



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-029

Fritz Marketing Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, November 2, 2006*

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IN THE MATTER OF an application made by Fritz Marketing Inc., under section 67.1 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, for an order extending the time to file notices of appeal under subsection 67(1) of the *Customs Act* with respect to transaction Nos. 10827036774763, 10827025808429, 10827035331630, 10827036797190 and 10827022058686;

AND IN THE MATTER OF an appeal heard on April 4, 2006, under subsection 67(1) of the *Customs Act* from 93 decisions of the President of the Canada Border Services Agency dated July 6, 2005, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN**FRITZ MARKETING INC.****Appellant****AND****THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY****Respondent****ORDER AND DECISION**

Pursuant to section 67.1 of the *Customs Act*, the Canadian International Trade Tribunal hereby grants the application for an order extending the time to file notices of appeal under subsection 67(1) of the *Customs Act* with respect to transaction Nos. 10827036774763, 10827025808429, 10827035331630, 10827036797190 and 10827022058686 and orders that the time to file be extended to October 13, 2005.

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 4, 2006
Tribunal Members:	Ellen Fry, Presiding Member Zdenek Kvarda, Member Meriel V. M. Bradford, Member
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Appearances:	Greg Kanargelidis, for the appellant Michael Roach, for the respondent

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STATEMENT OF REASONS

BACKGROUND

1. On October 13, 2005, pursuant to subsection 67(1) of the *Customs Act*,¹ Fritz Marketing Inc. (Fritz Marketing) filed notices of appeal with respect to 93 decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Act*, concerning the importation of various polypropylene sheets (the goods in issue). The goods in issue were imported between August 1999 and July 2003.

2. Fritz Marketing requested that this matter proceed by way of written submissions.² The Tribunal agreed to hear this matter on the basis of the evidence already on the record, but directed the parties to appear at a hearing in order to present oral argument.³

EXTENSION OF TIME

3. Of the 93 Detailed Adjustment Statements (DASs) in issue, 88 were issued on July 26, 2005, and 5 were issued on July 6, 2005. The DASs issued on July 6, 2005, relate to transaction Nos. 10827036774763, 10827025808429, 10827035331630, 10827036797190 and 10827022058686. For the notices of appeal relative to those transactions to have been filed within the time frame stipulated under subsection 67(1) of the *Act*, they would have had to have been filed with the CBSA and the Tribunal no later than October 5, 2005. However, they were filed on October 13, 2005. Accordingly, these notices of appeal were filed beyond the statutory time frame to do so.

4. Consequently, the Tribunal examined the application made by Fritz Marketing under section 67.1 of the *Act* for an order extending the time to file notices of appeal under subsection 67(1) with respect to transaction Nos. 10827036774763, 10827025808429, 10827035331630, 10827036797190 and 10827022058686.⁴

5. Section 67.1 of the *Act* provides as follows:

67.1(1) If no notice of appeal has been filed within the time set out in section 67, a person may make an application to the Canadian International Trade Tribunal for an order extending the time within which a notice of appeal may be filed, and the Tribunal may make an order extending the time for appealing and may impose any terms that it considers just.

...

67.1(1) La personne qui n'a pas interjeté appel dans le délai prévu à l'article 67 peut présenter au Tribunal canadien du commerce extérieur une demande de prorogation du délai pour interjeter appel. Le tribunal peut faire droit à la demande et imposer les conditions qu'il estime justes.

[...]

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

2. Letters from Mr. Greg Kanargelidis to the Tribunal dated March 30, 2006, Tribunal Exhibits AP-2005-029-24 and AP-2005-029-25.

3. Tribunal letter to the parties dated March 31, 2006, Tribunal Exhibit AP-2005-029-26.

4. Appellant's Reply Brief, paras. 21-31.

(4) No order may be made under this section unless

(a) the application is made within one year after the expiry of the time set out in section 67; and

(b) the person making the application demonstrates that

(i) within the time set out in section 67 for appealing, the person was unable to act or to give a mandate to act in the person's name or the person had a *bona fide* intention to appeal,

(ii) it would be just and equitable to grant the application,

(iii) the application was made as soon as circumstances permitted, and

(iv) there are reasonable grounds for the appeal.

(4) Il n'est fait droit à la demande de prorogation que si les conditions suivantes sont réunies :

a) la demande est présentée dans l'année suivant l'expiration du délai d'appel prévu à l'article 67;

b) l'auteur de la demande établit ce qui suit :

(i) au cours du délai d'appel prévu à l'article 67, il n'a pu ni agir ni mandater quelqu'un pour agir en son nom, ou il avait véritablement l'intention d'interjeter appel,

(ii) il serait juste et équitable de faire droit à la demande,

(iii) la demande a été présentée dès que possible,

(iv) l'appel est fondé sur des motifs raisonnables.

6. The CBSA did not oppose the application.⁵ Having examined the submissions made by Fritz Marketing,⁶ the Tribunal is satisfied that the conditions set out in section 67.1 of the *Act* have been met.

