Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-014

Transport Desgagnés inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, June 20, 2012

Canada

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IN THE MATTER OF an appeal filed on May 5, 2009, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a rejection notice issued by an officer of the Canada Border Services Agency on February 20, 2009, with respect to a request for the re-determination of a decision to deny an application for the refund of duties paid on imported goods.

BETWEEN

TRANSPORT DESGAGNÉS INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 27, 2011
Tribunal Member:	Serge Fréchette, Presiding Member
Counsel for the Tribunal:	Georges Bujold
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Julie Lescom

PARTICIPANTS:

Appellant	**Counsel/Representative**
Transport Desgagnés inc.	Jean-Félix Brassard
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Andrew Gibbs Jean-Robert Noiseux

WITNESS:

Byron Fitzgerald
Manager, Litigation Section
Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Transport Desgagnés inc. (Desgagnés) pursuant to section 67 of the *Customs Act*.[1] The good in issue is a ship, the *Anna Desgagnés*, which was acquired on August 22, 1996, by Desgagnés, following the seizure of the ship in the Port of Québec and its judicial sale, pursuant to an order of the Federal Court of Canada.[2]

2. Desgagnés then used the ship for international freight transportation for a few years. In 1999, Desgagnés decided to use the ship for a different purpose, namely, for coasting trade operations in Canada, and thus brought the ship back to Canada. Desgagnés then accounted for the ship pursuant to section 32 of the *Act* and paid the applicable customs duties, representing 25 percent of the value of the ship.

3. In January 2002, Desgagnés claimed a refund of the duties paid. On June 3, 2004, an officer of the Canada Border Services Agency (CBSA) informed Desgagnés of the denial of its application for a refund. A few weeks later, on August 26, 2004, Desgagnés requested that the President of the CBSA re-determine the decision regarding its application for a refund. Several years later, in a letter dated February 20, 2009, the CBSA informed Desgagnés that it did not have the authority to deal with its request for re-determination, on the ground that the denial of its application for a refund could not be treated as if it were a re-determination under paragraph 59(1)(*a*) of the *Act*. It is this rejection notice that is at issue in this appeal.

4. The CBSA submitted that, since this notice cannot be treated as if it were a re-determination under section 60 of the *Act*, the Canadian International Trade Tribunal (the Tribunal) does not have jurisdiction to decide this appeal. Therefore, the Tribunal must rule on the preliminary issue of compliance with the jurisdictional requirements of subsection 67(1). Before hearing the submissions on the merits of the appeal, the Tribunal requested submissions on the jurisdictional issue.

5. On March 11, 2010, after reviewing the submissions of the parties, the Tribunal informed them that it had accepted to hear this appeal, subject to a subsequent determination of the jurisdictional issue. The parties were then invited to include, in their respective briefs, additional submissions on the jurisdictional issue, as well as on the merits of the appeal.

6. Therefore, the first issue before the Tribunal is whether the CBSA's letter of February 20, 2009, in which the President of the CBSA refused to deal with Desgagnés's request for re-determination, is a decision under section 60 of the *Act*, i.e. a determination that is subject to appeal to the Tribunal.

7. If the Tribunal finds that it has jurisdiction to hear this appeal, the issue is whether the *Anna Desgagnés* (the ship) was properly classified, in 1999, under tariff item No. 8901.90.90 of the schedule to the *Customs Tariff*[3] as other vessels for the transport of goods and other vessels for the transport of both persons and goods, or should be classified under tariff item No. 9814.00.00 as goods which have once been released and accounted for under section 32 of the *Act* and have been exported, if the goods are returned without having advanced in value or having been improved in condition by any process of manufacture or other means, or combined with any other article abroad, as claimed by Desgagnés.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. Tribunal Exhibit AP-2009-014-13A, tab 14; Tribunal Exhibit AP-2009-014-22A at 5-7. In accordance with the order of the Federal Court of Canada, Desgagnés Shipping International Inc., a related company of Desgagnés, acquired the ship.
3. S.C. 1997, c. 36.

RELEVANT FACTS

8. To a large extent, this appeal concerns the events that occurred between March 1996, when the ship arrived in Canada for the first time, and July 1999, when it was accounted for under section 32 of the *Act* and Desgagnés paid the prescribed customs duties following its importation into Canada. Before summarizing the history of the subsequent proceedings that led to the filing of the notice of appeal, it is appropriate to relate the sequence of events leading to the importation of the ship. These facts, for the most part, are admitted by both parties. However, the presentation of the facts is necessary to determine whether this appeal falls within the Tribunal's jurisdiction and, if so, whether the ship was the subject of an error in tariff classification in 1999, as claimed by Desgagnés.

9. On March 8, 1996, the ship arrived in Canada, in the Port of Québec. At that time, it bore the name *Truskavets*, flew the Cypriot flag and was engaged in international freight transportation. In applying for a berth, the agent for the charterer had requested permission to occupy such a berth in the Port of Québec for about one week beginning on March 9, 1996.[4] The reason given for the stay was the loading of milk powder and granite. Its next port of destination was Marina de Carrera, Italy.

10. Thus, the ship's stay in Canada was to be temporary. According to the CBSA, the ship was classified under tariff item No. 9801.00.00 which, in 1996, allowed for the temporary duty-free importation of conveyances engaged in international commercial transportation. At that time, that tariff item provided as follows:

> **9801.00.00** **Foreign-based conveyances of heading No. 86.09 or of Chapters 87, 88 and 89, other than cargo containers less than 6.1 metres in length or having an internal capacity less than 14 cubic metres, engaged in the international commercial transportation of passengers or goods, under such regulations for each mode of conveyance provided for in this heading as the Governor in Council may prescribe.**[5]

11. However, the documents showing the classification of the ship under this tariff item in 1996 and establishing that the ship had not been declared as dutiable were not produced as evidence because, according to the CBSA, they no longer exist. At the hearing, the witness for the CBSA, Mr. Byron Fitzgerald, stated that the documents in question (namely, the relevant A6 general declaration forms) were normally kept in the CBSA's archives for a period of four to six years.[6] The Tribunal has no reason to doubt that the documents in question were therefore destroyed no later than 2002, according to this established practice.

12. For its part, Desgagnés did not contest that the ship had to be classified in heading No. 98.01 in 1996, since it stated that the applicable customs duties were not paid at that time. However, it submitted that the ship was classified at that time under tariff item No. 9801.*10*.00.[7] The Tribunal notes that this tariff item

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4. Tribunal Exhibit AP-2009-014-13A, tab 3.
5. Moreover, in 1996, note 3 to Chapter 98 of the schedule to the *Customs Tariff* provided as follows: "Goods entitled to be classified under heading No. 98.01, 98.02, 98.03, 98.04 (other than tariff item No. 9804.30.00), 98.05 or 98.21 shall be exempt from all duties, other than the customs duties imposed under Part I of this Act with respect to tariff item No. 9804.30.00, *notwithstanding the provisions of this or any other Act of Parliament*" [emphasis added].
6. *Transcript of Public Hearing*, 27 September 2011, at 19-20, 35-38, 50.
7. Tribunal Exhibit AP-2009-014-22A at 15, 30.

did not exist in 1996.[8] In fact, the only tariff item included under heading No. 98.01 during that period was tariff item No. 9801.00.00. Since there was only one tariff item under heading No. 98.01 in which the ship could be classified as exempt from customs duties when it entered Canada in 1996 and considering that Desgagnés acknowledged that the ship had to be classified in heading No. 98.01 at that time, the Tribunal thus must conclude that the ship was classified under tariff item No. 9801.00.00.

13. According to the CBSA, the ship was thus released in 1996 without being accounted for. It is true that paragraph 7(2)(*b*) of the *Accounting for Imported Goods and Payment of Duties Regulations* provided, during that period, that vessels classified under tariff item No. 9801.00.00 could be released without being accounted for under section 32 of the *Act*.[9] Desgagnés did not contest this fact and did not submit any evidence indicating that the ship, in 1996, was accounted for under section 32. The Tribunal thus finds that, in March 1996, the release of the ship was not accounted for under section.

14. However, the ship did not leave Canada one week after its arrival in March 1996, as was scheduled. Indeed, on March 12, 1996, an Admiralty action *in rem* and *in personam* was instituted against the owner of the ship, the Baltic Shipping Company. A warrant of seizure against the ship was then issued by the designated public servant. These proceedings were served at the Québec Customs Office.[10]

15. On June 18, 1996, a second Admiralty action *in rem* was instituted by another creditor of the owner of the ship. Under these proceedings, a warrant of seizure, ordering the Marshal to keep the ship under seizure until further notice, was also issued.[11]

16. On July 9, 1996, the ship was seized in accordance with the provisions of the *Canada Ports Corporation Act*.[12] Under this act, the order of seizure was issued by the Chief Officer of Customs of the Port of Québec.[13]

17. On that day, the Prothonotary of the Federal Court of Canada also issued an order establishing the procedure and the terms of sale of the ship by the Acting Marshal, Mr. André J. Landriau. Paragraph 23 of that order provides as follows:

> In the event that the sale of the Ship is adjudged by this Court, then the Marshal is empowered to execute a Bill of Sale transferring to the Buyer the ownership of all the shares of the Ship in the same manner and to the same extent as though he were the registered owner thereof, free and clear of any liens or encumbrances.[14]

18. Desgagnés acquired the ship under this order. The judicial sale of the ship to Desgagnés was confirmed by an order issued by a judge of the Federal Court of Canada on August 20, 1996. That order provided, in particular, that Desgagnés's offer to purchase had been accepted and that the ownership of the ship was to be transferred to Desgagnés, or to a person designated in writing by Desgagnés, by the Acting

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8. It was only in 1998 that tariff item No. 9801.10.00 was added to the tariff nomenclature. Indeed, the schedule to the *Customs Tariff* that was in force in 1996 and 1997 does not include this tariff item. It is therefore impossible that the ship was classified under tariff item No. 9801.10.00 in 1996, as claimed by Desgagnés.
9. *Accounting for Imported Goods and Payment of Duties Regulations*, S.O.R./86-1062, as amended by the *Accounting for Imported Goods and Payment of Duties Regulations, amendment*, S.O.R./88-515; Tribunal Exhibit AP-2009-014-15A, tab K.
10. Tribunal Exhibit AP-2009-014-13A, tabs 4, 5.
11. *Ibid.*, tabs 9, 10.
12. R.S.C. 1985, c. C-9.
13. Tribunal Exhibit AP-2009-014-13A, tab 11.
14. *Ibid.*, tab 12.

Marshal ". . . free and clear of any liens or encumbrances, in the same manner and to the same extent as though the Acting Marshall were the registered owner of the Ship . . . ."[15]

19. On August 22, 1996, after receiving payment of the selling price, the Marshal of the Federal Court of Canada transferred ownership of the ship to a company designated by Desgagnés, namely, Desgagnés Shipping International Inc.[16] The ship's name was then changed to *Anna Desgagnés*.

20. Despite these proceedings and the fact that the ship remained in Canada longer than anticipated, its classification under tariff item No. 9801.00.00 was not re-determined or further re-determined by the CBSA's predecessor during that period, the Department of National Revenue (Revenue Canada). No application to that effect was made by Desgagnés after acquiring the ship on August 22, 1996. However, the parties agreed that, a few months later, the ship left Canada and engaged in international commercial freight transportation for a few years.

21. Nearly three years later, in June 1999, the ship returned to Canada to be assigned to a different use by Desgagnés. Indeed, before the ship's arrival, on May 28, 1999, Desgagnés wrote to Revenue Canada to inform it that the ship was in the process of being registered in Canada, that it would be assigned to coasting trade operations in Canada, but not before the beginning of July, and that it would not undertake such operations before paying the prescribed duties. Desgagnés also informed the customs authorities that, upon its arrival in Canada, the ship would end an international voyage.[17]

22. Revenue Canada then informed Desgagnés of the conditions applicable to importation of the ship, in a facsimile dated June 14, 1999. In that correspondence, the proper authorities confirmed their understanding that, at the time of its importation, the ship would be in an international transportation situation and in a repair or storage situation at the end of this service. Moreover, they indicated that the conditions described in a previous determination, dated March 9, 1999, concerning the importation of another ship, the *Maria Desgagnés*, would also apply to the importation of the *Anna Desgagnés*.[18]

23. In that determination, Revenue Canada explained that the ship would first be admitted to Canada as a ship engaged in international commercial freight transportation and classified under tariff item No. 9801.30.00. When the ship ceased to be engaged in international commercial freight transportation, it would then be imported under a temporary admission permit (Form E29B), which would allow it to be placed in storage at a Canadian port facility for a period not exceeding 12 consecutive months. The determination also specified the following: "It is understood that the ship will not be used for any other purpose in Canada during the warehousing period"[19] [translation].

