow substantive question of the correct tariff classification, origin or value for duty of imported goods.

30. 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 . . . ."[12] This wording contrasts with subsection 60(4), which gives the CBSA the authority only to ". . . re-determine or further re-determine . . ." or, in the case of an advance ruling, ". . . affirm, revise or reverse . . ." This contrast implies that the Tribunal's authority is broader than just determining the correct tariff classification, origin or value for duty *per se*.

31. This view is reinforced by a reading of section 16 of the *Canadian International Trade Tribunal Act*,[13] which states that the duties and functions of the Tribunal are, *inter alia*, to "*. . . hear, determine and deal with* all appeals that, pursuant to any other Act of Parliament [e.g. *Customs Act*] or regulations thereunder, may be made to the Tribunal, and *all matters related thereto* . . ." [emphasis added].

32. That is not to say that the Tribunal's authority permits it to determine all questions of law that arise in any appeal before it. The Tribunal has found in the past that its jurisdiction does not extend, for example, to the fairness of the retroactive application of an amendment,[14] which is a matter for Parliament itself, to the proper calculation of interest on unpaid duties[15] or to the adequacy of security provided to the Minister of National Revenue as a prerequisite for a re-determination under section 60 of the *Act*,[16] which are clearly matters of administration and enforcement.

33. However, the Tribunal 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. In the Tribunal's view, correctness and validity go hand in hand.

34. If a tariff classification decision made under section 60 of the *Act* is not correct on the merits, then it cannot stand. Likewise, if it is not valid on jurisdictional grounds, it should not stand. As such, the Tribunal is of the view that the validity of a decision under section 60 is a matter "related" to the correctness of such a decision and, therefore, that the Tribunal is authorized to "deal with" it by making ". . . such order, finding or declaration as the nature of the matter may require . . . ."

---

10. *Deputy M.N.R.C.E. v. Unicare Medical Products Inc.* (30 April 1990), 2437, 2438, 2485, 2591 and 2592 (CITT).
11. *Walker Exhausts Division of Tenneco Canada Inc. v. Deputy M.N.R.C.E.* (6 July 1994), AP-93-063 (CITT).
12. This wording is noticeably broader than the 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 . . . ."
13. R.S.C. 1985 (4th Supp.), c. 47.
14. See procedural order in *Gammon Trading Co. Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (21 April 2004), AP-2003-012 (CITT).
15. *Ibid.*
16. *Volpak Inc. v. President of the Canada Border Services Agency* (8 November 2010), AP-2010-031 (CITT).

35. Indeed, in *Canada v. Fritz Marketing Inc.*,[17] the Federal Court of Appeal expressly held that the Tribunal, rather than the Federal Court, has jurisdiction under section 67 of the *Act* to determine the validity of, and to set aside, a DAS issued on the basis of an invalid decision made subsection 59(1).[18] According to Sharlow J.A., only the Tribunal can determine ". . . the validity and correctness . . ." of a DAS and to determine whether a DAS ought to be set aside on the basis that the CBSA could not support it except on the basis of illegally obtained evidence.[19]

36. The Tribunal is of the view that *Fritz Marketing* stands for the proposition that the Tribunal's jurisdiction under section 67 of the *Act* effectively enables it to examine and, if necessary, revisit the validity of decisions under section 59, which underpin any decision made under section 60 from which an appeal to the Tribunal is directly made. The effect of subsection 59(6), then, is that an appellant must first ask the CBSA, pursuant to section 60, to reconsider the matter, and the effect of section 67 is to then escalate the matter to the Tribunal.

