

Ottawa, Thursday, January 27, 2000

Appeal No. AP-92-238

IN THE MATTER OF an appeal under section 81.19 of the
Excise Tax Act, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a motion filed by the Minister of
National Revenue on February 1, 1999, pursuant to rule 24 and
subrule 25(1) of the *Canadian International Trade Tribunal Rules*

BETWEEN

DRISCOLL'S DARTS & TROPHIES LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The respondent's motion is granted, and the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-238

DRISCOLL'S DARTS & TROPHIES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issue in this motion is whether the Tribunal has jurisdiction to dismiss an appeal for failure to comply with a direction of the Tribunal. The appellant, which filed a notice of appeal under the *Excise Tax Act* within the statutorily prescribed time limits, has failed to comply with a direction of the Tribunal to submit a brief in support of the appeal.

HELD: The motion is granted, and the appeal is dismissed. The Tribunal is empowered to grant the respondent's motion by virtue of paragraph 29(b) of the *Canadian International Trade Tribunal Rules*. The Tribunal is of the view that it may dismiss an appeal pursuant to paragraph 29(b) where the appellant has failed to comply with an order or direction of the Tribunal. The appellant has not complied with two directions from the Tribunal. This appeal has been delayed for seven years, over which time the respondent has had to maintain an open file and has had to make attempts to locate the appellant. There is no reasonable alternative remedy available to the Tribunal in these circumstances. Requiring the respondent to prepare for a hearing, including the filing of a brief, in a situation in which it seems certain the appellant will not file a brief nor appear is not reasonable. As such, the Tribunal hereby grants the respondent's motion to dismiss this appeal according to paragraph 29(b) on the grounds that the appellant has failed to comply with the direction of the Tribunal.

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 5, 2000
Date of Decision: January 27, 2000

Tribunal Member: Pierre Gosselin, Presiding Member

Counsel for the Tribunal: Gerry Stobo
John Dodsworth

Clerk of the Tribunal: Anne Turcotte

Parties: M.J. Driscoll, for the appellant
R. Jeff Anderson, for the respondent

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REASONS FOR DECISION

The respondent in this appeal has filed a notice of motion seeking an order from the Tribunal dismissing the appeal as a result of the fact that the appellant did not file its brief, although directed to do so by the Tribunal over three years ago.

The appeal in question is with respect to the denial by the respondent of the appellant's application for a federal sales tax inventory rebate. The following is a chronology of events subsequent to the launching of the appeal:

1. On December 4, 1992, the appellant filed an appeal pursuant to section 81.19 of the *Excise Tax Act*,¹ with respect to a decision of the respondent pursuant to section 81.17 of the *Excise Tax Act*.
2. On February 7, 1993, the appellant requested a two-month extension to submit its written brief.
3. On February 16, 1993, the Tribunal granted this request and directed that the appellant's brief be filed by April 13, 1993.
4. In a letter submitted April 27, 1993, by Mr. Robert E. Skelly, MP for Comox-Alberni, on behalf of the President of Driscoll's Darts & Trophies Ltd., Mr. M.J. Driscoll, a further extension to submit the appellant's brief was requested.
5. This request was also granted by the Tribunal, and a new deadline of May 31, 1993, was set.
6. On May 28, 1993, the appellant requested an additional extension to file its brief. The appellant requested that the appeal be held in abeyance until the decision in *Techtouch Business Systems Ltd.*² was made and that it be granted a period of two months after that decision to file its brief. On June 2, 1993, the Tribunal notified the appellant that it agreed to postpone the hearing of the

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

2. Federal Court of Canada, Trial Division, Court File No. T-70-93 [hereinafter *Techtouch*].

- appeal until the decision of the Federal Court of Canada in the *Techtouch* case was rendered, with the appellant being granted an additional 60 days from that date to file its brief.
7. On October 29, 1996, the Tribunal informed the appellant that, as the *Techtouch* case had been discontinued, it had until December 18, 1996, to file its brief.
 8. The appellant did not file its brief.
 9. On February 1, 1999, the respondent filed a notice of motion for dismissal.
 10. On September 25, 1999, notice was published in the *Canada Gazette* indicating that the respondent had filed a notice of motion for dismissal and that the Tribunal's efforts to locate Mr. Driscoll had been unsuccessful and directing that the appellant show cause by October 18, 1999, why the appeal should not be dismissed, as requested in the notice of motion.

POSITION OF THE PARTIES

The respondent argues that the appellant's failure to file its brief constitutes a complete failure to comply with the rules and directions of the Tribunal. It argues that the Tribunal has authority to dismiss a case for delay, as granted in rule 5 of the *Canadian International Trade Tribunal Rules*,³ particularly when that rule is read in conjunction with rules 29 and 46.