24. The evidence shows that Desgagnés had made a commitment to inform the proper authorities as soon as it assigned the ship to coasting trade operations in Canada and to pay the prescribed duties in that event. When the ship was imported in 1999, Desgagnés agreed with Revenue Canada that, if it subsequently used the ship for a different purpose than storage for repair, such as for coasting trade operations, it would have to pay the applicable duties.

25. That is what later happened. Indeed, Desgagnés initially imported the ship duty-free under the terms of a temporary admission permit issued on June 21, 1999, which indicated that it would be "warehoused for

15. *Ibid.*, tab 14.
16. *Ibid.*, tab 16.
17. Tribunal Exhibit AP-2009-014-15A, tab D.
18. *Ibid.*, tab E.
19. *Ibid.*, tab C.

repairs" [translation] in Canada and allowed the temporary importation of the ship for that purpose up to July 30, 1999.[20] On July 12, 1999, before the expiry date of the permit, Desgagnés presented the customs authorities with an accounting for the ship (in the prescribed form and with the prescribed information, namely, by providing a duly completed B3 Coding Form) with a view to importing the ship into Canada permanently.[21]

26. Desgagnés then declared that the ship was classified under tariff item No. 8901.90.90 as a vessel for the transportation of goods. The customs duties, payable at the applicable rate of 25 percent of the value for duty of the ship, were then set at $1,393,465. On the same day, that is, July 12, 1999, the temporary admission permit was cancelled, as evidenced by the annotations on the permit made by the Canadian customs officer.[22]

27. The amount of $1,393,465 was then paid by Desgagnés and the ship was released, such as it appears from the "*droits acquittés*" (duties paid) stamp, dated July 13, 1999, which appears on the accounting for the ship made by Desgagnés.

PROCEDURAL HISTORY

28. In its customs declaration in respect of the ship, Desgagnés declared its value for duty, and its "origin", Norway, which resulted in the application of the most-favoured-nation tariff and classification under a special tariff item, 8901.90.90. Since the CBSA did not examine the customs declaration in depth no later than the time of the accounting for the ship, its value for duty, its origin and its tariff classification were deemed to have been determined according to the accounting for the ship on July 12, 1999, in accordance with subsection 58(2) of the *Act*.

29. Nearly three years later, on January 11, 2002, Desgagnés applied for a refund of the customs duties paid at the time of importation of the ship into Canada in 1999.[23] Pursuant to subsection 74(1) of the *Act*, such an application may be made within four years after accounting for the goods under section 32. In this case, Desgagnés's application for a refund was therefore submitted within the prescribed time limits.

30. The application for a refund was based on the following grounds:

- The ship entered Canada for the first time in March 1996 and was not at that time owned by Desgagnés. At that time, i.e. before its acquisition by Desgagnés, customs duties were payable after importation of the ship.[24]

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20. *Ibid.*, tab F.
21. Tribunal Exhibit AP-2009-014-13A, tab 19.
22. Tribunal Exhibit AP-2009-014-15A, tab G. In fact, it is clearly indicated in this document that the duties on the ship were paid following the July 12, 1999, transaction specified in Desgagnés's accounting for the good, since the annotations on the permit indicate the relevant transaction number, namely, the one that appeared when Desgagnés accounted for the good on July 12, 1999. In view of the release of the ship following this transaction, the temporary admission permit no longer served a purpose and was thus destroyed, according to the CBSA. *Transcript of Public Hearing*, 27 September 2011, at 123-25.
23. Tribunal Exhibit AP-2009-014-13A, tab 20.
24. In its application, Desgagnés submitted that, in 1996, the ship did not meet the eligibility criteria of tariff item No. 9801.10.00, which granted, according to Desgagnés, an exemption from customs duties to certain foreign-based conveyances and containers designed for the transportation of goods which left and returned to a foreign country in the normal course of their operations. However, tariff item No. 9801.10.00 did not exist in 1996, and the evidence indicates that the ship was classified instead under tariff item No. 9801.00.00 in 1996.

- Since the ship was dutiable *before* its judicial sale to Desgagnés on August 22, 1996, these duties are deemed to have been paid and discharged as a result of the sale made under an Admiralty action *in rem*.[25] According to Desgagnés, it thus should not have been required to pay $1,393,465 in 1999, when it brought the ship back to Canada.

31. More than two years later, on June 3, 2004, in a letter signed by Ms. Lise Boisvert, Trade Policy Officer, the CBSA informed Desgagnés that it had to deny its application for a refund. Pursuant to that determination, the CBSA's position was that the ship actually entered Canada only on July 12, 1999, and that the prescribed duties were duly paid by the importer at that time, as required under sections 12 and 32 of the *Act*. According to the CBSA, ". . . the importer . . . accounted for the ship and paid the duties and taxes when they were due . . . , namely, on July 12, 1999, after the *sale in rem* (August 22, 1996) when the customs duties and taxes were not yet due"[26] [translation].

32. On August 26, 2004, Desgagnés filed an application with the CBSA for a re-determination or further re-determination of the June 3, 2004, determination. Counsel for Desgagnés then characterized the basis of the request for re-determination as follows: "We submit to you that the duties that were paid . . . by our client were not paid on the ground that all the duties payable upon the importation of this ship had been paid before the judicial sale of the ship in August 1996 or discharged by that sale"[27] [translation].

33. The request for re-determination or further re-determination of August 26, 2004, also referred to a telephone conversation that occurred on August 19, 2004, during which a representative of the CBSA had informed counsel for Desgagnés that the June 3, 2004, determination was treated as if it were a re-determination under paragraph 59(1)(*a*) of the *Act*, in accordance with subsection 74(4), and that the determination could be the subject of a request for re-determination or further re-determination under section 60.

34. A CBSA internal document, "Brief for the Record" [translation], dated February 3, 2009, which Desgagnés submitted as evidence, confirms this fact. The relevant passage of this document provides as follows:

> On August 19, 2004, the Trade Policy Officer who had signed the June 3 letter contacted the Appeals Division . . . of the Quebec Region, because the importer had contacted her to ask where it should apply to object to the determination. After discussions with the Director of our regional division, it was decided that the letter of June 3 would be treated as if it were a notice given to the importer under subsection 59(2) of the Customs Act. Therefore, the importer, having been notified in this manner, could request a re-determination of the decision under section 60 of the Act, within 90 days of the notice under 59(2). Since no Canada Customs Adjustment Request was issued on June 3, the determination having been made by letter, it was also determined that the applicant could submit its request for re-determination under section 60, also in the form of a letter.[28]
>
> [Translation]

25. In support of this argument, Desgagnés cited decisions of the Federal Court of Canada in maritime law, according to which a judicial sale under an Admiralty action *in rem* has the effect of assigning the ship to the buyer free of any charge.
26. Tribunal Exhibit AP-2009-014-13A, tab 22.
27. *Ibid.*, tab 23. On November 29, 2004, in a letter containing additional information and authorities, which was sent to the CBSA, counsel for Desgagnés substantiated this argument.
28. Tribunal Exhibit AP-2009-014-13A, tab 26 at 170.

35. The same document also indicates why the CBSA had accepted, at that time, to liken Desgagnés's request for re-determination or further re-determination to an application made under section 60 of the *Act*:

> The reason why the Recourse Division of the Quebec Region accepted this application by the importer, in August 2004, was that we believed, at that time, that we could consider this dispute from the standpoint of the tariff classification. At that time, we believed that we essentially had to determine whether the ship Anna Desgagnés, when declared in July 1999, had been classified correctly under the Harmonized System **(HS) item 8901.90.90.00** . . . or whether it should have been classified instead under **HS item 9814.00.00.96** . . . .[29]
>
> [Translation]

36. However, after obtaining a legal opinion and proceeding with a deeper analysis of the information provided by Desgagnés, the CBSA decided that the application sought to determine whether the duties and taxes on the ship had been discharged as a result of the judicial sale and, consequently, did not fall within its jurisdiction. According to the "Brief for the Record" of February 3, 2009, the grounds in support of this determination can be summarized as follows:

> In accordance with section 60 of the Customs Act, our role is limited to determining or re-determining the origin, tariff classification or value for duty of goods. After review, it appeared that this application did not concern any of these three customs programs and that the Customs Act therefore did not allow us to rule on it. In hindsight, it appeared that the said application was inadmissible when filed in 2004. It thus was agreed that the importer and its representative would be informed that we could not act on their application objecting to the applicability of the duties and taxes, *following a judicial sale within the context of an action in rem*. Of course, the letter that would be sent to the importer and its representative would not constitute in any way a determination of the Regional Recourse Division.[30]
>
> [Translation]

37. As such, on February 20, 2009, nearly five years after the filing of the 2004 request for re-determination or further re-determination, Mr. Robert A. Lapierre, CBSA Recourse Officer, informed Desgagnés that the CBSA did not have the authority to rule on the request. According to Mr. Lapierre, the denial of Desgagnés's application for a refund by the CBSA's Client Services Division on June 3, 2004 (i.e. the above-mentioned letter signed by Ms. Boisvert) could not be treated as if it were a re-determination under paragraph 59(1)(*a*) of the *Act*, because that denial does not pertain to the origin, tariff classification or value for duty of the ship. Mr. Lapierre also expressed the opinion that, in accordance with section 60, the mandate of the CBSA's Recourse Division ". . . is limited to the re-determination or further re-determination of the origin, tariff classification or value for duty of goods" [translation]. He therefore concluded that, since Desgagnés's application did not concern any of these three programs, the *Act* did not allow the CBSA to rule on the application.

38. On May 4, 2009, Desgagnés filed this appeal with the Tribunal under subsection 67(1) of the *Act*. On May 14, 2009, the Secretary of the Tribunal informed counsel for Desgagnés that the Tribunal did not have jurisdiction to accept the matter, because the February 20, 2009, letter did not constitute a determination by the CBSA made under section 60 or 61.

39. On May 20, 2009, following telephone conversations with the Secretary of the Tribunal, counsel for Desgagnés informed the Secretary that their understanding was that the May 14, 2009, letter ". . . was not a decision of the Tribunal but simply a preliminary notice based only on the text of the February 20, 2009,

29. *Ibid.* at 172-73.
30. *Ibid.* at 174.

decision made by the [CBSA]" [translation]. In their May 20, 2009, letter, counsel for Desgagnés, as agreed with the Secretary of the Tribunal, also provided more information on the context of this appeal.

40. On June 30, 2009, the Tribunal sent a copy of the relevant documents to the CBSA and asked Desgagnés and the CBSA to make submissions on the issue of whether the Tribunal had jurisdiction to hear this appeal. On July 20, 2009, the Tribunal received brief submissions from the CBSA in this regard. Desgagnés then submitted a short response on July 22, 2009.

41. On March 11, 2010, the Tribunal informed the parties that, for it to have jurisdiction to hear this appeal, the CBSA's letter of February 20, 2009, had to be treated as if it were a decision of the President of the CBSA under section 60 or 61 of the *Act*. The Tribunal also informed the parties that, according to the determination made on February 23, 2010, by the Federal Court of Appeal in *Canada* (*Border Services Agency) v. C.B. Powell Limited*,[31] it had jurisdiction to decide whether that letter, which indicates a refusal on the part of the CBSA to rule on Desgagnés's request for re-determination or further re-determination, had to be treated as if it were such a determination.

42. Moreover, the Tribunal informed the parties that, because it was unable to make a determination on the jurisdictional issue on the basis of the information on record and that it wished to obtain additional submissions in this regard, both the jurisdictional issue and the issues regarding the merits of the appeal would be the subject of a public hearing. The Tribunal also informed the parties of the scheduled date of the public hearing, that is, November 25, 2010.

43. After granting motions for postponement of the hearing presented by the parties on various grounds, the Tribunal finally held a public hearing in Ottawa, Ontario, on September 27, 2011. The CBSA called a witness, Mr. Byron Fitzgerald, Manager, Litigation Section, CBSA. Desgagnés did not call any witness.

JURISDICTIONAL ISSUE

Positions of Parties

44. Desgagnés submitted that the CBSA's letter of February 20, 2009, denying its application for a refund represented a determination within the Tribunal's jurisdiction under section 67 of the *Act*. To reach that conclusion, Desgagnés was of the view that the wording of the CBSA officer's determination of June 3, 2004, and the wording of the February 20, 2009, letter clearly show that the CBSA denied its application for a refund on the ground that the change of the tariff classification of the ship that it had at least implicitly requested was unjustified, while the change that Desgagnés had declared in 1999 was ruled to be correct.

