CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, January 26, 1993

Appeal No. AP-91-180

IN THE MATTER OF an appeal heard on October 20 and 23, 1992, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated August 24, 1991, with respect to a request for a re-determination pursuant to section 63 of the *Customs Act*.

BETWEEN

SHRIMP PROJECTORS INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appellant filed its notice of appeal outside 90 days after the time notice of the decision of the Deputy Minister of National Revenue for Customs and Excise was given to the appellant. As such, the Tribunal lacks the jurisdiction to consider the merits of the appeal. The appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. AP-91-180

SHRIMP PROJECTORS INC. **Appellant**

and

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

The Tribunal has to address a preliminary matter in respect of an appeal initiated under section 67 of the Customs Act. The preliminary issue is whether the appellant has appealed the decision of the Deputy Minister of National Revenue for Customs and Excise made pursuant to section 63 of the Customs Act within the statutorily prescribed 90 days after the time notice of the decision was given, thus giving the Tribunal the jurisdiction to consider the merits of the appeal.

HELD: *On the basis of the evidence and arguments presented by the parties, the Tribunal concludes that it lacks the jurisdiction to consider the merits of the appeal. In its assessment, the appellant filed its notice of appeal outside 90 days after notice of the decision of the Deputy Minister of National Revenue for Customs and Excise was given.*

Place of Hearing:	*Edmonton, Alberta*
Dates of Hearing:	*October 20 and 23, 1992*
Date of Decision:	*January 26, 1993*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Arthur B. Trudeau, Member* *Sidney A. Fraleigh, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Douglas Tkachuk, for the appellant* *Linda J. Wall, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-180

SHRIMP PROJECTORS INC. **Appellant**

and

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

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
ARTHUR B. TRUDEAU, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This represents the decision of the Tribunal on a preliminary matter made in respect of an appeal initiated under section 67 of the *Customs Act*[1] (the Act). The preliminary issue is whether the appellant has appealed the decision of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) made pursuant to section 63 of the Act within the statutorily prescribed 90 days after the time notice of the decision was given, thus giving the Tribunal the jurisdiction to consider the merits of the appeal. Counsel for the respondent acknowledged that if the Tribunal determined that it had the jurisdiction to proceed to the merits of the appeal, the respondent would agree to the tariff classification proposed by the appellant.

For purposes of completeness, the goods, the subject of the appeal, are described in the appellant's brief to the Tribunal as "two Digital Test Bed Computers, one with variable display optics and one with RGB optics." At the hearing, the appellant's witness, Mr. Neil W. Nichols, the sole director and officer of the appellant company, described the goods as a "real-time data-graphics video projector." Counsel for the respondent, in her brief, described the goods as two models of colour video projectors designed to be used in conjunction with computer and television signal sources. It was explained that when the goods are used in conjunction with a computer, digital graphics and text are dumped from the computer to the projector, whereupon they are projected onto a screen. These projectors are also capable of accepting NTSC, PAL, PAL-M, SECAM and S-VHS television signals to project real-time moving television pictures. This evidence was not addressed at the hearing.

The goods were imported into Calgary, Alberta, on September 9, 1989, under tariff item No. 8471.20.00. However, on October 18, 1989, a determination under subsection 58(1) of the Act classified the goods under tariff item No. 9008.30.00. On January 15, 1990, the appellant, through its authorized customs brokers, submitted a request for a re-determination pursuant to paragraph 60(1)(*a*) of the Act. On April 19, 1990, the respondent rendered a decision under subsection 60(3) of the Act, confirming the decision made under subsection 58(1). By adjustment request date stamped June 27, 1990, the appellant, again through its customs brokers, submitted

1. R.S.C. 1985, c. 1 (2nd Supp.).

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a request for a further re-determination under paragraph 63(1)(*a*) of the Act. By letter dated May 23, 1991, the appellant, on its letterhead, supplemented this latter request with a "technical submission" advocating its initial classification of the goods. The submission was apparently made on the request of an official from the Department of National Revenue, Customs and Excise (Revenue Canada), who sought additional information on the imported goods. Mr. Nichols noted that the customs brokers were no longer involved at the stage when supplementary submissions were made.

The witness recounted that he did not receive notice of the Deputy Minister's decision, rendered under subsection 63(3) of the Act, until September 26 or 27, 1991, when he phoned Revenue Canada. Mr. Nichols testified that he was informed that the Deputy Minister had confirmed the tariff classification, rendered under subsection 58(1) of the Act, in a decision dated August 28, 1991. He received a faxed copy of that decision from Revenue Canada on September 26, 1991. Based on that information, he diarized the 90-day appeal period, of which he was aware, and filed his notice of appeal to the Tribunal on this basis. However, when he was preparing the appeal, he noticed on the faxed copy of the decision that it was rendered on August 24, 1991. The appellant filed its notice of appeal on November 26, 1991.

Counsel for the respondent argued that the Deputy Minister's decision was rendered on the basis of the request for a further re-determination made under subsection 63(1) of the Act. That request was made on behalf of the appellant by customs brokers, who instructed the Deputy Minister, on the adjustment request form, to mail the decision to their address, which is what occurred. The decision of the Deputy Minister is dated Saturday, August 24, 1991. Counsel argued that it is the respondent's normal practice to mail decisions issued on the weekend on the next business day. Based on this practice, the respondent takes the position that the decision was mailed on Monday, August 26, 1991.[2] Counsel noted, therefore, that the 90-day appeal period expired on November 22, 1991. As the appellant's notice of appeal is dated November 26, 1991, the appellant missed the statutorily prescribed appeal period and the Tribunal therefore lacks the jurisdiction to address the merits of the appeal.