7. In accordance with paragraph 67.1(4)(a) of the *Act*, the application was made within one year after the expiry of the time set out in section 67.⁷

8. In addition, in accordance with subparagraph 67.1(4)(b)(i) of the *Act*, the Tribunal is satisfied that Fritz Marketing had a *bona fide* intention to appeal within the time frame set out in section 67 of the *Act* because it filed notices of appeal shortly after the October 5, 2005, deadline to do so. In this connection, the Tribunal accepts Fritz Marketing's submission that its actions showed that it had been working on this appeal, i.e. that it was reviewing its position and assembling the documentation necessary in order to file the appeal.⁸

9. As well, the Tribunal is satisfied, in accordance with subparagraph 67.1(4)(b)(ii) of the *Act*, that the circumstances surrounding this matter show that it would be just and equitable to grant the application because, if the application were not granted, Fritz Marketing would lose the opportunity to present its case, and the Tribunal believes that it would not be equitable for it to lose that opportunity because of a minor defect in filing dates.

10. The Tribunal is also satisfied, in accordance with subparagraph 67.1(4)(b)(iii) of the *Act*, that the application was made as soon as circumstances permitted.

11. Finally, in accordance with subparagraph 67.1(4)(b)(iv) of the *Act*, the Tribunal is satisfied that Fritz Marketing has shown that there were reasonable grounds for this appeal.

5. *Transcript of Public Argument*, 4 April 2006, at 5.

6. Appellant's Reply Brief, paras. 21-31.

7. That deadline would have been 90 days from July 6, 2005, or October 4, 2005, plus one year, or October 5, 2006. Fritz Marketing made the application under section 67.1 of the *Act* relative to the five DASs dated July 6, 2005, in its Reply Brief received by the Tribunal on March 17, 2006. Accordingly, that date is prior to October 5, 2006.

8. Appellant's Reply Brief, para. 27.

12. Accordingly, the Tribunal grants the application for an order extending the time to file notices of appeal under subsection 67(1) of the *Customs Act* with respect to transaction Nos. 10827036774763, 10827025808429, 10827035331630, 10827036797190 and 10827022058686 and orders that the time to file be extended to October 13, 2005.

JURISDICTION

13. Before examining the merits of the appeal, the Tribunal will address the jurisdictional issue raised by the CBSA.

14. The Tribunal derives its jurisdiction from subsection 67(1) of the *Act*, which provides as follows:

67.(1) A person *aggrieved by a decision* of the Commissioner 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 Commissioner and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

67.(1) Toute personne *qui s'estime lésée par une décision* du commissaire rendue conformément aux articles 60 ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du commissaire et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

[Emphasis added]

[Nos italiques]

15. The CBSA contended that the Tribunal does not have jurisdiction to hear this appeal. It argued that, as a creature of statute, the Tribunal can only adjudicate those matters permitted under section 67 of the *Act*. The CBSA argued that Fritz Marketing did not take issue with the actual tariff classification of the goods in issue and, therefore, that there was not an issue of tariff classification before the Tribunal. It submitted that Fritz Marketing challenged the retroactive application of the CBSA's tariff classification and argued that the goods in issue accounted for prior to the date of the CBSA's decision under section 60 of the *Act* should be classified under tariff item No. 3921.10.90 of the schedule to the *Customs Tariff*.⁹ In that regard, the CBSA submitted that the Tribunal does not have jurisdiction to examine the effective date of the CBSA's decision because the Tribunal is limited by statute to determining the appropriate tariff classification of the goods in issue.¹⁰

16. Conversely, Fritz Marketing argued that the Tribunal does indeed have jurisdiction to dispose of this matter. It argued that the CBSA's decision involved the tariff classification of the goods in issue pursuant to section 60 of the *Act* and that it was incorrect, as it did not take into account the CBSA's own published policies respecting the compliance with its prior decisions, whether correct or incorrect. Specifically, it submitted that the CBSA's decision on tariff classification in respect of the 93 transactions in issue was in error because it should have been consistent with three other decisions issued by the CBSA on August 18, 2003, pursuant to section 59 of the *Act*, which classified "polyethylene"¹¹ sheets under tariff item No. 3921.19.90 (the three decisions).¹²

17. The decisions under appeal are all decisions of the CBSA concerning the tariff classification of the goods in issue made pursuant to subsection 60(4) of the *Act*. Fritz Marketing, the importer of the goods in issue, argued that they should have received a different tariff classification.

9. S.C. 1997, c. 36.

10. *Transcript of Public Argument*, 4 April 2006, at 63-94.

11. As opposed to "polypropylene".

12. *Transcript of Public Argument*, 4 April 2006, at 8.

18. Accordingly, the Tribunal considers that Fritz Marketing was aggrieved by the decisions of the CBSA and that, consequently, it has jurisdiction, pursuant to section 67 of the *Act*, to dispose of this matter.