45. According to Desgagnés, the denial of its application for a refund by a CBSA officer on June 3, 2004, should therefore be likened, under subsection 74(4) of the *Act*, to a re-determination under paragraph 59(1)(*a*), a determination that itself may be subject to re-determination or further re-determination by the President of the CBSA under section 60. Desgagnés submitted that, in accordance with the requirements of subsection 60(1), it submitted a request for the re-determination or further re-determination of the June 3, 2004, determination by means of its letter of August 26, 2004, which was addressed, *inter alia*, to the President of the CBSA. Consequently, Desgagnés concluded that the February 20, 2009, letter, in which another CBSA officer informed it of the denial of the duly submitted request for re-determination, is a decision under section 60, which it can appeal to the Tribunal in accordance with section 67.

31. 2010 FCA 61 (CanLII) (*C.B. Powell I*).

46. For its part, the CBSA submitted that the grounds invoked by Desgagnés in support of its application for a refund were not that the origin, tariff classification or value for duty of the ship, as established in 1999, was incorrect. The CBSA was therefore of the view that subsection 74(5) of the *Act*, which excludes recourse to the control scheme of the CBSA's determinations under sections 57.1 and 67 and therefore excludes the Tribunal's jurisdiction, applies here.

47. According to the CBSA, the denial of the application for a refund was based on grounds other than those specified in subsection 74(4) of the *Act*, such that, in accordance with subsection 74(5), the denial cannot be likened, for the purposes of the *Act*, to a re-determination under paragraph 59(1)(*a*). Consequently, the CBSA submitted that, in the absence of a re-determination under subsection 59(1) of the deemed determination of the tariff classification under subsection 58(2), there was nothing the President of the CBSA could re-determine or further re-determine regarding the issues under the powers conferred on him by subsection 60(1). It follows that, in the absence of a decision by the President of the CBSA within the meaning of subsection 60(1), there is no appeal to the Tribunal under subsection 67(1).

Tribunal's Analysis

Statutory Framework

48. The Tribunal's jurisdiction comes from its enabling legislation, the *Canadian International Trade Tribunal Act*,[32] which provides as follows:

> **16.** The duties and functions of the Tribunal are to
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> . . .
>
> (*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*; . . . .
>
> **16.** Le Tribunal a pour mission :
>
> [...]
>
> *c*) de connaître de tout appel pouvant y être interjeté *en vertu de toute autre loi fédérale ou de ses règlements et des questions connexes*;
>
> [...]
>
> [Emphasis added]

49. In this regard, the Tribunal's jurisdiction in customs matters is based on subsection 67(1) of the *Act*. Pursuant to that provision, a previous decision of the President of CBSA made under section 60 or 61 may be appealed to the Tribunal. Subsection 67(1) provides as follows:

> **67.** (1) A person aggrieved by a *decision of the President made under section 60* or 61 may appeal from the decision to the . . . Tribunal by filing a notice of appeal in writing with the President and the Secretary of the . . . 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 président rendue conformément aux articles 60* ou 61 peut en interjeter appel devant le Tribunal [...] en déposant par écrit un avis d'appel auprès du président et du secrétaire [du] Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.
>
> [Emphasis added]

50. As mentioned above, the Federal Court of Appeal, in a recent decision on the matter,[33] ruled that, under subsection 67(1) of the *Act*, the Tribunal is authorized to interpret the word "decision" and decide whether it has jurisdiction to hear an appeal.

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32. R.S.C. 1985 (4th Supp.), c. 47.

51. To resolve the jurisdictional issue in this appeal, it is therefore necessary to determine whether the February 20, 2009, letter signed by Mr. Lapierre, CBSA Recourse Officer, in which he indicated a refusal on the part of the CBSA to hear Desgagnés's request for re-determination submitted under subsection 60(1) of the *Act*, constitutes ". . . a decision of the President [of the CBSA] made under section 60 or 61 . . . ."[34] Since section 61 concerns certain decisions of the President of the CBSA that may be made in circumstances that are not present in this appeal and is therefore irrelevant here, only section 60 must be examined.

52. Section 60 of the *Act* provides as follows in subsections (1) and (4):

> **60.** (1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.
>
> . . .
>
> (4) On receipt of a request under this section, the President shall, without delay,
>
> (*a*) re-determine or further re-determine the origin, tariff classification or value for duty;
>
> (*b*) affirm, revise or reverse the advance ruling; or
>
> (*c*) re-determine or further re-determine the marking determination.

> **60.** (1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-vingt-dix jours suivant la notification de l'avis et après avoir versé tous droits et intérêts dus sur des marchandises ou avoir donné la garantie, jugée satisfaisante par le ministre, du versement du montant de ces droits et intérêts, demander la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques.
>
> [...]
>
> (4) Sur réception de la demande prévue au présent article, le président procède sans délai à l'une des interventions suivantes :
>
> *a*) la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane;
>
> *b*) la confirmation, la modification ou l'annulation de la décision anticipée;
>
> *c*) la révision ou le réexamen de la décision sur la conformité des marques.

53. Therefore, section 60 of the *Act* provides recourse to the President of the CBSA for the re-determination or further re-determination of a prior determination, notice of which is given to an

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33. *C.B. Powell I.*

34. The Tribunal notes that, when Desgagnés submitted its request for re-determination or further re-determination in 2004, section 67 of the *Act* referred to a decision of the predecessor of the President of the CBSA, namely, the Commissioner of the Canada Customs and Revenue Agency. However, the Tribunal must interpret the *Act* as it was worded at the time of the February 20, 2009, letter, which is the subject of this appeal, and, in any case, the amendments made to the *Act* between 2004 and 2009 represent changes of form that do not significantly affect the application of the administrative scheme that may lead to an appeal to the Tribunal. Moreover, although these amendments turned out to be necessary to reflect the fact that the President of the CBSA and the officers designated by the President, who are henceforth the authorities empowered to make decisions under the system set out in sections 57.1 to 68, this framework of control of matters related, in particular, to the tariff classification of the goods has remained essentially the same since the time when Desgagnés accounted for the ship to Customs in 1999. Consequently, for ease of reference, except where otherwise indicated, the terms "President" and "officer designated by the President" will refer herein both to the persons currently empowered by the *Act* to make decisions and to their predecessors.

interested person under subsection 59(2). That prior determination is the re-determination or further re-determination of an issue by an officer designated by the President of the CBSA under subsection 59(1).

54. Subsections 59(1) and (2) of the *Act*, pertaining to the re-determination of prior determinations and the further re-determination of prior re-determinations by customs officers, provide as follows:

> **59**. (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section, may
>
> (*a*) in the case of a determination under section . . . 58, *re-determine* the origin, tariff classification, value for duty or marking determination of any imported goods at any time within
>
> (i) four years after the date of the determination . . . or
>
> (ii) four years after the date of the determination, if the Minister considers it advisable to make the re-determination; and
>
> (*b*) *further re-determine* the origin, tariff classification or value for duty of imported goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed . . . .
>
> (2) An officer who makes a determination under subsection . . . 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give *notice* of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.
>
> **59**. (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut :
>
> *a*) dans le cas d'une décision prévue à l'article [...] 58, *réviser* l'origine, le classement tarifaire ou la valeur en douane des marchandises importées, ou procéder à la révision de la décision sur la conformité des marques de ces marchandises, dans les délais suivants :
>
> (i) dans les quatre années suivant la date de la détermination [...]
>
> (ii) dans les quatre années suivant la date de la détermination, si le ministre l'estime indiqué;
>
> *b*) *réexaminer* l'origine, le classement tarifaire ou la valeur en douane dans les quatre années suivant la date de la détermination ou, si le ministre l'estime indiqué, dans le délai réglementaire [...].
>
> (2) L'agent qui procède à la décision ou à la détermination en vertu [du paragraphe] [...] 58(1) [...] ou à la révision ou au réexamen en vertu du paragraphe (1) donne sans délai *avis* de ses conclusions, motifs à l'appui, aux personnes visées par règlement.
>
> [Emphasis added]

55. This means that, for the President of the CBSA to make a decision pursuant to section 60 of the *Act*, an officer designated by the President must necessarily have previously re-determined or further re-determined the origin, tariff classification or value for duty of imported goods under subsection 59(1).[35] The powers granted to the customs officers under subsection 59(1) include the re-determination of determinations made under section 58, including the deemed determinations within the meaning of subsection 58(2):

35. Paragraph 59(1)(*a*) of the *Act* also provides for the re-determination of a marking determination, but this issue is irrelevant in this appeal.

> **58.** (1) Any officer, or any officer within a class of officers, designated by the President for the purposes of this section, may *determine* the origin, tariff classification and value for duty of imported goods at or before the time they are accounted for under subsection 32(1), (3) or (5).
>
> (2) If the origin, tariff classification and value for duty of imported goods are not determined under subsection (1), the origin, tariff classification and value for duty of the goods are *deemed to be determined*, for the purposes of this Act, to be as declared by the person accounting for the goods in the form prescribed under paragraph 32(1)(*a*). That determination is deemed to be made at the time the goods are accounted for under subsection 32(1), (3) or (5).
>
> **58.** (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut *déterminer* l'origine, le classement tarifaire et la valeur en douane des marchandises importées au plus tard au moment de leur déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).
>
> (2) Pour l'application de la présente loi, l'origine, le classement tarifaire et la valeur en douane des marchandises importées qui n'ont pas été déterminés conformément au paragraphe (1) sont *considérés comme ayant été déterminés* selon les énonciations portées par l'auteur de la déclaration en détail en la forme réglementaire sous le régime de l'alinéa 32(1)*a*). Cette détermination est réputée avoir été faite au moment de la déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).
>
> [Emphasis added]

56. In summary, the structure of the process provided by the *Act* is based on a sequence of administrative mechanisms allowing for the re-determination and further re-determination of determinations and re-determinations by the persons expressly authorized at each stage of the process to make these determinations, and on an appeal mechanism, before the Tribunal, for the purpose of reviewing any determination regarding tariff classification, origin or value for duty.

57. In light of the foregoing, the Tribunal subscribes to the following conclusion, which it expressed in *C.B. Powell Limited v. President of the Canada Border Services Agency*:[36]

> 30. It follows from the interrelated and sequential nature of the administrative mechanisms in the *Act* that, without either a prior determination made by a customs officer pursuant to subsection 58(1), *or a re-determination under subsection 59(1) of the subsection 58(2) deemed determination of origin* [of the tariff classification or value for duty], *there would be nothing for the President of the CBSA to re-determine or to further re-determine in respect of that issue under the authority conferred upon him by subsection 60(1).* A request pursuant to subsection 60(1) in such a situation would therefore necessarily be met with a rejection notice. In the absence of a "decision" pursuant to subsection 60(1), an appeal would not lie to the Tribunal pursuant to subsection 67(1).
>
> [Emphasis added]

58. Therefore, if the Tribunal finds that, in this case, there was in fact no re-determination by a customs officer of the original deemed determination of the tariff classification or the value for duty of the ship under subsection 58(2) of the *Act* (namely, Desgagnés's declarations in this regard in its accounting for the ship at the time of importation in 1999), there cannot be a determination made pursuant to section 60 and, consequently, an appeal to the Tribunal under subsection 67(1). In other words, in order to determine whether the CBSA's letter of February 20, 1999, constitutes a determination made pursuant to section 60, the Tribunal must first examine the issue of whether, in this case, there was a re-determination under

36. (11 August 2010), AP-2010-007 and AP-2010-008 (CITT).

subsection 59(1) of the deemed determination of the tariff classification of the ship. If so, the Tribunal will examine whether the February 20, 2009, letter must be treated as if it were the re-determination or further re-determination of the issue by the President of the CBSA under the powers conferred on him under subsection 60(1).

> Was there a re-determination, under subsection 59(1) of the *Act*, of the deemed determination of the tariff classification of the ship?

59. According to the process set out in the *Act*, to conclude that there has been a decision of the President of the CBSA made pursuant to section 60 in this case, the Tribunal must first determine that the initial denial of Desgagnés's application for a refund by a CBSA officer, on June 3, 2004, is a determination made under subsection 59(1). In that case, the June 3, 2004, letter which informed Desgagnés of that denial must be treated as if it were a notice given under subsection 59(2), which itself is subject to recourse to the President of the CBSA pursuant to subsection 60(1).

