



Ottawa, Wednesday, July 2, 2003

**Appeal No. AP-2002-091**

IN THE MATTER OF an appeal heard on February 19, 2003,  
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of  
the Canada Customs and Revenue Agency dated August 22, 2002,  
with respect to a request for redetermination under section 63 of  
the *Customs Act*.

**BETWEEN**

**ASEA BROWN BOVERI INC.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Ellen Fry  
Ellen Fry  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



## UNOFFICIAL SUMMARY

**Appeal No. AP-2002-091**

**ASEA BROWN BOVERI INC.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY**

**Respondent**

This is an appeal pursuant to subsection 67(1) of the *Customs Act* from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) not to accept a request for a further redetermination made pursuant to section 63 of the *Customs Act*. The preliminary issue in this appeal is whether the Tribunal has jurisdiction to decide the appeal.

**HELD:** The appeal is dismissed. The Tribunal finds that it does not have jurisdiction to decide this appeal. Section 67 of the *Customs Act* provides the Tribunal with jurisdiction to hear appeals from a person who deems himself aggrieved by a decision of the Commissioner (formerly the Deputy Minister) made pursuant to section 63. In the Tribunal's opinion, section 63 requires the Commissioner to have performed a tariff classification exercise in reaching his decision in order for there to be a right of appeal from the decision. In this case, the Tribunal determined that the Commissioner's decision did not involve a tariff classification exercise and, therefore, was not a decision under section 63 and, thus, that there was no right of appeal under section 67.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: February 19, 2003  
Date of Decision: July 2, 2003

Tribunal Members: Ellen Fry, Presiding Member  
Pierre Gosselin, Member  
James A. Ogilvy, Member

Counsel for the Tribunal: Roger Nassrallah  
Reagan Walker

Clerk of the Tribunal: Anne Turcotte

Appearances: Douglas J. Bowering, for the appellant  
Marie Crowley, for the respondent



**Appeal No. AP-2002-091**

**ASEA BROWN BOVERI INC.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY**

**Respondent**

TRIBUNAL: ELLEN FRY, Presiding Member  
PIERRE GOSSELIN, Member  
JAMES A. OGILVY, Member

**REASONS FOR DECISION**

This is an appeal pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated August 22, 2002, made under section 63 of the *Act*. The preliminary issue in this appeal is whether the Tribunal has jurisdiction to decide this appeal.

**EVIDENCE**

In this case, the facts are not in dispute. On March 17, 1995, Asea Brown Boveri Inc. (ABB)<sup>2</sup> imported on-load tap changers into Canada. On August 31, 1995, Corporate Audit Services (CAS), acting as agent for ABB, requested a redetermination of the tariff classification, pursuant to paragraph 60(1)(b) of the *Act*. On October 5, 1995, the Commissioner issued a detailed adjustment statement (DAS) in response to CAS's request for redetermination, pursuant to subsection 60(3). The DAS was sent to ABB and also erroneously to Universal Customs Brokers Ltd., another agent for ABB. However, the DAS was not sent to CAS.

On October 22, 2001, more than six years after its request for redetermination, CAS asked for an update on the status of the request. On November 2, 2001, the Commissioner replied that CAS's request had been approved on October 5, 1995. On November 13, 2001, CAS requested a further redetermination, pursuant to paragraph 63(1)(a) of the *Act*.<sup>3</sup> On August 22, 2002, the Commissioner wrote to CAS informing

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
  2. ABB was represented at the public hearing by Mr. Douglas J. Bowering, who is a contract employee of Corporate Audit Services, which is an agent for ABB.
  3. In responding to questions from the Tribunal, ABB stated that the import duties that were originally paid were set at 13.9 percent and that, subsequent to its request for redetermination, pursuant to section 60 of the *Act*, the Commissioner redetermined that the duty rate ought to have been 9.6 percent and refunded the difference. Furthermore, ABB stated that it requested a further redetermination, under section 63, in order to benefit from the Tribunal's decision in Appeal No. AP-98-001, dated February 21, 2000, which, it contended, would bring the duty rate down to zero.

it that its request for a further redetermination was made outside the limitation period provided for in section 63. On September 17, 2002, CAS filed its notice of appeal with the Tribunal.

