



Ottawa, Monday, February 17, 1992

Appeal No. AP-90-245

IN THE MATTER OF an appeal heard on October 23, 1991, under subsection 61(1) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15;

AND IN THE MATTER OF a re-determination of the Deputy Minister of National Revenue for Customs and Excise dated September 20, 1990.

BETWEEN

ONE HOUR PHOTO CENTRE

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. There is no evidence that authorizes the Tribunal to find that the Deputy Minister of National Revenue for Customs and Excise did not act within the statutory framework provided by the *Special Import Measures Act*.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-245

ONE HOUR PHOTO CENTRE

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

This appeal concerns two issues, the first, whether the appeal was filed within the time limit provided under the Special Import Measures Act (the Act) and the second, whether the appellant is liable to pay anti-dumping duties on certain photo albums.

HELD: *The appeal is dismissed. The Tribunal has jurisdiction to hear the appeal as it was filed within the time limit prescribed under the Act. However, there is no statutory basis to support the proposition that duties should be waived because the appellant could not exercise the option of having the goods destroyed in lieu of paying the duties as the goods were no longer in its possession at the time of the re-determination.*

*Place of Hearing: Calgary, Alberta
Date of Hearing: October 23, 1991
Date of Decision: February 17, 1992*

*Tribunal Members: Arthur B. Trudeau, Presiding Member
Sidney A. Fraleigh, Member
W. Roy Hines, Member*

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Janet Rumball

*Appearances: Jerri Lo, for the appellant
Howard A. Baker, for the respondent*

Case Cited: *The Muffin House Bakery Ltd. v. The Deputy Minister of National Revenue for Customs and Excise, (1986) 11 T.B.R. 315.*

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ONE HOUR PHOTO CENTRE

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
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Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
SIDNEY A. FRALEIGH, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal under subsection 61(1) of the *Special Import Measures Act*¹ (the Act) from a re-determination by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) with respect to photo albums imported from Hong Kong that were subject to a finding of material injury under the Act.

There are two issues raised by this appeal: first, whether the notice of appeal was filed within the 90-day time limit prescribed by subsection 61(1) of the Act; and second, whether the application of anti-dumping duties should be waived because the importer, at the time of the re-determination by the Deputy Minister, was no longer able to exercise the option of having the goods destroyed in lieu of paying the duties as the goods had been distributed to customer.

The basic facts in this case are as follows. On June 28, 1989, the appellant received a shipment of 20,600 photo albums imported from Hong Kong on which a customs duty of \$268.10 was assessed. On February 28, 1990, a Detailed Adjustment Statement imposed an anti-dumping duty of \$4,576.04. On July 31, 1990, the appellant provided 7,140 photo albums to the Department of National Revenue (Revenue Canada) for destruction in lieu of payment of the additional duties. On September 20, 1990, the Deputy Minister issued a revised Detailed Adjustment Statement under section 59 of the Act requesting payment of \$2,989.98 for anti-dumping duties on the remaining 13,460 photo albums.

The issue of whether the appeal was filed in time will be dealt with at the outset as it concerns the jurisdiction of the Tribunal to hear the appeal.

Subsection 61(1) of the Act reads as follows:

61. (1) A person who deems himself aggrieved by a re-determination of the Deputy Minister made pursuant to section 59 with respect to any goods may appeal therefrom to the Tribunal by filing a notice of appeal in writing with the Deputy Minister and the Secretary of the Tribunal within ninety days after the day on which the re-determination was made.

1. R.S.C., 1985, c. S-15.

Counsel for the respondent argued that the Tribunal did not have jurisdiction to hear the appeal as the notice of appeal was filed with the Tribunal after the statutory deadline.

The facts available from the file and the evidence adduced at the hearing indicate that a Request for Re-determination dated December 18, 1990, was forwarded to Revenue Canada by the appellant on that day by overnight courier. Also, the document received by Revenue Canada was date stamped Central Index, December 21, 1990. The appellant's witness at the hearing testified that this document was meant to be a notice of appeal and admitted that it had been wrongly sent to Revenue Canada alone. In fact the "document" was subsequently submitted to the Tribunal by an official of Revenue Canada under a covering letter dated January 11, 1991. The appellant's witness also testified, and there is documentary evidence as well, that the documents were delivered by courier to Revenue Canada and that pick up had occurred on December 18, 1990, at his counsels' offices in Calgary.

The first issue is to determine if the fact that no document was filed with the Secretary of the Tribunal voids the appellant's right of appeal. The Tribunal is of the view that this in itself does not void the appeal as it is in the nature of procedural matters. There is clear evidence that the appellant wished to file an appeal and had filed a document which was addressed to Revenue Canada under cover of a letter dated December 18, 1990, to be sent by overnight courier. The documents were subsequently sent to the Secretary of the Tribunal by Revenue Canada. The Tribunal, therefore, recognizes the document in question as an appeal.

Having made this decision, the Tribunal, however, is of the view that there is a statutory obligation for the appeal to have been filed within the 90-day time limit imposed by the statute. In this regard, the facts in this case are as follows. The re-determination is dated September 20, 1990, and the day following that date is, therefore, day one of the 90-day time limit pursuant to subsection 61(1). Accordingly, the appellant had until the end of the day on December 19, 1990, to file the appeal. As there is evidence that December 18, 1990, the day the appellant signed the document and requested courier delivery is correct and a proper reflection of the facts, the Tribunal is of the view that the time requirement for filing the appeal has been met. It is only proper that both the computation of the first and last date in the 90-day time limit be subject to the same rule, i.e., the date the documents were dated and sent. Furthermore, no proof could be provided by Revenue Canada's officials that the document had not been received physically prior to December 21, 1990, the day on which, presumably, it was date stamped.

The decision by the Tariff Board (the Board) in *The Muffin House Bakery Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*² provides support for the Tribunal's decision in this case. In that case, the Board indeed had to decide whether an appeal sent by electronic mail from Vancouver, the 60th day of a time-limit period of 60 days, had been correctly filed with the Board Secretary in Ottawa pursuant to subsection 47(1) of the *Customs Act*,³ a provision similar to the one at issue. The Board accepted that the notice of appeal was filed within the statutory time limit, even though it received it on the 61st day, because it concluded that:

2. (1986) 11 T.B.R. 315.

3. R.S.C., 1970, c. C-40.

... the mode of communication chosen by the sending party constitutes an election of a mode of transmission for any reply or for the exercise of any right involved, which mode the sender must accept as sufficient in the absence of any explicit wording as to any particular mode of response, in the present case, for filing an appeal against the decision reported in the message received. (at p. 324)

With respect to the other issue, the Tribunal is satisfied that the Deputy Minister was acting in accordance with the statute when the re-determination was issued. The proposition that the appellant should not be liable for anti-dumping duties, or excused of these duties, because the goods could no longer be returned to Revenue Canada to be destroyed is of no assistance. As the goods were imported into Canada and were the subject of anti-dumping duties, there can be no remedy that would waive the application of anti-dumping duties. The evidence, moreover, reveals that the appellant was indeed aware of the anti-dumping duties to be levied on the imported goods when it cleared customs and, therefore, it cannot be said that it was taken by surprise.

For the foregoing reasons, the appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

W. Roy Hines

W. Roy Hines
Member