37. The Tribunal is also mindful of the statement of Stratas J.A. in the Federal Court of Appeal's decision in *C.B. Powell I* to the effect that the Tribunal's jurisdiction under section 67 of the *Act* is not limited to decisions on the merits, but extends to jurisdictional decisions as well.[20]

38. In that case, the CBSA ruled that it did not have jurisdiction to decide a matter under section 60 of the *Act*. The importer brought a judicial review in the Federal Court, which granted relief. However, the Federal Court of Appeal held that parties must exhaust their rights and remedies by pursuing an appeal to the Tribunal under subsection 67(1) before pursuing any recourse to the courts (specifically to the Federal Court of Appeal on appeal of a decision of the Tribunal pursuant to subsection 67[1]), even on so-called "jurisdictional" issues.[21]

39. Stratas J.A. clarified that recourse could be had to the courts in exceptional circumstances, but specifically stated that ". . . the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts."[22] Thus, the Federal Court of Appeal concluded that, if the importer wished to have recourse against the jurisdictional ruling of the CBSA, it should have pursued an appeal to the Tribunal under subsection 67(1) of the *Act*, rather than applied to the Federal Court.

40. In the present case, the CBSA has not found that it lacks jurisdiction to make a determination under section 60 of the *Act*. Rather, in the face of an objection by Grodan to the validity of the decision made by the designated officer under subsection 59(1), the CBSA has made an implied ruling that it does have jurisdiction.

---

17. 2009 FCA 62 (CanLII) [*Fritz Marketing*].
18. In that case, the CBSA had relied upon evidence obtained in violation of section 8 of the *Charter of Rights and Freedoms*. Fritz Marketing Inc. was unsuccessful in an application to the CBSA, pursuant to section 60, for a further re-determination. Fritz Marketing Inc. then appealed to the Tribunal pursuant to section 67. The Tribunal stayed the appeal pending related judicial proceedings. The Federal Court ordered that the DAS be set aside. On appeal, however, the Federal Court of Appeal, at para. 33, held that subsection 59(6) deprives the Federal Court of the jurisdiction to set aside a DAS ". . . for any reason . . . ."
19. *Fritz Marketing* at paras. 36, 38.
20. *C.B. Powell I* at paras. 33, 48-49.
21. *Ibid.* 4-5.
22. *Ibid.* at para. 33.

41. The CBSA did so by deciding, pursuant to section 60 of the *Act*, that the goods in issue were not eligible for classification under tariff item No. 9903.00.00. It may be the case that the CBSA did not believe that it had the authority to negate the determination made under subsection 59(1), considering that its authority under subsection 60(4) is to re-determine or further re-determine the tariff classification. But whether the CBSA did or did not have the authority is of no consequence for the purposes of the present proceedings where no such limitation on the Tribunal's authority exists. Put otherwise, the CBSA has made an implied decision on jurisdiction from which Grodan appeals pursuant to subsection 67(1) and, in light of the Federal Court of Appeal's decision in *C.B. Powell I*, this means that the Tribunal is legally seized to hear the appeal and deal with the matter in a manner prescribed in subsection 67(3).

42. That the Tribunal has authority to hear appeals of implied decisions is now well established in the Tribunal's view.

43. In *C.B. Powell Limited v. Canada (Border Services Agency)*,[23] a subsequent related decision of the Federal Court of Appeal, Stratas J.A. recognized that the ability of an importer to argue that an "implied decision" was made by the CBSA substantially lessens the potential unfairness that would arise from having to overpay duties and that an interpretation of subsection 67(1) of the *Act* that embraces the possibility of the Tribunal reviewing "implied decisions" is ". . . rationally defensible given the framework provisions enacted by Parliament when it set up this administrative regime."[24]

44. In the present case, Grodan dropped its application for judicial review of the validity of the DASs after the Federal Court of Appeal, in *C.B. Powell I*, ruled that importers had to pursue recourse to the Tribunal instead.[25]

45. Were the Tribunal to refuse to exercise jurisdiction in a case such as this one, where the CBSA fails or is unable to annul, through section 60 of the *Act*, decisions that a designated officer of the CBSA had no authority to make under subsection 59(1) in the first place, then Grodan and importers like it would have no recourse. The Tribunal will not countenance such an unjust outcome.