60. To settle this issue, since Desgagnés's recourse concerns an application for a refund of the duties paid on the ship, the Tribunal must take into account the requirements of section 74 of the *Act*, which are also part of the general administrative framework provided by the *Act* and expressly concern refunds. This provision clearly establishes that the denial of an application for a refund is not, in all cases, treated as if it were a re-determination under paragraph 59(1)(*a*). Therefore, the denial by a customs officer of an application for a refund does not necessarily lead to the application of the re-determination and appeal mechanism set out in sections 57.1 to 67.

61. Section 74 of the *Act* provides as follows:

> **74** (1) Subject to this section, section 75 and any regulations made under section 81, a person who paid duties on any imported goods may, in accordance with subsection (3), apply for a refund of all or part of those duties, and the Minister may grant to that person a refund of all or part of those duties, if
>
> . . .
>
> (*e*) *the duties were paid or overpaid as a result of an error in the determination under subsection 58(2) of origin . . . tariff classification or value for duty* in respect of the goods and the determination has not been the subject of a decision under any of sections 59 to 61;
>
> . . .
>
> (3) No refund shall be granted under subsection (1) in respect of a claim unless
>
> . . .
>
> (*b*) an application for refund, including such evidence in support of the application as may be prescribed, is made to an officer in the prescribed manner and in the prescribed form
>
> **74.** (1) Sous réserve des autres dispositions du présent article, de l'article 75 et des règlements d'application de l'article 81, le demandeur qui a payé des droits sur des marchandises importées peut, conformément au paragraphe (3), faire une demande de remboursement de tout ou partie de ces droits et le ministre peut accorder à la personne qui, conformément à la présente loi, a payé des droits sur des marchandises importées le remboursement total ou partiel de ces droits dans les cas suivants :
>
> [...]
>
> *e*) les *marchandises ont fait l'objet d'un paiement de droits excédentaire ou erroné résultant d'une erreur de détermination, en application du paragraphe 58(2), de leur origine [...], de leur classement tarifaire ou de leur valeur en douane* et elles n'ont pas fait l'objet de la décision prévue à l'un ou l'autre des articles 59 à 61;
>
> [...]
>
> (3) L'octroi d'un remboursement réclamé en vertu du paragraphe (1) est subordonné à la

containing the prescribed information within

(i) in the case of an application for a refund under paragraph (1)(*a*), (*b*), (*c*), (*c.11*), (*d*), (*e*), (*f*) or (*g*), four years after the goods were accounted for under subsection 32(1), (3) or (5), and

. . .

(4) A denial of an application for a refund of duties paid on goods is to be treated for the purposes of this Act as if it were a re-determination under paragraph 59(1)(*a*) if

(*b*) *the application is for a refund under paragraph (1)(e), (f) or (g) and the application is denied because the origin, tariff classification of value for duty of the goods as claimed in the application is incorrect*.

(5) For greater certainty, *a denial of an application for a refund* under paragraph (1) (*c.1*), (*c.11*), (*e*), (*f*) or (*g*) on the basis that complete or accurate information has not been provided, or *on any ground other than the ground specified in subsection (4), is not to be treated for the purposes of this Act as if it were a re-determination under this Act of origin, tariff classification or value for duty*.

condition que :

[...]

b) d'autre part, soit adressée à l'agent une demande de remboursement, présentée selon les modalités et assortie des justificatifs réglementaires, et établie en la forme ainsi qu'avec les renseignements réglementaires dans le délai ci-après suivant la déclaration en détail des marchandises en application du paragraphe 32(1), (3) ou (5) :

(i) quatre ans, pour les réclamations dans les cas prévus aux alinéas (1)*a*), *b*), *c*), *c.11*), *d*), *e*), *f*) ou *g*),

[...]

(4) Pour l'application de la présente loi, est assimilé à la révision prévue à l'alinéa 59(1)*a*) le rejet de la demande de remboursement des droits payés sur les marchandises dans les cas suivants :

[...]

b) *les cas prévus aux alinéas (1)e), f) ou g), pour le motif que l'origine, le classement tarifaire ou la valeur en douane des marchandises en cause est erroné*.

(5*) Il est entendu que le rejet de la demande* dans les cas prévus aux alinéas (1) *c.1*), *c.11*), *e*), *f*) ou *g*) pour le motif que la documentation fournie est incomplète ou inexacte *ou pour un motif autre qu'un motif précisé au paragraphe (4) n'est pas, pour l'application de la présente loi, assimilé à la révision de l'origine, du classement tarifaire ou de la valeur en douane aux termes de la présente loi*.

[Emphasis added]

62. In this instance, Desgagnés submitted that its application for a refund of January 11, 2002, was based on paragraph 74(1)(*e*) of the *Act* because, according to Desgagnés, duties on the ship were overpaid as a result of an error in the determination under subsection 58(2) of its tariff classification at the time of its importation in 1999. By and large, Desgagnés's position is that when it accounted for the importation of the ship in 1999, it should not have stated on the prescribed form that the ship was to be classified under tariff item No. 8901.90.90, which resulted in an error in the determination of its tariff classification.

63. The CBSA agreed that Desgagnés's application for a refund was submitted in accordance with subsection 74(3) of the *Act* and thus fulfilled the requirements concerning the prescribed time limit, form, manner, information and supporting evidence.[37] The CBSA does not contest either that paragraph 74(1)(*e*)

37. Tribunal Exhibit AP-2009-014-31A at 19-22.

is the only case referred to in this provision that could possibly give rise to a refund in the circumstances of this matter, namely, an incorrect payment of duties following an error in determination, in 1999, of the tariff classification of the ship.[38] The Tribunal also notes that, in accordance with the requirements of paragraph 74(1)(*e*), at the time of the application, the deemed determination of the tariff classification of the ship under subsection 58(2) had not been the subject of a decision under any of sections 59 to 61.

64. In such a case, subsections 74(4) and (5) of the *Act* clearly provide that the denial by a customs officer of an application for a refund is to be treated like a re-determination under paragraph 59(1)(*a*) and, therefore, a determination made under subsection 59(1), *only if* the application is denied because ". . . the origin, tariff classification or value for duty of the goods as claimed . . . is incorrect." If the denial of the application is based on another ground, it is not to be treated as if it were a re-determination under subsection 59(1) for the purposes of the *Act*.

65. In view of the foregoing, in order to rule on the jurisdictional issue, the Tribunal must first determine whether, on June 3, 2004, Desgagnés's application for a refund was denied on the ground specified in paragraph 74(4)(*b*) of the *Act*. If such is the case, the denial of the application would then constitute a decision made under subsection 59(1), which could then be the subject of a further re-determination by the President of the CBSA and, therefore, of a decision under section 60, which would be subject to appeal to the Tribunal pursuant to section 67.

66. However, if the denial of the application for a refund, because it is based on another ground, could not be treated as if it were a re-determination under paragraph 59(1)(*a*) of the *Act*, it would not be possible for Desgagnés to resort to the scheme set out in the *Act* with the purpose of reviewing determinations regarding the tariff classification, origin or value for duty of goods. This would mean that the Tribunal would not have jurisdiction to hear this appeal. Indeed, for a decision issued pursuant to section 60 to exist, an officer designated by the President of the CBSA must first have made a determination under subsection 59(1).

67. At the hearing, the CBSA summarized the issue as follows: "Can the [June 3, 2004] determination be treated as if it were a decision under [section] 59, which is the bottom of the ladder . . . to file an appeal with the Tribunal. Therefore, if the determination cannot be treated as if it were a determination under [section] 59, [Desgagnés] cannot go back to the bottom rung to ascend the ladder to the Tribunal"[39] [translation].

68. It is clear that Desgagnés's application for a refund was duly submitted, because it was admitted that it fulfilled the conditions of subsection 74(3) of the *Act*. According to Desgagnés, its application was based on one of the cases provided for in paragraph 74(1)(*e*), namely, an incorrect payment of duties resulting from an error in the determination of the tariff classification of the ship under subsection 58(2). The CBSA admitted that this is the only case that could be relevant. Moreover, it is undisputable that the application for a refund was denied on June 3, 2004.

69. Therefore, the parties agree, and the Tribunal concurs, that the provisions of subsections 74(4) and (5) of the *Act* must be followed in this instance in order to determine whether the denial of Desgagnés's application for a refund must be treated as if it were a decision that could subsequently be re-determined or further re-determined under the recourse mechanism set out in the *Act*, which culminates in an appeal to the Tribunal under section 67.

38. *Transcript of Public Hearing*, 27 September 2011, at 115-17.
39. *Ibid.* at 115.

70. Therefore, in accordance with paragraph 74(4)(*b*) of the *Act*, and given that only an error in the determination of the tariff classification of the ship is alleged before the Tribunal, the denial of the application by the CBSA can be treated as if it were a re-determination under paragraph 59(1)(*a*) only to the extent that the ground of denial is that ". . . the tariff classification . . . of the goods as claimed . . . is incorrect." Therefore, the dispute between the parties concerning the Tribunal's jurisdiction concerned mainly the issue of whether the CBSA's determination of June 3, 2004, denying the application was based on this ground and thus fulfilled the condition set out in paragraph 74(4)(*b*).

71. Desgagnés submitted that such is the case, because the application for a refund was denied in 2004 on the grounds that, according to the CBSA, the judicial sale of the ship could not have had the effect of removing the customs duties for which the ship was declared dutiable in 1999 and that, by stating such grounds for its decision, the CBSA in effect rejected its implicit argument that the release of the ship in 1996 dictated a different tariff classification than the one that Desgagnés had declared in 1999. In Desgagnés's opinion, in its denial of the application for a refund, the CBSA considered that the judicial sale of the ship in 1996 had no impact on the tariff classification of the ship in 1999, so that this determination was based only on an issue of tariff classification.

72. In other words, Desgagnés submitted that the application for a refund contemplated in paragraph 74(1)(*e*) of the *Act* could be based, *inter alia*, on an implicit application for a change of tariff classification and that, in the case that concerns us, although its application for a refund did not explicitly claim a new determination of the tariff classification of the ship in 1999, the further re-determination of the rationale of this tariff classification was implicitly required in order to rule in favour of this application. As such, Desgagnés's position is that, in order to deny its application for a refund, the CBSA necessarily had to rule on the issue of the tariff classification of the ship and, as provided in paragraph 74(4)(*b*), to deny the application on the ground that the change of tariff classification that it had claimed at least implicitly, but that nonetheless was clearly in issue, was incorrect.

73. According to Desgagnés, that provision must be interpreted generously, reasonably and fairly for a taxpayer who has paid duties diligently but in error because they were not due, in accordance with section 12 of the *Interpretation Act*.[40] To interpret it so as to deprive Desgagnés of recourse to the Tribunal, simply because the wording of the application for a refund did not refer explicitly to a specific tariff item under which the ship should have been classified instead in 1999, would be incompatible with Parliament's intention and with the purpose of that provision and would lead to an iniquitous and unreasonable result, according to Desgagnés.

74. Desgagnés also noted that the CBSA had admitted, both in a telephone conversation with its counsel in August 2004 and in its "Brief for the Record" dated February 2009, that its position was that the June 3, 2004, decision would be treated as a re-determination under paragraph 59(1)(*a*) of the *Act*, in accordance with subsection 74(4), and that this decision could thereupon be the subject of a request for re-determination or further re-determination under section 60. According to Desgagnés, that admission is binding on the CBSA and means that, in view of the CBSA's management of this file, it could not legitimately conclude in its February 20, 2009, decision or argue before the Tribunal that the June 3, 2004, determination could not be treated as if it were a re-determination under paragraph 59(1)(*a*).

75. For its part, the CBSA submitted that the application for a refund made no reference to the tariff classification of the ship in 1999 and noted that it was only in its brief submitted to the Tribunal on May 27, 2010, that Desgagnés referred for the first time to the tariff item that it considered applicable, i.e. tariff item

40. R.S.C. 1985, c. I-21.

No. 9814.00.00, instead of the one that it had declared in 1999, i.e. tariff item No. 8901.90.90. Rather, according to the CBSA, Desgagnés, in its January 11, 2002, application for a refund objected to the tariff classification of the ship at the time of its first importation in 1996, more than six years after such importation, which it could no longer do, in view of the mandatory four-year time limit established under subsection 74(3) of the *Act* to submit a claim in the cases provided in paragraph 74(1)(*e*).

76. The CBSA also submitted that paragraph 74(4)(*b*) of the *Act* requires that the tariff item under which the applicant claims the goods should have been classified appears expressly in an application for a refund based on an alleged error in the determination of the tariff classification under paragraph 74(1)(*e*). Consequently, according to the CBSA, such an application for a refund cannot be based on an implicit application for a change of tariff classification. In support of this argument, the CBSA invoked the English version of paragraph 74(4)(*b*), which specifies that the denial of an application for a refund, in the cases provided in paragraph 74(1)(*e*), will be treated as if it were a re-determination under paragraph 59(1)(*a*) if the application is denied because the tariff classification of the goods, ". . . as claimed in the application . . .", is incorrect.

