



Ottawa, Wednesday, July 6, 1994

Appeal No. AP-93-063

IN THE MATTER OF an appeal heard on November 10, 1993, 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 April 28, 1993, with respect to a request for a further re-determination under section 63 of the *Customs Act*.

**BETWEEN**

**WALKER EXHAUSTS  
DIVISION OF TENNECO CANADA INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed in part.

Desmond Hallissey  
Desmond Hallissey  
Presiding Member

Charles A. Gracey  
Charles A. Gracey  
Member

Lise Bergeron  
Lise Bergeron  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-93-063**

**WALKER EXHAUSTS  
DIVISION OF TENNECO CANADA INC.**

**Appellant**

**and**

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

**Respondent**

*The appellant imported into Canada goods which were classified as mufflers. Under paragraph 60(1)(a) of the Customs Act, the appellant filed requests for re-determination of the tariff classification of the goods. The appellant simultaneously requested a re-determination of the origin of the goods, for purposes of securing U.S. tariff treatment. The appellant's requests for re-determination under section 60 of the Customs Act were denied. The appellant filed a request, under paragraph 63(1)(b) of the Customs Act, for a further re-determination of the origin of the goods, which request was denied because it was the view of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) that the appellant's request could have been filed within the prescribed time limit.*

*Counsel for the respondent raised a preliminary issue concerning the Tribunal's jurisdiction to grant the relief requested by the appellant. Counsel submitted that the Deputy Minister had not made a "decision" which could be appealed under subsection 67(1) of the Customs Act. Counsel also suggested that the Tribunal lacked the requisite jurisdiction to consider the Deputy Minister's decision not to allow the further re-determination to proceed.*

**HELD:** *The appeal is allowed in part. The Tribunal finds that the Deputy Minister's decision not to allow the further re-determination to proceed under paragraph 63(1)(b) of the Customs Act was a "decision" within the meaning of subsection 67(1) of the Customs Act and that it is, therefore, appealable under that subsection. Moreover, the Tribunal finds that the Deputy Minister exercised his discretion not to allow the further re-determination to proceed on the basis of a misapprehension of the facts underpinning this matter and, on that basis, the Tribunal is prepared to grant the appellant at least part of the relief that it requested.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: November 10, 1993  
Date of Decision: July 6, 1994*

*Tribunal Members: Desmond Hallissey, Presiding Member  
Charles A. Gracey, Member  
Lise Bergeron, Member*

*Counsel for the Tribunal: John L. Syme*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: John D. Armstrong, for the appellant  
Linda J. Wall, for the respondent*

Appeal No. AP-93-063

**WALKER EXHAUSTS  
DIVISION OF TENNECO CANADA INC.**

**Appellant**

**and**

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

**Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member  
CHARLES A. GRACEY, Member  
LISE BERGERON, Member

**REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) dated April 28, 1993.

Between January 17 and July 5, 1989, the appellant imported into Canada goods which were classified as mufflers under tariff item No. 8708.92.90 of Schedule I to the *Customs Tariff*.<sup>2</sup> Under paragraph 60(1)(a) of the Act, the appellant filed requests dated April 20 and December 4, 1989, and January 10, 1990, for re-determination of the tariff classification of the goods. The appellant simultaneously requested a re-determination of the origin of the goods, for purposes of securing U.S. tariff treatment.

The goods were reclassified in accordance with the appellant's requests, and that reclassification is not an issue in this appeal. The appellant's request for re-determination of the origin of the goods was denied, as the appellant provided insufficient information to substantiate its request. On October 25, 1990, the appellant submitted a request, under paragraph 63(1)(b) of the Act, for a further re-determination of the origin of the goods by the Deputy Minister.

Subsection 63(1) of the Act provides that:

*Any person may,*  
*(a) within ninety days after the time he was given notice of a decision under section 60 or 61, or*  
*(b) where the Minister deems it advisable, within two years after the time a determination or appraisal was made under section 58,*  
*request a further re-determination of the tariff classification or a further re-appraisal of the value for duty re-determined or re-appraised under section 60 or 61.*

As its request for a further re-determination was filed more than 90 days after the decision under section 60 of the Act, the appellant could not request a further re-determination under paragraph 63(1)(a) of the Act. The appellant, therefore, requested a further

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1. R.S.C. 1985, c. 1 (2nd Supp.).  
2. R.S.C. 1985, c. 41 (3rd Supp.).

re-determination under paragraph 63(1)(b) of the Act. A re-determination under that paragraph may only proceed in circumstances where the Minister of National Revenue (the Minister) deems it advisable. Appendix D to Memorandum D11-6-1<sup>3</sup> sets out the four criteria established by the Minister for determining whether it is deemed advisable for a further re-determination to proceed. A party requesting a further re-determination under paragraph 63(1)(b) of the Act must demonstrate that it satisfies one of those criteria. In the present case, the appellant relied on the third criterion, which is reproduced and discussed below.