Counsel for the appellant noted that the notice of appeal that is claimed to be statute barred by the respondent was in respect of the tariff classification confirmed by the Deputy Minister under section 63 of the Act. However, in the respondent's brief submitted for purposes of the hearing, the appellant was notified that the Deputy Minister had abandoned tariff item No. 9008.30.00 and now took the position that the goods should be classified under tariff item No. 8528.10.99. Counsel argued, therefore, that the appellant should have 90 days from notice of this new tariff classification to launch an appeal. As the respondent's brief was received in August 1992, the appellant was within the time to appeal. Counsel contended that it would be a breach of the rules of natural justice not to know the case that must be made and not to be given an opportunity to respond to the new classification.

Counsel for the appellant acknowledged that a formal request for a further re-determination under paragraph 63(1)(*a*) of the Act was filed by customs brokers, who

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2. In support of this submission, counsel referred to section 149 of the Act that states: "For the purposes of this Act, the date on which a notice is given pursuant to this Act or the regulations shall, where it is given by mail, be deemed to be the date of mailing of the notice, and the date of mailing shall, in the absence of any evidence to the contrary, be deemed to be the day appearing from such notice to be the date thereof unless called into question by the Minister or by some person acting for him or Her Majesty."

instructed the Deputy Minister to mail the response to their address. He argued, however, that the letter of May 23, 1991, from Mr. Nichols was in effect a "second appeal." No reference to the brokers was made; rather, the letterhead of the appellant was used, giving the appellant's mailing address. It was submitted that the response to this appeal should have been directed to the appellant and not to the brokers, and because the appellant only became aware of the decision of the Deputy Minister on September 26, 1991, it is on this date that the 90-day period commences. As the notice of appeal was filed on November 26, 1991, it was done within the 90-day period and, therefore, the Tribunal has the jurisdiction to consider the merits of the appeal.

Counsel for the respondent noted that an appeal under section 67 of the Act to the Tribunal is from a decision of the Deputy Minister made on the basis of a request for a further re-determination under paragraph 63(1)(*a*) of the Act. Authorized customs brokers filed the request for a further re-determination and instructed the Deputy Minister to mail the response to their offices. The letter from Mr. Nichols dated May 23, 1991, was not an appeal or request for a further re-determination; it was simply a submission in support of the request of re-determination.

With regard to the new tariff classification proposed in the respondent's brief, counsel for the respondent noted that it is a normal practice during the litigation process to have a change in position. She noted that an appeal under section 67 of the Act is from a decision of the Deputy Minister made under section 63 or 64 of the Act. The new classification proposed in the brief did not represent a formal decision of the Deputy Minister made under the Act.

On the basis of the evidence and arguments presented by the parties, the Tribunal concludes that it lacks the jurisdiction to consider the merits of the appeal. In its assessment, the appellant filed its notice of appeal outside 90 days after notice of the decision of the Deputy Minister was given.

The Tribunal did not accept the argument that the new tariff classification proposed by counsel for the respondent in her brief created a new right to appeal for the appellant, thus giving it a further 90 days within which to appeal. Section 67 of the Act, under which this matter proceeds, creates a right of appeal from a "decision of the Deputy Minister made pursuant to section 63 or 64" of the Act. Under these latter provisions, the Deputy Minister may re-determine the tariff classification of imported goods or re-appraise their value for duty. Under both sections, the Deputy Minister must give notice of the decision. Counsel's proposed tariff classification was not a re-determination made pursuant to either section 63 or 64 of the Act.

The request for a further re-determination under paragraph 63(1)(*a*) of the Act was made by Professional Customs Brokers Canada Ltd. on behalf of the appellant. On the request form, under the heading "MAIL TO," the name of Professional Customs Brokers Canada Ltd. appears. The Tribunal interprets this to mean that the Deputy Minister was directed to mail all correspondence to the brokerage firm, unless otherwise directed. Counsel for the appellant argued that the technical submission of May 23, 1991, made on the letterhead of the appellant, was directed to the Deputy Minister to mail the notice of decision directly to the appellant. However, the decision was mailed to Professional Customs Brokers Canada Ltd., and the appellant did not receive notice of that decision until Mr. Nichols made inquiry in September 1991. The Tribunal has given careful consideration to the technical submission and cannot read into it a request to the Deputy Minister to disregard the explicit instruction contained in the request for a further re-determination and, instead, mail the decision directly to the appellant. Nor can the Tribunal view the technical submission as a "second appeal."

The Tribunal is troubled that the respondent was prepared to accept the tariff classification urged by the appellant if the Tribunal found that it had the jurisdiction to pronounce on the matter. If the respondent accepts that classification as correct, the appellant should not have been subject to the burden of appealing to the Tribunal. If it is within the power of the Deputy Minister to adopt that classification, the Tribunal urges such action to be taken.

Desmond Hallissey
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Arthur B. Trudeau
Arthur B. Trudeau
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