77. According to the CBSA, the English version thus requires that the change of tariff classification claimed be mentioned explicitly in the application, in order to be "*en cause*" within the meaning of the French version of paragraph 74(4)(*b*) of the *Act*. In this regard, the CBSA noted that the principles of interpretation of bilingual texts that have equal authority prescribe seeking the common meaning of the two versions and that, in the present case, the common meaning of the two versions of paragraph 74(4)(*b*) requires that the tariff classification sought be mentioned explicitly in the application for a refund.

78. The CBSA submitted that Desgagnés admitted in paragraph 78 of its amended brief that ". . . the application for a refund and the application for re-determination of the decision denying the refund did not include an incidental application explicitly claiming a re-determination of the tariff classification . . ." [translation] of the ship. The CBSA submitted that this admission is fatal for Desgagnés because, since the tariff classification sought, which could have entitled it to a refund, had not been explicitly mentioned in its application, and thus was not as claimed in the application, the ground of denial of the application by the CBSA could not be that ". . . the tariff classification . . . of the goods *as claimed in the application* is incorrect."

79. The CBSA further submitted that the examination of the grounds of the June 3, 2004, determination confirms that the application for a refund was denied on grounds other than the ground that ". . . the tariff classification . . . of the goods as claimed in the application is incorrect." According to the CBSA, by stating in its decision that the ship had really entered Canada only on July 12, 1999, and that the prescribed duties had been duly paid at that time by the importer, as required under sections 12 and 32 of the *Act*, at the time they were due, namely, after the judicial sale of August 22, 1996, it then simply rejected as irrelevant Desgagnés's arguments that the customs duties had instead become payable in 1996.

80. In view of these facts, the CBSA submitted that subsection 74(5) of the *Act* applies in this instance and, because the denial of Desgagnés's application for a refund was based on a ground other than the ground specified in paragraph 74(4)(*b*), the CBSA's determination of June 3, 2004, cannot be treated as if it were a re-determination under paragraph 59(1)(*a*), such that it could not be the subject of a further re-determination by the President of the CBSA under section 60 nor, consequently, of an appeal to the Tribunal under section 67.

81. In the Tribunal's view, the first issue in order to determine whether the June 3, 2004, determination meets the condition set out in paragraph 74(4)(*b*) of the *Act* is whether the application for a refund indeed

indicated an error in the determination of the tariff classification of the ship in 1999. In this regard, the Tribunal agrees with Desgagnés that the application necessarily involved the issue of the tariff classification of the ship in 1999.

82. Indeed, although the application does not explicitly mention the tariff item under which, according to Desgagnés, the ship should have been classified in 1999, it nonetheless contains a clear allegation that the customs duties applicable to the ship had become payable in 1996, before its judicial sale, such that there had been an error in the determination of the tariff classification of the ship at the time of its importation in 1996. The corollary of this allegation is that, according to Desgagnés, the ship should have been classified in Chapter 89, which covers imported ships and modes of conveyance on which customs duties are payable, as of 1996. Therefore, the CBSA had sufficient information to deduce and conclude that Desgagnés ultimately objected to the tariff classification of the ship in 1999 because, if the ship should have been released and classified under tariff item No. 8901.90.90 in 1996, it could not have been classified again under that tariff item in 1999.

83. In short, Desgagnés's allegation directly challenged the tariff classification of the ship in 1999 because, if it turned out to be valid, the ship could not be declared dutiable, and thus be classified under tariff item No. 8901.90.90, upon its return to Canada in 1999. In summary, in the Tribunal's view, by alleging that the customs duties were deemed to have been paid as a result of the judicial sale of the ship, Desgagnés found itself objecting to the tariff classification of the ship, in 1999, under a tariff item of Chapter 89, the only one that covers the importation of ships on which customs duties are payable. In so doing, it implicitly, but nonetheless very certainly, claimed that the ship should be classified instead under a tariff item of Chapter 98, which concerns, in particular, the case of ships or other goods imported without being subject to customs duties because they returned to Canada in the same condition as they were after having once been released and accounted for under section 32 of the *Act*.

84. The Tribunal also notes that, in 2002, Desgagnés explicitly claimed a complete refund of the duties paid in 1999. In the Tribunal's view, such a refund could only result from a change of tariff classification, in view of the legislative framework and its application to the facts of the case.

85. Concerning the legislative framework itself, section 57.1 of the *Act* provides that there are three essential elements that must be established to determine whether customs duties are payable, that is, the origin, the tariff classification and the value for duty. Section 57.1 provides as follows:

57.1 For the purposes of sections 58 to 70,	**57.1** Pour l'application des articles 58 à 70 :
(*a*) the *origin* of imported goods is to be determined in accordance with section 16 of the *Customs Tariff* and the regulations under that section;	*a*) l'*origine* des marchandises importées est déterminée conformément à l'article 16 du *Tarif des douanes* et aux règlements d'application de cet article;
(*b*) the *tariff classification* of imported goods is to be determined in accordance with sections 10 and 11 of the *Customs Tariff*, unless otherwise provided in that Act; and	*b*) le *classement tarifaire* des marchandises importées est déterminé conformément aux articles 10 et 11 du *Tarif des douanes*, sauf indication contraire de cette loi;
(*c*) the *value for duty* of imported goods is to be determined in accordance with sections 47 to 55 of this Act and section 87 of the *Customs Tariff*.	*c*) la *valeur en douane* des marchandises importées est déterminée conformément aux articles 47 à 55 de la présente loi et à l'article 87 du *Tarif des douanes*.

[Emphasis added]

86. In this case, the tariff classification of the ship was the only element that could be re-determined by the CBSA to give rise to a complete refund of the duties paid. Nothing in the application for a refund allows the inference that Desgagnés challenged, in any way, the origin and the value for duty that it stated in its accounting for the ship on July 12, 1999. Therefore, the deemed determinations of these two elements under subsection 58(2) of the *Act* have never been in dispute. As Desgagnés submitted, only the change of the tariff classification of the ship to a tariff item included in Chapter 98 of the nomenclature regarding the importation of goods not subject to customs duties, namely, No. 9814.00.00 (the only item, other than No. 8901.90.90, which could possibly be applicable to the ship in this instance[41]), could result in a complete refund of the duties. Consequently, the Tribunal is of the view that, in the circumstances of this case, challenging the payability of the duties would necessarily involve challenging the tariff classification of the ship in 1999.

87. Therefore, an error in the determination of the tariff classification of the ship in 1999 was the only ground among those set out in section 74 of the *Act* that could be relevant and give rise to a refund in the circumstances. The other cases provided in paragraph 74(1)(*e*), namely, an overpayment or incorrect payment of duties, resulting from an error in the determination of the origin or value for duty of the ship, definitely could not constitute the basis of Desgagnés's application for a refund in this instance.

88. The same is true of the refund scenarios provided in the other paragraphs of subsection 74(1) of the *Act*, which contemplate, in particular, cases of transcription errors in the calculation of the duties, the failure by an importer to have claimed preferential tariff treatment in respect of goods imported from a country that is party to a free trade agreement with Canada, or cases of importation of goods in a quantity less than or of a quality inferior to those for which the duties were paid. Clearly, Desgagnés's application for a refund did not concern any of these cases and could therefore only be based on an error in the determination of the tariff classification of the ship. The Tribunal therefore finds that it was clear from the reading of the reasons invoked by Desgagnés to claim the complete reimbursement of the duties paid that it was challenging the tariff classification of the ship that it had declared in 1999.

89. The evidence before the Tribunal also indicates that the change of tariff classification claimed by Desgagnés was never a mystery for the CBSA. In this regard, the CBSA's "Brief for the Record" indicates that it had initially examined the issue from the standpoint of the tariff classification and that, in view of the contents of Desgagnés's application, the only tariff item that could theoretically apply, apart from 8901.90.90, was 9814.00.00. This was the only reason for which, on August 19, 2004, the CBSA informed Desgagnés that it had "been decided" [translation] that the June 3, 2004, letter denying the application for a refund would be treated as if it were a notice given under subsection 59(2) of the *Act* and consequently that the determination as such would be treated as if it were a re-determination under paragraph 59(1)(*a*) in accordance with paragraph 74(4)(*b*).[42] Since the denial of the application on the ground that the tariff classification of the ship, as claimed in Desgagnés's application, was incorrect constituted the only case contemplated in section 74 that could result in a determination that could be re-determined under the scheme set out under sections 58 to 67, if it had been decided at the time that this determination could be subject to such re-determination, this is because it had to fulfill the condition set out in paragraph 74(4)(*b*), at least *prima facie*.

90. In light of the foregoing, the Tribunal is of the view that, in order to deny the application for a refund, the CBSA officer necessarily had to examine the issue of whether it was appropriate to change the

41. The ship could not be classified under another tariff item of Chapter 98 that would allow the importation of a ship duty-free because it is not a ship of Canadian origin. Tribunal Exhibit AP-2009-014-13A at 24, tab 29 at 204.
42. Tribunal Exhibit AP-2009-014-13A, tab 26 at 170-73, tab 23 at 154.

tariff classification of the ship, which had been determined in 1999 on the basis of Desgagnés's accounting for it. It was not possible to separate the issue of payability of customs duties from the issue of the determination of the tariff classification of the ship within the context of the application for a refund in question.

91. In other words, to rule on an application that claimed that customs duties were not due in 1999, the officer necessarily had to re-determine the issue of the tariff classification of the ship in 1999. His conclusion was that the duties were indeed due in 1999, meaning that Desgagnés's accounting for the ship did not contain an error. This came down to confirming the basis of the imposition of duties, in particular the determination of the 1999 tariff classification, and therefore to determining that there was no reason to change the tariff classification of the ship, as Desgagnés was requesting, at least implicitly, in its application for a refund. In short, by denying the application for a refund, the CBSA determined that there had been no error in the determination of the tariff classification of the ship in 1999, contrary to what was raised by necessary implication in Desgagnés's application. In so doing, it effectively denied the application on the ground that it would be incorrect to classify the ship under tariff item No. 9814.00.00, the tariff classification implicitly claimed in the application.

92. Regarding the CBSA's argument based on the English version of paragraph 74(4)(*b*) of the *Act*, the Tribunal is not convinced that the common meaning of the two versions of this paragraph requires that the tariff classification sought be mentioned explicitly in the application for a refund, as the CBSA submitted. On the contrary, in the Tribunal's view, the interpretation proposed by the CBSA adds a requirement that does not appear clearly in the French version of the paragraph and, for this reason, it relies exclusively on a textual interpretation of the English text, which does not sufficiently consider the wording of the French version of paragraph 74(4)(*b*) or the context of this provision.

93. In this regard, the Tribunal sees nothing in the wording of the English version of section 74 of the *Act* that indicates the manner in which a tariff classification error must be raised in an application for a refund concerning the case provided in paragraph 74(1)(*e*). Moreover, the Tribunal notes that the instructions appearing on the CBSA's form that the importers can use to submit an application for a refund based, *inter alia*, on an error in the determination of the tariff classification do not require a mention of the tariff item under which the applicant alleges that the imported goods would be correctly classified. This form only indicates that the tariff item may be entered "if available" or "if known". Moreover, under the heading "Reason for refund/adjustment request", this form allows the applicant simply to check the box entitled "Goods incorrectly described or classified".[43]

94. Therefore, the Tribunal is of the view that a reasonable interpretation of the English version of paragraph 74(4)(*b*) of the *Act* (which concerns the result of denying such an application), which is consistent with the plain meaning of its French version, is that, in order to fulfill the condition set out in this paragraph, it is sufficient that an application for a refund involve the question of the tariff classification and that the denial of the application for a refund be on the ground that the change of tariff classification claimed by the applicant, explicitly or by necessary implication, is incorrect. A change of determination of the tariff classification may be "claimed in the application" and thus be "*en cause*" without necessarily indicating a tariff item under which the goods must be classified instead. Indeed, in the Tribunal's view, what counts is that the application for a refund be based on the ground that the imported goods were classified incorrectly.

95. The CBSA's argument ignores the possibility that the terms ". . . tariff classification . . . as claimed in the application . . ." in the English version of paragraph 74(4)(*b*) of the *Act* may be interpreted as simply

43. *Ibid.*, tab 28 at 200-201.

meaning that the application must raise, in one way or another, an error in the determination of the tariff classification of the goods in issue. However, in the Tribunal's view, this is a reasonable interpretation that is consistent with the perspective of allowing the review of any decision regarding the tariff classification under the scheme set out in sections 58 to 67.