## RELEVANT LEGISLATION

The following provisions of the *Act* as it read at the time of the transactions at issue are relevant to this appeal:

60.(1) The importer or any person who is liable to pay duties owing on imported goods ... may ...  
(a) within ninety days, or  
(b) where the Minister deems it advisable, within two years  
after the time the determination or appraisal was made in respect of the goods under section 58,  
request a re-determination of the tariff classification or a re-appraisal of the value for duty.

(2) A request under this section shall be made to a designated officer in the prescribed manner and in the prescribed form containing the decision to the person who made the request.

(3) On receipt of a request under this section, a designated officer shall, with all due dispatch, re-determine the tariff classification or re-appraise the value for duty, as the case may be, and give notice of his decision to the person who made the request.

63.(1) Any person may,  
(a) within ninety days after the time the person was given ... notice of a decision under section 60 or 61, or  
(b) where the Minister deems it advisable, within two years after the time ... a determination or appraisal was made under section 58,  
request ... a further re-determination of the tariff classification or a further re-appraisal of the value for duty re-determined or re-appraised under section 60 or 61.

67.(1) A person who deems himself aggrieved by a decision of the Deputy made pursuant to section 63 or 64 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing to the Deputy Minister and the secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

## ARGUMENT

ABB submitted that the circumstances of this appeal are identical in principle to those of *Rexnord Canada Limited v. Deputy M.N.R.*<sup>4</sup> and relied on the Tribunal's order in that appeal. It stated that, in *Rexnord*, the Deputy Minister of National Revenue had issued a decision under section 60 of the *Act*, but had failed to provide notice to the person who had made the request which, it argued, was similar to the circumstances of this appeal. Furthermore, it submitted, the principles applied by the Tribunal in *Rexnord* were correct.

With respect to the Tribunal's jurisdiction, ABB argued that the wording of section 63 of the *Act* requires the Commissioner to make a decision, as opposed to the wording of section 64 which, it argued, provides the Tribunal with greater discretion. ABB contended that, in this particular case, the Commissioner

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4. (14 January 1997) AP-95-289 (CITT) [*Rexnord*].

made a decision within the meaning of section 63, by deciding that the request was made beyond the statutory 90-day time limit. ABB also contended that, even though the Commissioner's decision did not deal with the substance of a tariff classification issue, it nonetheless constituted a decision within the meaning of section 63. It supported this argument by referring to the Tribunal's decision in *Walker Exhausts Division of Tenneco Canada Inc. v. Deputy M.N.R.C.E.*<sup>5</sup> Based on this reasoning, ABB submitted, the Tribunal did have jurisdiction to decide the appeal.

In replying to a question from the Tribunal with respect to the decision of the Federal Court of Canada in *Mueller Canada Inc. v. Canada (M.N.R.)*,<sup>6</sup> ABB referred to a portion of that decision, which indicated that the primary jurisdictional issue with which the Tribunal must deal is whether the Commissioner had actually provided a decision within the meaning of section 63.<sup>7</sup>

The Commissioner submitted that the Tribunal did not have jurisdiction to decide this appeal, since a decision under section 63 of the *Act* has been interpreted by the Tribunal in many of its cases to mean a decision on the substance of the issue of classification. The Commissioner further submitted that any decision that relates to a threshold matter should not be considered a decision pursuant to section 63.

In reply to ABB's argument that the Tribunal should follow the principles set out in *Walker Exhausts*, the Commissioner argued that that decision was no longer authoritative on this issue. Furthermore, the Commissioner submitted that the Tribunal's decisions since *Mueller* indicate that the Tribunal has abandoned the position that it took in *Walker Exhausts* and consistently applied the principle set out in *Mueller*. Finally, the Commissioner submitted that the proper recourse for threshold decisions is judicial review before the Federal Court of Canada, rather than an appeal before the Tribunal.

## DECISION

The preliminary issue in this appeal is whether the Tribunal has jurisdiction under section 67 of the *Act* to decide this appeal. Subsection 67(1) states, in part:

A person who deems himself aggrieved by a decision of the Deputy made pursuant to section 63 . . . may appeal from the decision to the Canadian International Trade Tribunal.