On April 28, 1993, the Deputy Minister advised the appellant that a further re-determination of the origin of the goods had been deemed not advisable because the third criterion had not been met.

The issue in this appeal is whether the Deputy Minister was correct in determining that the third criterion was not met. In its brief, the appellant simply stated that "the provisions of section 63(1)(b) criteria # 3 were in fact met" and, on that basis, the Minister should not have refused to exercise his discretion to proceed with a further re-determination.

In the respondent's brief, it was submitted that the appellant had failed to establish that "exceptional circumstances" had precluded it from making its request on time, as required by the third criterion.

Counsel for the respondent also raised a preliminary issue concerning the Tribunal's jurisdiction to grant the relief requested by the appellant. Counsel submitted that the only "decision" that the Deputy Minister may make under section 63 of the Act is a further re-determination decision. Counsel pointed out that the appellant has filed its appeal under subsection 67(1) of the Act, which provides, in part, that:

*A person who deems himself aggrieved by a decision of the Deputy Minister made pursuant to section 63 or 64 may appeal from the decision to the Canadian International Trade Tribunal.*

Counsel for the respondent pointed out that subsection 67(1) of the Act provides for an appeal in respect of decisions of the Deputy Minister. To discover which decisions are appealable, counsel submitted that the Tribunal must have reference to subsection 63(3) of the Act, which provides that:

*On receipt of a request under this section, the Deputy Minister shall, with all due dispatch, re-determine the tariff classification or re-appraise the value for duty, as the case may be, and give notice of his decision to the person who made the request.*

Counsel for the respondent submitted that subsection 63(3) of the Act is the only part of section 63 that speaks of the Deputy Minister making a decision. Therefore, counsel argued, in referring to "a decision of the Deputy Minister made pursuant to section 63," subsection 67(1) of the Act is referring only to those decisions made under subsection 63(3) of the Act. Counsel submitted that, in the present case, because it was deemed not advisable to proceed with a further re-determination, the Deputy Minister never reached the point of making a "decision" under subsection 63(3) of the Act; therefore, there is nothing for the appellant to appeal under

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3. The Determination/Re-Determination and Appraisal/Re-Appraisal of Goods, Department of National Revenue, Customs and Excise, June 1, 1986.

section 67 of the Act, and the Tribunal is, therefore, without jurisdiction to grant the appellant any relief.

Counsel for the respondent argued that, if the appellant disagreed with the criteria established by the Minister or with the manner in which those criteria were applied, it could seek judicial review in some other forum.

In answer to questions put to her by the Tribunal, counsel for the respondent indicated that, under subsection 63(1) of the Act, the Minister specifies the criteria which should guide departmental officials, and ultimately the Deputy Minister, in determining whether an appellant has provided sufficient proof for the exercise of discretion to allow a further re-determination to proceed. Counsel indicated that the Deputy Minister's role under paragraph 63(1)(b) of the Act is to decide whether a person requesting a further re-determination under that paragraph has satisfied any of the criteria established by the Minister. However, counsel was not prepared to characterize a decision of the Deputy Minister under paragraph 63(1)(b) of the Act as a decision within the meaning of subsection 67(1) of the Act. In counsel's submission, the Deputy Minister's decision under paragraph 63(1)(b) of the Act would be better characterized as a "preliminary assessment."

The appellant was represented by Mr. John D. Armstrong, Manager, Customs Litigation Services for Russell A. Farrow Limited. Mr. Armstrong submitted that the Tribunal did have jurisdiction to hear and decide the appellant's case. He submitted that paragraph 16(c) of the *Canadian International Trade Tribunal Act*<sup>4</sup> (the CITT Act) confers a broad jurisdiction on the Tribunal with respect to appeals. Section 16 of the CITT Act provides, in part:

*The duties and functions of the Tribunal are to  
(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.*

Before addressing the substantive issue raised by the appellant in this appeal, the Tribunal considers it appropriate to first deal with the preliminary issue raised by counsel for the respondent regarding the Tribunal's jurisdiction. The Tribunal is of the view that counsel's preliminary issue gives rise to two questions.

First, the Tribunal must determine if the Deputy Minister's decision not to proceed with a further re-determination under section 63 of the Act is a decision within the meaning of subsection 67(1) of the Act. Second, even if the Deputy Minister's action under paragraph 63(1)(b) of the Act can fairly be characterized as a decision, the Tribunal must establish if it has the authority to grant any relief in respect of that decision.