96. The CBSA therefore proposed an overly restrictive interpretation of the English version, which would limit unduly the scope of section 74 of the *Act*. Rather, using the rule of interpretation of bilingual legislative texts proposed by the CBSA, the Tribunal is of the view that the plain meaning that can be drawn from the two versions of paragraph 74(4)(*b*) is that it is sufficient for the application for a refund to be denied on the grounds that the tariff classification, i.e. as concerned or contemplated by the application, is incorrect.[44] This conclusion appears to be more in line with Parliament's intention, which clearly emerges from the overall structure of the *Act*, to allow the subsequent review of any decision regarding tariff classification.

97. In addition, the Tribunal agrees with Desgagnés's contention that, in view of section 12 of the *Interpretation Act*, section 74 of the *Act* must be interpreted broadly and fairly for the taxpayer. In the Tribunal's opinion, it would be unjust to deprive Desgagnés of recourse under the scheme set out in sections 58 to 67 of the *Act* for what is ultimately a matter of form. The form must not prevail over the substance in a matter involving the right to appeal. In the context of this case, what is important is that Desgagnés's application for a refund necessarily involved, as already indicated, a reconsideration of the tariff classification of the ship in 1999.

98. Therefore, the Tribunal finds that the June 3, 2004, decision by the CBSA officer must be treated as a re-determination under paragraph 59(1)(*a*) of the *Act*, because it is based on the ground that the tariff classification as claimed in the application (i.e. the change of tariff classification that was implicitly requested by Desgagnés) was incorrect, in accordance with paragraph 74(4)(*b*). In that sense, it constitutes a decision on the tariff classification of the ship that could be subject to a re-determination or further re-determination under subsection 60(1).

> Is the February 20, 2009, letter a decision issued pursuant to section 60 of the Act that could be appealed to the Tribunal?

99. To the extent that the denial of the application for a refund constitutes a re-determination under paragraph 59(1)(*a*) of the *Act*, the CBSA's letter of February 20, 2009, which denied a request for further re-determination of the decision issued under section 60, is tainted by an error of law. Indeed, it is incorrectly affirmed in that letter that the ground of denial of the application for a refund did not pertain to the tariff classification of the ship. In that letter, which is the subject of this appeal, the CBSA also determined incorrectly that the *Act* did not allow it to rule on Desgagnés's request for further re-determination under section 60, because it did not concern the origin, tariff classification or value for duty of the ship.[45]

100. In light of the above analysis, the Tribunal finds that the CBSA had the obligation to rule on Desgagnés's request for further re-determination because it could be the subject of a decision by the President of the CBSA under subsection 60(4) of the *Act*. In other words, the CBSA was wrong to conclude that the President of the CBSA did not have jurisdiction under subsection 60(1) to issue a decision (i.e. a

44. At the hearing, the CBSA acknowledged that the term "*en cause*" could reasonably be interpreted as meaning "*concerné*" (concerned). *Transcript of Public Hearing*, 27 September 2011, at 133.
45. Tribunal Exhibit AP-2009-014-13A, tab 25 at 162.

further re-determination) on the issue of the tariff classification of the ship. Does this mean that no "decision" was rendered by the President of the CBSA, who is the authority designated under subsection 60(1) to issue such decisions?

101. The authority to hear an appeal granted to the Tribunal under subsection 67(1) of the *Act* is conditional on a prior "decision" by the President of the CBSA under subsection 60(1). As such, the issue that remains to be resolved is whether, in this instance, such a decision exists by necessary implication, as a consequence of the CBSA's conclusion that the President of the CBSA did not have the authority to rule on Desgagnés's request for further re-determination. Essentially, can the Tribunal conclude that the refusal by the President of the CBSA to issue a decision under section 60 inherently constitutes a decision subject to appeal to the Tribunal?

102. In the Tribunal's view, since the CBSA incorrectly omitted to treat the denial of Desgagnés's application for a refund as if it were a re-determination under paragraph 59(1)(*a*) of the *Act*, the CBSA may not validly submit that its February 20, 2009, letter in which it refused to grant a request for further re-determination of its previous determination of June 3, 2004, does not constitute a decision made in accordance with section 60. Moreover, the CBSA did not present any subsidiary argument to convince the Tribunal that, even if it concluded that the June 3, 2004, denial of the application for a refund had to be treated as if it were a re-determination under paragraph 59(1)(*a*), its subsequent decision of February 20, 2009, nonetheless did not constitute a decision under section 60.

103. In the Tribunal's opinion, to the extent that the denial of the application for a refund must be treated as if it were a determination made under paragraph 59(1)(*a*) of the *Act*, it follows that the February 20, 2009, letter in response to a request for further re-determination of that determination, which had been duly submitted by Desgagnés, represents the outcome of the CBSA's internal recourse concerning the issue in this case. Therefore, that letter must be treated as if it were a decision under section 60, which could be appealed to the Tribunal.

104. Otherwise, Desgagnés would be deprived of recourse to the Tribunal due to an error of law by the CBSA, which is the authority designated under subsection 60(1) of the *Act* to make such decisions. According to the Tribunal, such a result would be unacceptable, because it would be tantamount to allowing the CBSA to conclude wrongly that the President of the CBSA has no jurisdiction under subsection 60(1) to issue a decision, without the possibility for an importer objecting to that conclusion. Indeed, under the re-determination scheme set out in sections 58 to 68, the Tribunal is vested with the mandate to rule on the validity and rationale of determinations and decisions made under sections 59 and 60.[46]

105. In any event, the Tribunal notes that the CBSA had indicated to Desgagnés that it could apply for a further re-determination by the President of the CBSA of the June 3, 2004, determination under section 60 of the *Act*. From Desgagnés's point of view, the case then followed its course between the time of filing its request for further re-determination and the receipt of the CBSA's letter of February 20, 2009. Desgagnés therefore could legitimately expect, in view of the fact that its application challenged the issue of the tariff classification of the ship, that, in accordance with paragraph 60(4)(*a*), the President of the CBSA would proceed to "re-determine or further re-determine . . . the tariff classification . . ." of the ship.

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46. *Fritz Marketing Inc. v. Canada*, 2009 FCA 62 (CanLII); *Abbott Laboratories Ltd. v. Canada (Minister of National Revenue)*, 2004 FC 140 (CanLII). According to these precedents, the legislator's intention is for the interested parties to use the administrative, quasi-judicial and judicial recourses set out in sections 58 to 68 of the *Act*, to the exclusion of any other path of re-determination or appeal, to review the CBSA's decisions concerning the imposition of customs duties.

106. In this regard, in the Tribunal's view, the February 20, 2009, letter constitutes a disguised or implied decision on the substantive issues, namely, the appropriate tariff classification of the ship in 1999. Indeed, to deny Desgagnés's request for further re-determination, the CBSA essentially had to perform a tariff classification exercise. Considering that Desgagnés's reasoning regarding the ground on which a tariff item other than 8901.90.90 should have been declared in 1999 involved the reconsideration of the tariff classification that had been determined in 1996, the tariff classification exercise performed by the CBSA in order to confirm, in its February 20, 2009, letter, the rationale of the tariff classification indicated in the July 12, 1999, accounting for the ship emerges clearly from the following passage of the letter:

> However, when the ship *Truskavets* was subjected to a judicial sale, within the context of a transaction *in rem*, in August 1996, it had not yet entered Canada officially. It was only three years later that it was officially imported into Canada and classified under HS No. 8901.90.90.00. According to the information submitted in 1996, no change was made to the tariff classification of the *Truskavets*, whether by the owner of said ship at the time or by the Canada Customs and Revenue Agency (CCRA), now the Canada Border Services Agency (CBSA). In this regard, please note that there is no legal provision allowing an automatic change of tariff classification, according to the English expression, "by application of the law".[47]
>
> [Translation]

107. Therefore, the decision contains a general analysis of Desgagnés's request for further re-determination that can reasonably be interpreted so as to cover the tariff classification of the ship. In that sense, the February 20, 2009, letter was not a mere administrative notice informing Desgagnés that it did not fulfill the criteria set out in the *Act* in order to submit a request for further re-determination under subsection 60(1).

108. Moreover, the Tribunal's authority to conclude that an implied decision was made in accordance with section 60 of the *Act* was established clearly by the Federal Court of Appeal in *C.B. Powell Limited v. Canada (Border Services Agency)*.[48] In that decision, the Federal Court of Appeal gave the example of a situation, other than the present one, in which an "implied decision" can be issued in accordance with section 60 and thus constitute a decision under section 67. However, the Federal Court of Appeal took care to add the following:

> No doubt, there may be other situations where the Tribunal will find that implied decisions were made. That, of course, will be for the Tribunal to determine on a case-by-case basis. In developing its own jurisprudence in this area, the Tribunal will need to consider the purposes of Part III of the Act and this administrative regime.[49]

109. For the foregoing reasons, the Tribunal finds that there was indeed an implied decision, confirming the deemed determination of the tariff classification of the ship, that was issued in accordance with section 60 of the *Act* in this instance. In the Tribunal's opinion, one of the objectives of the administrative regime is to grant importers a right of appeal to the Tribunal, which is the quasi-judicial body possessing the expertise in such matters, on any matter concerning, *inter alia*, the rationale of the tariff classification of imported goods. In this case, Desgagnés's request for further re-determination included, by necessary implication, an application to the President of the CBSA to change the determination of the 1999 tariff classification of the ship, which previously had been maintained by a CBSA officer by means of a determination made under paragraph 59(1)(*a*), in order to give rise to the refund of the duties paid.

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47. Tribunal Exhibit AP-2009-014-13A, tab 25.
48. 2011 FCA 137 (CanLII) [*C.B. Powell II*].
49. *C.B. Powell II* at para. 33.

110. Therefore, by indicating incorrectly, i.e. contrary to the provisions of paragraph 60(4)(*a*) of the *Act*, that the CBSA did not have the authority to rule on the application, the February 20, 2009, letter informed Desgagnés of the CBSA's final decision regarding the matter of the tariff classification of the ship. Ultimately, the President of the CBSA, by refusing to make the further re-determination of the issue that had been raised, essentially issued a negative decision that confirmed the original tariff classification. As such, it must be treated as if it were a decision issued under section 60. In other words, in the circumstances, such a decision, which can be appealed to the Tribunal, exists by necessary implication as a result of the manner in which the CBSA chose to dispose of Desgagnés's request.

111. The Tribunal finds that the CBSA's letter of February 20, 2009, is a decision under section 60 of the *Act* and, therefore, that there can be an appeal of that decision to the Tribunal under subsection 67(1). In short, the Tribunal determines that it has jurisdiction to hear this appeal.

ISSUE OF THE TARIFF CLASSIFICATION OF THE SHIP

112. Having concluded that there was indeed a decision under subsection 60(1) of the *Act* and that there was therefore a right of appeal to the Tribunal under subsection 67(1), the Tribunal must now address the merits of the issue, namely, whether the CBSA was right to conclude in its February 20, 2009, decision that the ship had been classified correctly under tariff item No. 8901.90.90 in 1999.

Positions of Parties

113. Desgagnés submitted that it acquired the ship following a judicial sale, pursuant to the *Canada Shipping Act*,[50] which takes precedence, in its opinion, over the provisions of general application of the *Act*. According to Desgagnés, the judicial sale of the ship therefore had the effect of conferring title on Desgagnés free and clear of any liens or encumbrances, including those related to the importation of the ship into Canada. In support of this argument, which it qualified as a "jurisdictional matter" [translation], Desgagnés invoked sections 43 and 275 of the *Canada Shipping Act*, section 7 of the *Act* and the provisions of the *Federal Courts Act*[51] and the related rules of procedure governing the seizure and sale of ships within the context of Admiralty actions that were in force at the time of the judicial sale. Desgagnés's core argument is that the application of these legal rules means that the ship had to be deemed to have been released in 1996 and that it therefore did not have to pay customs duties in respect of the ship in 1999. According to Desgagnés, the orders issued by the Federal Court of Canada therefore had the effect of assigning the ship to it free and clear of any liens or encumbrances, including the customs duties.

114. Desgagnés submitted that its argument is based on a reasonable and fair interpretation of all the relevant statutory provisions. Moreover, it submitted that its interpretation is consistent with the assumption that all legislation is deemed to make up a coherent system. To the extent that there would be a conflict between the *Act* and the regime provided under the *Canada Shipping Act*, implemented by the related provisions of the *Federal Courts Act* regarding Admiralty actions, Desgagnés submitted that the rules specific to maritime law must prevail. As such, Desgagnés submitted that the legal solution in this appeal involves the sanction, observance and application of the judgments of the Federal Court of Canada establishing that the ownership of the ship was assigned to Desgagnés free and clear of any liens or encumbrances.[52]

50. R.S.C. 1985, c. S-9; Tribunal Exhibit AP-2009-014-35A, tab 1.
51. R.S.C. 1985, c. F-7; Tribunal Exhibit AP-2009-014-22A, tab 45.
52. *Transcript of Public Hearing*, 27 September 2011, at 74-82.