The respondent states that the appellant's failure to prosecute its appeal also warrants the dismissal of its appeal. It argues that the Tribunal controls its own processes and jurisdiction to dismiss a case for delay, as conferred upon it by subsection 17(2) of the *Canadian International Trade Tribunal Act*.⁴

Finally, the respondent argues that recent decisions of the Tribunal⁵ fully support his position in the appeal, that the appeal would likely fail in any case and that the appellant, having been apprised of the case law in question, has likely decided not to pursue the appeal.

As mentioned above, the appellant has not responded to either the notice of motion or the notice published by the Tribunal in the September 25, 1999, edition of the *Canada Gazette* in which the Tribunal directed that it show cause why the appeal should not be dismissed.

DECISION

In *DMNRCE v. Unicare Medical Products*,⁶ the Tribunal determined that it did not have jurisdiction to dismiss an appeal for want of prosecution. The Tribunal reasoned that the relevant provisions of the *CITT Act* and the *Customs Act*⁷ clearly direct the Tribunal to allow an appellant, that has filed a notice of appeal within the prescribed time limit, an opportunity to be heard at an oral hearing. The Tribunal also

3. S.O.R./91-499 [hereinafter *CITT Rules*]. Rule 29 states, under the heading "*Failure to Comply*":

Where a party to a proceeding has not met any requirement of these Rules or complied with any order or direction issued by the Tribunal, the Tribunal may

(a) stay the proceeding until it is satisfied that the requirement has been met or the order or direction has been complied with; or

(b) make such order as it considers appropriate.

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

5. *Jostens Canada v. MNR* (28 April 1994), AP-92-195 (CITT); and *Harry M. Guenberg, Synoda Co. Reg'd v. MNR* (5 April 1994), AP-92-252 (CITT).

6. (30 April 1990), 2437, 2438, 2485, 2591 and 2592 (CITT) [hereinafter *Unicare*].

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

rejected the argument, raised in this case by the respondent in the notice of motion, that the Tribunal is a master of its own procedure. To do so would be, under the guise of a procedural matter, an attempt by the Tribunal to restrict the substantive right to have an opportunity to be heard at an oral hearing.

However, the *CITT Rules* were enacted in 1991 and, therefore, were not in place at the time that *Unicare* was decided. As such, the Tribunal could not have considered the effect of rule 29 in circumstances in which a party has failed to comply with an order or direction of the Tribunal. It is worthwhile considering the potential application of this rule to strike appeals in the most egregious cases. It is essential that the Tribunal have some mechanism to exercise control over the management of its caseload.

It is the Tribunal's view that current paragraph 29(b) of the *CITT Rules* permits it to strike an appeal for non-compliance with a direction of the Tribunal. While this constitutes potentially serious consequences for the offending party, nothing in the *Unicare* decision would prevent the Tribunal from taking this interpretation. In the Tribunal's view, it is reasonable to read paragraph 29(b) in this manner in those exceptional cases where a party simply refuses to comply with the Tribunal's orders or directions. In those cases where a party has failed to file briefs or to take steps towards the disposition of the case, contrary to the Tribunal's order or direction, the Tribunal may decide, after taking factors such as the following into account, to strike the appeal. The relevant grounds include:

1. an inordinate delay in proceeding with an appeal;
2. no reason, acceptable to the Tribunal, for the failure to comply with the direction;
3. prejudice to the other party as a result of the delay; and
4. the absence of any other meaningful remedy.

It is the Tribunal's view that the present case satisfies these criteria. Clearly, this matter has been delayed for a significant period of time. It was initiated in 1992 and there has been no contact with or from the appellant since 1996.

No reason has been offered by the appellant to explain this failure. In fact, it appears that the appellant has no intention of proceeding with the appeal. It would not be reasonable, in the circumstances, to require the respondent to prepare for a hearing, including the filing of a brief, in a situation in which it seems certain that the appellant will not file a brief and will not appear.

The appellant has not complied with the rules and previous Tribunal correspondence with respect to the filing of material, nor has it complied with the notice published on September 25, 1999, in which the Tribunal directed the appellant to file its brief and show cause why the case should not be dismissed. Given the foregoing and as there is no other meaningful remedy available to the Tribunal, the Tribunal hereby grants the respondent's motion to dismiss this appeal pursuant to paragraph 29(b) of the *CITT Rules* on the grounds that the appellant has failed to comply with the direction of the Tribunal.

In light of the foregoing, the motion is granted, and the appeal is dismissed.

Pierre Gosselin

Pierre Gosselin
Presiding Member