46. The Tribunal recognizes that, in *Richards Packaging Inc. v. Deputy M.N.R. v. Eastman Chemical Canada Inc.*[26] and in *Convoy Supply Ltd. v. Deputy M.N.R.*,[27], it declined to set aside re-determinations made under the current section 59 when faced with claims that those decisions were invalidly made. At that time, the Tribunal's underlying assumption was that these jurisdictional matters were for the Federal Court. This assumption has now been dispelled by the Federal Court of Appeal in its pronouncements in *Fritz Marketing* and *C.B. Powell I* and *C.B. Powell II*. As such, those earlier decisions of the Tribunal no longer reflect the current state of the law.[28]

47. For all the foregoing reasons, the Tribunal finds that Grodan is aggrieved by a decision of the CBSA made under section 60 of the *Act* and that, therefore, the Tribunal has the authority to hear the appeal and to make such order, finding or declaration as the nature of the matter may require.

---

23. 2011 FCA 137 (CanLII) [*C.B. Powell II*].
24. *C.B. Powell II* at para. 34.
25. *Transcript of Public Hearing*, 21 February 2012, at 34.
26. (10 February 1999), AP-98-007 and AP-98-010 (CITT).
27. (28 February 2000), AP-99-015 to AP-99-025 (CITT).
28. In other cases, notably *Vilico Optical Inc. v. Deputy M.N.R.* (7 May 1996), AP-94-365 (CITT), the Tribunal held that a refusal by the CBSA (or its predecessors) to consider a request for re-determination may be reviewable by the Federal Court, but not by the Tribunal. In *C.B. Powell I*, at paras. 38-46, however, the Federal Court of Appeal specifically rejected this approach.

Analysis

48. Grodan takes the position that, given that the granting of the refunds took place more than 48 months after the deemed determination under section 58 of the *Act*, the CBSA did not have the authority to cancel the refunds.[29]

49. The CBSA admits that a further re-determination under subsection 59(1) of the *Act* shall generally be made within four years of the date on which the determination under section 58 was made and that section 2 of the *Regulations* extends this to five years where the granting of refunds under section 74 of the *Act* took place in the 37-48 month window after the determination under section 58.[30] The CBSA also admits that the refunds in issue were granted more than 48 months after the determination under section 58.[31] Nevertheless, the CBSA maintains that it had the authority to cancel the refunds and issue DASs.

50. The CBSA's argument is "convoluted"[32], to use its own term. Basically, the argument, as the Tribunal understands, is twofold.

51. First, because subsection 74(1.1) of the *Act* provides that a refund is to be treated as a re-determination made under paragraph 59(1)(*a*), and such a re-determination has to be made within four years, the Tribunal must deem the re-determination under subsection 59(1) to have been made within four years, whether or not that was true.[33]

52. Second, section 2 of the *Regulations* should be interpreted on policy grounds to extend the deadline to five years, otherwise the CBSA will not have an opportunity to review refunds that it has granted in cases where the importer has requested a refund immediately before the end of the 48th month.[34]

53. The Tribunal does not accept the CBSA's arguments.

54. Subsection 74(1.1) of the *Act* simply requires that the granting of a refund be treated as a re-determination made under paragraph 59(1)(*a*). It says nothing about timing. Rather, paragraph 74(3)(*b*) states that a refund under paragraph 74(1)(*e*) must be requested within four years after the goods were accounted for. There is a deadline for requesting the refund, but none for granting it.

55. Section 2 of the *Regulations* unambiguously deals with the specific situation whereby the CBSA has granted a refund between 37 and 48 months after the goods were accounted for. In that situation, the CBSA has an extra year to make a further re-determination under paragraph 59(1)(*b*) of the *Act*.

56. In the present case, the granting of refunds took place after the 48th month. As such, the CBSA did not have the authority to make a further re-determination under paragraph 59(1)(*b*) of the *Act*. Put differently, the CBSA did not have the authority to cancel the refunds.

29. *Transcript of Public Hearing*, 21 February 2012, at 27.
30. *Ibid.* at 38-39.
31. *Ibid.* at 7, 40.
32. *Ibid.* at 36.
33. *Ibid.* at 41-45.
34. *Ibid.* at 40-41.

57. This result might reveal an unintended shortcoming in the legislative scheme, which may require the CBSA to be more vigilant when it grants refunds under section 74 of the *Act*. However, the Tribunal's responsibility is to interpret the law as it is.

DECISION

58. The appeal is allowed.

Jason W. Downey

Jason W. Downey
Presiding Member