115. In the alternative, Desgagnés submitted that the customs duties arising from the importation of the ship had become payable before its judicial sale on August 22, 1996, such that the sale had, in any event, resulted in the cancellation of the duties or claims that the Crown might have had against the ship. In this regard, Desgagnés pointed out that the CBSA did not submit a request for payment of its claim in a timely manner, i.e. before the order for distribution of the balance of sale.[53]

116. Desgagnés's argument that the customs duties had become payable in 1996 is based on the claim that the ship did not meet all the conditions to be classified in heading No. 98.01 in 1996 and therefore to be imported duty-free by its owner at the time. In this regard, Desgagnés incorrectly assumed in its brief that the ship has been classified under tariff item No. 9801.10.00 in 1996 and analyzed the terms of this tariff item in its brief (whereas the ship was instead classified under tariff item No. 9801.*00*.00 at that time).[54] However, at the hearing, Desgagnés submitted that the ship did not meet the conditions of tariff item No. 9801.00.00 either and that, therefore, it had been classified incorrectly under this tariff item in 1996.

117. Regarding this issue, Desgagnés alleged that, in order to be entitled to the benefits of tariff item No. 9801.00.00, a ship must be foreign property and that, at the time of the judicial sale, the ship was deemed to be a Canadian ship, the property of the Marshal, and not a foreign ship. In support of this argument, Desgagnés invoked the provisions of the *Canada Shipping Act*, including the definitions of the terms "owner", "Canadian ship" and "foreign ship", the provisions of the *Coasting Trade Act*[55] and section 32.2 of the *Act*. According to Desgagnés, under these provisions, following the seizure of the ship in the Port of Québec, the ship was deemed to have become a ship registered in Canada, but not released, and the Marshal at that time became its deemed owner. Desgagnés submitted that the Marshal then had the duty, pursuant to subsections 32.2(2), (4) and (6) of the *Act*, to correct the declaration of the tariff classification of the ship and pay the customs duties, because he then had grounds to believe that the original declaration that the ship had to be classified under tariff item No. 9801.00.00 as a foreign ship was false or defective. Since, according to Desgagnés, the obligation to pay the customs duties thus arose before the judicial sale, it must be concluded that the sale had discharged all the customs duties. In support of this last point, Desgagnés referred to the orders of the Federal Court of Canada transferring ownership of the ship to it and the jurisprudence establishing that the buyer of a ship under an Admiralty action *in rem* acquires a title free and clear of any liens or encumbrances.[56]

118. For its part, the CBSA submitted that all of Desgagnés's arguments revolve around the 1996 judicial sale and that, to accept the appeal, the Tribunal must conclude that, before the judicial sale, there was an automatic change of the tariff classification of the ship without involvement by the CBSA or by Desgagnés. However, the CBSA submitted that the provisions of the *Act* do not allow any change to the tariff classification of goods except through the procedures provided under the *Act*. Therefore, the fact that no timely procedure was instituted to change the tariff classification of the ship under tariff item No. 9801.00.00 prevents Desgagnés from arguing its claim that the ship should not have been classified under this tariff item in 1996. In this regard, the CBSA pointed out that Desgagnés's objection concerns essentially the tariff classification under tariff item No. 9801.00.00, which was determined at the time of the

53. Tribunal Exhibit AP-2009-014-22A at 7-8, tabs 42, 43.
54. Tribunal Exhibit AP-2009-014-22A at 30-31. Desgagnés submitted that, contrary to the requirements of tariff item No. 9801.10.00, (i) there had been a change in the use of the ship in relation to the use declared at the time of its importation, (ii) the ship had not left Canada within 30 days after the date of its arrival and (iii) most of the certificates required for a ship under the *Canada Shipping Act* had expired.
55. S.C. 1992, c. 31; Tribunal Exhibit AP-2009-014-35A, tab 3.
56. *Transcript of Public Hearing*, 27 September 2011, at 83-94.

temporary importation of the ship on March 8, 1996, and that the mandatory four-year time limit to object to this determination, which is provided in subparagraph 59(1)(*a)*(ii), expired nearly 10 years ago.

119. Consequently, the CBSA submitted that no customs duties were payable before the judicial sale on August 22, 1996, and that the impact of the judicial sale in 1996 regarding the customs duties payable on July 12, 1999, was nil.

120. The CBSA also objected to Desgagnés's claim that a ship sold under the *Federal Courts Act* is thereby deemed to be a ship that is no longer dutiable for the application of the *Act* and the *Customs Tariff*. According to the CBSA, nothing in the texts invoked by Desgagnés makes it possible to conclude that Parliament intended to cancel all the customs duties payable when a ship is sold by judicial sale under this scheme. The CBSA submitted that Desgagnés's interpretation is unreasonable, because it implies that each ship engaged in international commercial freight transportation seized and sold through a judicial sale would become a ship released and not subject to customs duties, regardless of the ship's status before the judicial sale.

121. Rather, the CBSA submitted that, under the statutory rules cited by Desgagnés, the Marshal may not sell more than what the owner possessed before the seizure of the ship, namely, in this case, a ship engaged in international commercial freight transportation and not a ship released in Canada. According to the CBSA, the only acceptable interpretation in the circumstances is that the Marshal sells a good having the same attributes as those of the owner in whose hands the good was seized. In this case, the CBSA submitted that the ship was imported temporarily in 1996 and classified under tariff item No. 9801.00.00 and that it still had that status at the time of its seizure. Given that no request for further re-determination of this tariff classification was submitted, the ship was still classified under this tariff item and was sold to Desgagnés as a ship engaged in international commercial freight transportation and not as a ship released that could be used for coasting trade operations in Canada.

122. Therefore, the CBSA alleged that the ship was correctly classified under tariff item No. 8901.90.90 in 1999, because it did not meet the conditions of tariff item No. 9814.00.00 when Desgagnés imported it permanently into Canada. At the hearing, the CBSA also argued that Desgagnés had not discharged its burden of proving that the ship meets the conditions set out in tariff item No. 9814.00.00. In this regard, the CBSA noted that Desgagnés did not submit evidence that the ship had once been released and accounted for under section 32 of the *Act* upon its return to Canada in 1999 or that the ship was returned to Canada at that time without having been advanced in value or improved in condition.[57]

Tribunal's Analysis

123. Subsection 2(1) of the *Act* defines "tariff classification" as follows:

> "tariff classification" means the classification of imported goods under a tariff item in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*.
>
> « classement tarifaire » Le classement des marchandises importées dans un numéro tarifaire de la liste des dispositions tarifaires de l'annexe du *Tarif des douanes*.

124. The tariff provisions of the schedule to the *Customs Tariff* is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the

57. *Ibid.* at 139-46.

Customs Tariff prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

125. Tariff classification is based on the physical description of the imported goods, with the Tribunal determining the proper tariff classification of the goods in accordance with prescribed interpretative rules. Subsection 10(1) of the *Customs Tariff* provides as follows: ". . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System[58] and the Canadian Rules[59] set out in the schedule."[60]

126. The *General Rules* comprise six rules. Classification begins with Rule 1 of the *General Rules*, which provides as follows: ". . . classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes . . . ."

127. Desgagnés has the burden of proving that the CBSA incorrectly classified the ship under tariff item No. 8901.90.90 and that the ship should have been classified instead under tariff item No. 9814.00.00.[61] The parties agree, and the Tribunal concurs, that these two tariff items are the only ones that could possibly apply to the ship. Moreover, Desgagnés does not dispute that the ship is a vessel for the transport of goods which, *prima facie*, is included in heading No. 89.01 and tariff item No. 8901.90.90. The issue before the Tribunal is whether the ship also fell within the scope of tariff item No. 9814.00.00 in 1999 and thus was entitled to the benefit of duty-free treatment.[62] Thus, if the ship did not fulfill the conditions to be classified under tariff item No. 9814.00.00 in 1999, it would be correctly classified, by default, under tariff item No. 8901.90.90, as the CBSA determined.

128. To prevail in the case, Desgagnés must therefore prove that the terms of tariff item No. 9814.00.00,[63] taking into account the relevant section or chapter notes of the schedule to the *Customs Tariff*, applied to or included the ship at the time that it was imported in 1999.

129. Tariff item No. 9814.00.00 provides as follows:

> **9814.00.00** **Goods, including containers or coverings filled or empty, which have once been released and accounted for under section 32 of the *Customs Act* and have been exported, if the goods are returned without having been advanced in value or improved in condition by any process of manufacture or other means, or combined with any other article abroad.**

58. S.C. 1997, c. 36, schedule [*General Rules*].
59. S.C. 1997, c. 36, schedule.
60. Section 11 of the *Customs Tariff* provides that, in interpreting headings and subheadings, regard shall be had to the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*]) and the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System* (World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*]). However, there are no *Explanatory Notes* or *Classification Opinions* to consider in this case.
61. *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII); s. 152 of the *Act*.
62. Chapter 98, which includes tariff item No. 9814.00.00, provides for the special classification provisions that allow certain goods imported into Canada to benefit from tariff relief.
63. The only tariff item under heading No. 98.14 is 9814.00.00. Since this heading is not otherwise subdivided into subheadings or tariff numbers, the terms of tariff item No. 9814.00.00 are the terms of heading No. 98.14. Accordingly, the Tribunal may take into account Rule 1 of the *General Rules*, which applies to the headings, in order to determine whether the ship meets the requirements of tariff item No. 9814.00.00.

130. Therefore, for goods to benefit from tariff item No. 9814.00.00, the first condition is that they have "once been released and accounted for under section 32" of the *Act*. However, in this instance, it was only upon its return to Canada in 1999 that the ship was released and accounted for under section 32. As already indicated, when it arrived in Canada for the first time in 1996, the ship was not accounted for under section 32. It was classified instead under tariff item No. 9801.00.00 as a temporary importation because it was then engaged in international commercial freight transportation. The evidence also indicates that the modes of conveyance that could be classified under tariff item No. 9801.00.00 in 1996 could be released without being accounted for and that the ship was not accounted for and released before 1999.

131. Therefore, Desgagnés did not establish that the ship had "once been released and accounted for under section 32 [of the *Act*]", as required under the terms of tariff item No. 9814.00.00, when Desgagnés brought it back to Canada in 1999. The Tribunal subscribes to the CBSA's argument that this ground alone could suffice to dismiss the appeal.

132. To get around this obstacle, Desgagnés challenged the classification of the ship under tariff item No. 9801.00.00 in 1996. It essentially submitted that the ship must be deemed to have been released and accounted for in 1996. In this regard, it submitted that, under the *Canada Shipping Act* and the *Federal Courts Act* in matters of maritime law, the result of the judicial sale of a ship seized in Canada is to remove or eliminate the Crown's claims against it, including the customs duties related to the importation of the ship.

133. Alternatively, that is, if the Tribunal concluded that a judicial sale in an Admiralty action did not result in the elimination of the customs duties payable upon importation of a ship, Desgagnés submitted that the ship should not have been classified under tariff item No. 9801.00.00 in 1996, because it did not fulfill the conditions to be classified under this tariff item, such that the customs duties for which it was dutiable had become payable *before* its judicial sale. Desgagnés proposed the following theory: since the Crown's claim in connection with the importation of the ship existed previously, the judicial sale had the effect of discharging the customs duties and releasing Desgagnés from any obligation in respect of their payment. On this point, Desgagnés submitted that it was clearly established in law that the effect of a judicial sale was to confer title on the acquirer free and clear of any liens or encumbrances.

134. The Tribunal is not satisfied that these arguments are valid. To accept them, the Tribunal would have to conclude that the tariff classification of the ship in 1996 must be changed automatically, by operation of the law, to declare that the ship was incorrectly classified under tariff item No. 9801.00.00 in 1996, several years after the expiry of the time limit to request re-determination or further re-determination of that determination. On the following grounds, however, in the Tribunal's view, these two conclusions are not legally admissible.