MERITS OF THE APPEAL

19. Section 10 of the *Customs Tariff* provides that the tariff classification of goods shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*¹³ and the *Canadian Rules*.¹⁴ Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading . . .” shall be determined according to the *General Rules*. The *General Rules* are comprised of six rules structured in cascading form. Rule 1 of the *General Rules* provides that “. . . classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes . . .” If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2 and so on until classification is completed. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*¹⁵ and to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.¹⁶

20. The CBSA classified the goods in issue under tariff item No. 3921.90.19 as other non-cellular plates, sheets, film, foil and strip, of plastics. Fritz Marketing is seeking to have the goods in issue classified under tariff item No. 3921.19.90 as other cellular plates, sheets, film, foil and strip, of plastics.

21. The relevant nomenclature reads as follows:

...
3921 Other plates, sheets, film, foil and strip, of plastics.
 -Cellular:
3921.11 --Of polymers of styrene
...
3921.12 --Of polymers of vinyl chloride
...
3921.13 --Of polyurethanes
...
3921.14 --Of regenerated cellulose
...
3921.19 --Of other plastics
...
3921.19.90 ---Other
...
3921.90 -Other
...
3921.90.19 ----Other
...

13. *Supra* note 9 [*General Rules*].

14. *Ibid.*

15. Customs Co-operation Council, 1st ed., Brussels, 1987 [*Classification Opinions*].

16. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

22. According to Fritz Marketing, the "... Polypropylene Sheets at issue are woven polypropylene or polyethylene fabrics".¹⁷ It submitted that the fabric consists of three layers laminated together: a layer of black, embossed plastic; a textile layer of clear, woven, man-made, strips; and a layer of white plastics. The layers of plastic entirely and visibly coat the textile fabric.¹⁸ Fritz Marketing argued that whether the goods in issue are made of polypropylene or polyethylene plastic "is not relevant to the ultimate tariff classification of the product."¹⁹ According to the laboratory analysis provided by the CBSA, the polypropylene sheets are between 0.23 and 0.45 mm thick, weigh between 110 g/m² and 138 g/m² approximately and are constructed of a woven or warp-knit fabric that is completely coated or covered by a non-cellular layer composed of polypropylene.²⁰

23. As indicated above, Fritz Marketing agreed that the goods in issue were, in the absolute sense, properly classified under tariff item No. 3921.90.19, as determined by the CBSA, but argued that the CBSA should nevertheless have classified them in the same manner as it had classified the goods that were the subject of the three decisions.²¹

24. The plain language of the schedule to the *Customs Tariff* clearly indicates that subheading Nos. 3921.11 to 3921.19 are for cellular sheets of plastic, while subheading No. 3921.90 ("Other") covers non-cellular products.²² The laboratory report filed by the CBSA²³ confirmed that the goods in issue were non-cellular. Accordingly, pursuant to Rule 1 of the *General Rules* and Rule 1 of the *Canadian Rules*, the Tribunal agrees with the parties that, in an absolute sense, the goods are properly classified under tariff item No. 3921.90.19.

25. In support of its argument that the goods in issue should nevertheless be classified under tariff item No. 3921.19.90, Fritz Marketing relied on the premise that the goods that were the subject of the three decisions and the goods in issue were sufficiently similar to be classified in the same way. In the Tribunal's view, this premise was incorrect.

26. The Tribunal notes that, in an appeal pursuant to section 67 of the *Act*, it is required to classify goods in accordance with sections 10 and 11 of the *Customs Tariff* and is not bound by decisions made by the CBSA.

27. The evidence does not establish that the goods in issue are similar enough to the goods that were the subject of the three decisions to be classified in the same way. While there is a laboratory report²⁴ on the record with respect to the goods in issue, no similar evidence was provided with respect to the goods that were the subject of the three decisions. Therefore, the Tribunal has no basis to compare the technical characteristics of the goods.

17. See Tribunal Exhibit AP-2005-029-16, which corrected para. 19 of the Appellant's Brief.

18. Appellant's Brief, para. 19.

19. See Tribunal Exhibit AP-2005-029-16. See, also, *Transcript of Public Argument*, 4 April 2006, at 11.

20. Respondent's Brief, para. 5.

21. Appellant's Brief, para. 34. The goods in the three decisions were classified under tariff item No. 3921.19.90.

22. As mandated under section 11 of the *Customs Tariff*, the Tribunal also had regard for the *Compendium of Classification Opinions* and the *Explanatory Notes*. There were no relevant classification opinions, and no *Explanatory Notes* were relevant as an interpretative guide to the issues raised in these proceedings.

23. Respondent's Brief, Tab 8.

24. Respondent's Brief, Tab 8.

28. The Tribunal also notes that both the original decisions under section 59 of the *Act* for the three transactions that Fritz Marketing relied upon and those relative to the 93 transactions in issue were determined by the same officer, on the same day. In the Tribunal's view, this indicates that, in all likelihood, all 96 decisions were made on a consistent basis. This would suggest that some aspect of the goods was sufficiently different to merit being classified under two different tariff items.

29. Because the Tribunal considers that the evidence does not support the factual premise for Fritz Marketing's arguments, it does not need to consider the substance of the arguments that Fritz Marketing made based on that premise.

30. For the foregoing reasons, the appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member