Subsection 63(1) of the *Act* states, in part:

Any person may . . . within ninety days after the time the person was given . . . notice of a decision under section 60 . . . request . . . a further re-determination of the tariff classification.

Thus, the Tribunal's jurisdiction is dependent upon the Commissioner having made a decision pursuant to section 63 of the *Act*. The Commissioner's jurisdiction to make a redetermination under section 63 is dependent on ABB having made a timely request for such a redetermination.

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5. (6 July 1994) AP-93-063 (CITT) [*Walker Exhausts*].

6. [1993] F.C.J. No. 1193 (T.D.) (QL) [*Mueller*].

7. *Transcript of Public Argument* at 11-12.

The wording of the Commissioner's response to ABB's request for a further redetermination was: "This claim has been submitted beyond the time limit set under section 63 of the Customs Act. As the time limits have expired no further consideration will be given to this claim." This evidence concerning the nature of the Commissioner's decision was not contradicted, and the evidence indicated that this was the only decision made by the Commissioner. The question is whether this decision is, in and of itself, a decision under section 63 of the *Act* and, hence, appealable under section 67.

As outlined above, ABB relied on the Tribunal's decision in *Walker Exhausts* and its order in *Rexnord* in support of its position. The Commissioner submitted that the Tribunal's jurisprudence in this respect has evolved since *Mueller*. ABB did not appear to take the position that *Walker Exhausts* and *Rexnord* were inconsistent with *Mueller*.

In *Mueller*, the Federal Court of Canada determined that the respondents, having performed a "tariff classification exercise", had reached a decision on the merits that constituted a decision under section 63 of the *Act* and, accordingly, that the Tribunal had jurisdiction under section 67:

**what the respondents describe as a "threshold question" is, in my view, a disguised decision on the merits. In forming an opinion that the retroactive order did not apply to these goods, the respondents had to go through a tariff classification exercise.** To hold that this was a preliminary or threshold matter, would create a redundancy which Parliament could not have intended. . . . Again I do not think that this is what Parliament intended given the fact that the CITT is specifically empowered to deal with these technical matters.<sup>8</sup> [Emphasis added]

The Tribunal has consistently followed the principles set out in *Mueller* to determine whether it has jurisdiction under section 67 of the *Act*. The Tribunal has relied on *Mueller* not only in *Rexnord* but also in *Fisher Scientific Ltd. v. Deputy M.N.R.*,<sup>9</sup> *Vilico Optical Inc. v. Deputy M.N.R.*,<sup>10</sup> *Phillips Electronics Ltd. v. Deputy M.N.R.*<sup>11</sup> and *Chicago Rawhide Products Canada Ltd. v. Deputy M.N.R.*<sup>12</sup> In each instance, the Tribunal considered how *Mueller* applies to the particular facts of the case. The Tribunal notes that *Walker Exhausts* was heard prior to the date of the *Mueller* decision.

In the current appeal, in deciding that the request for further redetermination was not within the limitation period in section 63 of the *Act*, the Commissioner did not perform a tariff classification exercise and, therefore, did not make a decision on the merits. Rather, the Commissioner decided not to consider the substance of the request for redetermination because, in the Commissioner's view, the request was out of time. The evidence did not indicate that the Commissioner did anything that could be construed as tantamount to a tariff classification. The Commissioner only considered whether the request had been filed within the time limits for making a request for a redetermination under section 63.

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8. *Ibid.* at para. 14.

9. (7 May 1996) AP-94-324 (CITT).

10. (7 May 1996) AP-94-365 (CITT).

11. (18 December 1997) AP-95-224 (CITT).

12. (21 December 2000) AP-97-133 (CITT).

Accordingly, in this case, the Commissioner's decision is only a decision concerning a threshold condition that must be satisfied in order to make a request for redetermination under section 63 of the *Act*. It is not a decision on tariff classification nor a "disguised decision" on tariff classification as found in *Mueller*. Thus, following the principles in *Mueller*, it is not a decision made pursuant to section 63.

The Tribunal, therefore, does not have jurisdiction to decide this appeal and dismisses the appeal.

Ellen Fry  
Ellen Fry  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

James A. Ogilvy  
James A. Ogilvy  
Member