135. Indeed, as the CBSA submitted, the scheme of re-determinations and further re-determinations of the CBSA's determinations concerning, in particular, the tariff classification provided in the *Act*, is a coherent and complete system, including privative clauses,[64] which means that no possibility exists of re-determining or changing the tariff classification of goods, except under the provisions of the *Act*. The jurisprudence of the Federal Court of Appeal and the Federal Court of Canada also clearly establishes that the determination of the tariff classification made at the time of the customs declaration is final and

64. Paras. 58(3), 59(6) and 62(1) of the *Act*. These provisions specify that the determinations and decisions made under sections 58, 59 and 60 are not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided under sections 59 to 61 and 67, as applicable.

conclusive unless it is changed within the prescribed time limit under the procedure and the recourse mechanism provided in the *Act*.[65]

136. The Tribunal subscribes to the CBSA's interpretation that Parliament's intention was to ensure that the recourses available to importers of goods subject to payment of customs duties are limited and that, in this instance, neither Desgagnés nor the previous owner had filed a timely objection to the tariff classification of the ship in 1996 according to the procedure provided in sections 59 to 68 of the *Act*. In this regard, the Tribunal notes that, according to section 59, the time limit to request a re-determination or a further re-determination of a determination made under section 58 is four years after the date of such determination. Therefore, since the ship was declared and classified as a temporary importation in March 1996, Desgagnés had until March 2000 to obtain a re-determination of this determination.

137. Indeed, it was only upon filing its application for a refund on January 11, 2002, that Desgagnés challenged the tariff classification of the ship in 1996. Therefore, to the extent that Desgagnés's 2002 application for a refund substantively involves reviewing the tariff classification declared and determined under tariff item No. 9801.00.00 in 1996, it is time-barred. In view of these facts and the applicable legal framework, the Tribunal does not see on what legal basis it could rely to change the tariff classification established in 1996, which would be necessary to accept Desgagnés's arguments, in ruling on this appeal.

138. In this regard, contrary to Desgagnés's claims, it is impossible to change a tariff classification by invoking the effect of statutes other than the *Act*. Indeed, the *Act* leaves no doubt as to Parliament's intention to prevent a change to the tariff classification of goods from being made automatically in the absence of a re-determination by an officer or by the President of the CBSA. To conclude otherwise would be tantamount to authorizing an importer to circumvent the *Act* and broaden the remedies available to an importer regarding a tariff classification. The Tribunal does not see anything in the maritime law provisions invoked by Desgagnés that would change the general scheme applicable to the importation of goods, including ships, in the way proposed by Desgagnés.

139. Given that neither the former owner of the ship, nor the Marshal after the seizure of the ship in 1996, nor Desgagnés made a timely request for a re-determination of the 1996 tariff classification or that none of them made a correction to the declaration of the tariff classification of the ship under section 32.2 of the *Act* before its judicial sale, and that the *Act* does not provide for the re-determination or amendment of a tariff classification except by the application of its specific recourse mechanism, it is not legally possible to consider that the ship should not have been classified under tariff item No. 9801.00.00 in 1996. In other words, the *Act* does not allow an automatic and retroactive re-determination of the tariff classification of the ship in 1996 and the conclusion that such an automatic change, after the fact, would have rendered the customs duties payable just before the judicial sale, so that this sale would have subsequently removed them.

140. As for Desgagnés's arguments that the ship no longer met the conditions of tariff item No. 9801.00.00 at the time of the judicial sale, in the Tribunal's view, they are irrelevant. Indeed, legally, what is important is that the determination of the 1996 tariff classification was not changed within the prescribed time limit. At that time, that determination, whether valid or not, became final and conclusive and can no longer be reviewed by the Tribunal or otherwise. Following this line of reasoning, even if the Tribunal accepted Desgagnés's argument that, before the judicial sale, the Marshal had the duty to correct the 1996 declaration concerning the tariff classification of the ship under section 32.2 of the *Act* because it

65. *Neles Controls Ltd. v. Canada*, 2002 FCA 107 (CanLII); *Kearns and McMurchy Inc. v. Canada*, 2003 FCT 814 (CanLII).

had become defective after the release without accounting for the ship,[66] the fact remains that such a correction to the initial declaration was not made. The Tribunal cannot act as if or presume that such a correction exists because it could or should have been made, and the absence of such a declaration may not be used against the CBSA.

141. According to the Tribunal, this conclusion is consistent with the following observation of the Federal Court of Appeal in *C.B. Powell II*:[67]

> . . . this administrative regime [the regime provided by the *Act*] may have other purposes, such as ensuring administrative efficiency in the handling of the flood of imported goods that arrive at our borders every day. In an administrative regime designed to deal with such a flood, it may be legitimate to require importers to be held to the declarations they make and to limit their ability to launch appeals in order to try to claim a tax treatment that could have been claimed earlier. I note that Parliament's words in sections 58, 59, 60 and 67 of the Act do not give unlimited rights of appeal to importers.

142. Indeed, the Tribunal subscribes to the CBSA's argument that Desgagnés cannot invoke a correction that was never made to obtain a change of the tariff classification of the ship as determined in 1996 in an objection to the 1999 tariff classification. Moreover, in fact, the evidence indicates that the ship was declared in 1996 as a temporary importation, and the ship was then correctly classified as a ship assigned to a non-taxable use in Canada, namely, international freight transportation. This use was subsequently confirmed by Desgagnés since, after acquiring the ship, it assigned the ship to the same use between 1996 and 1999. No re-determination of this classification was requested. In its correspondence with the CBSA in 1999, Desgagnés also acknowledged that duties would become payable in respect of the ship only once it was assigned to coasting trade operations in Canada.

143. Regarding Desgagnés's arguments that a ship sold under the *Federal Courts Act* is by virtue of this fact alone deemed to be a ship released for the application of the *Act*, this conclusion, in the Tribunal's view, does not emerge from the wording of the provisions invoked by Desgagnés. Specifically, the Tribunal sees nothing in the wording of section 7 of the *Act*, which provides that the powers, duties and functions established under the *Act* may be exercised in foreign countries where they do not conflict with the laws of those countries, nor in the wording of sections 43 and 275 of the *Canada Shipping Act*, which indicates that the scheme of a judicial sale and execution of judgments in maritime law takes precedence over the *Act* and its regulations. In the Tribunal's opinion, section 275 of the *Canada Shipping Act* seems to govern the cases of conflict between that act and foreign law.[68] This provision is irrelevant in this instance.

144. As for section 43 of the *Canada Shipping Act*, it only affirms the principle that, when a court orders the sale of a ship, the person designated by the court to make the sale has the right to transfer the ship in the same way and to the same extent as if that person were the registered owner. It does not provide that the

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66. In the Tribunal's view, it is unnecessary to rule on the matter of the extent of the Marshal's duties in this regard, in view of the way in which it disposes of this appeal and, for greater certainty, nothing in these reasons should be construed as meaning that the Tribunal subscribes to Desgagnés's argument that the Marshal had the duty to make a correction under section 32.2 of the *Act* or that the obligation to pay the customs duties had arisen at the time of the judicial sale.
67. At para. 29.
68. In *Imperial Oil Ltd. v. Petromar Inc.*, 2000 CanLII 16066 (FC), the Federal Court of Canada indicated that section 275 of the *Canada Shipping Act* is found in Part III of this act, which is entitled "Seamen", which deals with matters such as the hiring and firing of seamen, the payment of their wages, apprenticeship indentures, and working conditions on Canadian ships. Section 275 applies to matters that arise in this context and does not apply in this instance, since the issue has nothing to do with the interests of seamen.

designated person then necessarily transfers a released ship in respect of which customs duties are not payable. In addition, under this provision, if the registered owner of a ship cannot transfer a released ship that can be assigned to a taxable use in Canada, it seems that the person designated by the court to proceed with its judicial sale could transfer the ship only "in the same manner and to the same extent". Therefore, the Tribunal finds that the effect of section 43 cannot be the automatic elimination of the customs duties for which a ship was or might have been dutiable.

145. Moreover, the Tribunal is of the view that the interpretation of these provisions proposed by Desgagnés is not acceptable because it means that each ship engaged in international commercial transportation sold under an Admiralty action *in rem* would be deemed to be a released ship, on which the Government of Canada could no longer require payment of customs duties, no matter the status of the ship under the *Act* before the judicial sale. In the Tribunal's view, nothing in the provisions invoked by Desgagnés allows the conclusion that Parliament's intention was to cancel all the customs duties normally payable in cases of a judicial sale under the *Federal Courts Act* and the *Canada Shipping Act*.

146. In addition, Desgagnés did not cite any case law in support of this interpretation. Rather, it invoked subsection 16(21) of the *Coasting Trade Act*, a provision which is not applicable in this case, but which provides that no ship sold pursuant to the scheme provided by this statute shall be deemed to have been duty paid under the *Customs Tariff* by reason only of that sale, and alleges that, in the absence of an analogous provision in the *Federal Courts Act*, it must be held *a contrario* that a ship sold under the latter statute is, for that reason alone, a ship deemed to be a ship released for the application of the *Act* and the *Customs Tariff*.

147. Although it is true that the different wording of certain statutes can sometimes create the presumption of a difference in meaning and serve as a basis for such *a contrario* reasoning, the Tribunal is not convinced of the validity of Desgagnés's reasoning in this case. Rather, in the Tribunal's view, if Parliament had wanted to nullify the Government's right to claim customs duties in respect of ships sold under an Admiralty action *in rem*, it would have said so expressly. The Tribunal also notes that Desgagnés's interpretation is contrary to the intention, clearly expressed by the legislator in the *Act*, to limit the recourses available to importers regarding the tariff classification of goods and the circumstances that could give rise to a refund of duties paid. Indeed, this is tantamount to an automatic change of tariff classification by virtue of provisions other than those of the *Act*.

148. Desgagnés's interpretation is also contrary to note 3 to Chapter 98 which, in 1996, provided as follows: "Goods entitled to be classified under heading No. *98.01*, 98.02, 98.03, 98.04 (other than tariff item No. 9804.30.00), 98.05 or 98.21 *shall be exempt from all duties*, other than the customs duties imposed under Part I of this Act with respect to tariff item No. 9804.30.00, *notwithstanding the provisions of this or any other Act of Parliament*" [emphasis added]. Since the ship could be classified in heading No. 98.01 at the time of its arrival in Canada in 1996, and that this classification was not subsequently re-determined or corrected under the *Act*, the Tribunal finds that it should have been exempt from customs duties at that time, notwithstanding the provisions of any other Act of Parliament.

149. The Tribunal agrees with the CBSA and also considers that the reasonable interpretation of all the relevant provisions allowing them to be given full effect in the circumstances is that the Marshal sells a ship possessing the same attributes as the owner in whose hands it was seized. In this case, the ship was classified under tariff item No. 9801.00.00 as a ship engaged in international commercial transportation when it was seized, and it was still classified under this tariff item when it was sold by judicial sale. Thus, it was still a ship engaged in international commercial transportation when Desgagnés acquired it and not a ship which had "once been released and accounted for under section 32" of the *Act*.

150. Contrary to Desgagnés's claims, this interpretation is not unfair and does not disadvantage potential Canadian buyers relative to potential foreign buyers that submit proposals to be awarded a ship under a judicial sale in the case of an Admiralty action *in rem*. Indeed, nothing compels a potential Canadian buyer to import a ship engaged in international commercial transportation seized in Canada in order to assign it to a taxable use in Canada. It is lawful for a potential Canadian buyer, just like a foreign buyer, to continue to use the ship acquired under the sale for international commercial transportation purposes. This is what Desgagnés did between 1996 and 1999, after the acquisition of the ship in this case. Conversely, if a foreign buyer wanted to use the ship to engage in coasting trade operations in Canada, the ship would then become subject to the applicable customs duties and thus could not be imported duty-free.

151. Therefore, the Tribunal finds that the CBSA correctly classified the ship under tariff item No. 8901.90.90 in July 1999 on the basis of Desgagnés's declaration, because it did not meet the first criterion to be classified under tariff item No. 9814.00.00 at that time.

152. Finally, the Tribunal notes that another condition for the application of tariff item No. 9814.00.00 is that the goods be ". . . returned without having been advanced in value or improved in condition by any process of manufacture or other means, or combined with any other article abroad." In this regard, Desgagnés did not submit any evidence or call any witnesses to prove that the ship had been returned to Canada in 1999 without having been advanced in value or improved in condition at the time of its acquisition in 1996. The Tribunal cannot assume that such was the case. Therefore, Desgagnés has not met its burden of proving that the ship fulfilled this other criterion to be classified under tariff item No. 9814.00.00 in 1999.

153. In conclusion, the Tribunal finds that the CBSA correctly classified the ship under tariff item No. 8901.90.90 in 1999 and, therefore, that Desgagnés's application for a refund was unfounded in fact and in law.

DECISION

154. Therefore, the appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member