With respect to the first question, the Tribunal has concluded that the Deputy Minister's preliminary assessment is a decision within the meaning of subsection 67(1) of the Act. In reaching this conclusion, the Tribunal first considered the fact that subsection 67(1) of the Act refers to "a decision of the Deputy Minister made pursuant to section 63." The Tribunal notes that the word "decision" in subsection 67(1) of the Act is in no way circumscribed or modified by the other words appearing in that subsection. Had Parliament intended that only decisions made under subsection 63(3) of the Act be appealable, it could have made such a provision.

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

Counsel for the respondent argued that the Deputy Minister never got to the point of making a decision under subsection 63(3) of the Act because the appellant failed to get beyond the preliminary stage under paragraph 63(1)(b) of the Act. However, in *Attorney General of Canada v. S.F. Enterprises Inc.*,<sup>5</sup> the Federal Court of Appeal recognized that a decision which has the practical effect of bringing an appellant's case to an end constitutes a final decision, even if that decision is made on the basis of a preliminary matter and not upon the substantive issue that the appellant had hoped to raise.<sup>6</sup> In the present case, the fact that the Deputy Minister never reached the point of making a decision under subsection 63(3) of Act does not, in the Tribunal's view, preclude the Tribunal from finding that the Deputy Minister's decision not to allow the appellant's further re-determination to proceed was a "decision" within the meaning of subsection 67(1) of the Act.

Simply put, the Tribunal is of the view that the Deputy Minister's "preliminary assessment" was a decision made under section 63 of the Act and that, as such, it may be appealed under subsection 67(1) of the Act.

The second question relates to the nature of the Tribunal's jurisdiction with regard to appeals under section 67 of the Act. The Tribunal is of the view that it is clear from reading subsection 67(3) of the Act that Parliament intended to confer on the Tribunal broad appellate jurisdiction. Subsection 67(3) of the Act provides that:

*On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.*

(Emphasis added)

It is settled law that, when performing an appellate function, administrative tribunals and, indeed, courts of law should refrain from substituting their opinion for that of a decision-maker whose decision is under appeal.<sup>7</sup> In the present case, the Deputy Minister was called upon to decide whether the further re-determination requested by the appellant should be allowed to proceed. He decided that the further re-determination should not proceed. In so doing, the Deputy Minister exercised his discretion under paragraph 63(1)(b) of the Act. Notwithstanding the referenced constraints placed on the Tribunal when acting as an appellate body in an appeal dealing with the exercise of a discretion, the Tribunal is of the view that it may grant relief in respect of a discretionary decision of the Deputy Minister, if it can be shown that the said discretion was exercised based on a wrong principle of law or if the facts which formed the basis for the exercise of the discretion were misapprehended by the Deputy Minister. The Tribunal recognizes that it should intervene on the latter ground only in the most exceptional cases.

As noted above, the appellant filed its request for a further re-determination under paragraph 63(1)(b) of the Act and, in particular, relied on the third criterion established by the Minister. The third criterion provides that a further re-determination will be deemed advisable and allowed to proceed if:

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5. Federal Court of Appeal, unreported, File No. A-137-89, February 26, 1990.

6. See, also, *Her Majesty the Queen v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. at 425.

7. *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited*, [1957] S.C.R. 185.

*The request could not be filed within one year after the time a determination or appraisal was made in respect of the goods under section 57.2 or section 58 [of the Act], due to exceptional circumstances beyond the control of the importer/owner or broker, e.g., extended mail strike.*

To satisfy the Deputy Minister that it is advisable for a further re-determination to proceed under the third criterion, a party has to establish that the following two conditions exist: (1) its request could not be filed within one year after the determination or appraisal was made in respect of the goods; and (2) its inability to file in that time frame was due to circumstances beyond its control. The reference in the third criterion to filing within one year stems from the first criterion established by the Minister. It provides that a further re-determination will be deemed advisable if:

*The request was filed within one year after the time a determination or appraisal was made in respect of the goods under section 57.2 or section 58.*

In short, the first criterion provides that a party may, as of right, request a further re-determination under paragraph 63(1)(b) of the Act, if its request for same is filed within one year of the decision under section 57.2 or 58 of the Act. If the request cannot be filed within one year, a party requesting a further re-determination can proceed under the third criterion and attempt to establish that it could not file within one year due to exceptional circumstances.

In the present case, in denying the appellant's request for a further re-determination, the Deputy Minister's decision stated:

*These requests have been reviewed and a re-determination of origin is not deemed advisable in these cases because criterion 3 has not been met. These claims could have been filed within the prescribed time limits.*

(Emphasis added)

In making this decision, the Deputy Minister relied on the fact that the appellant failed to satisfy the first condition set out in the third criterion. Having concluded that the appellant could have filed its request for further re-determination within one year, the Deputy Minister did not go on to consider whether the appellant's failure to file within that time was due to exceptional circumstances.

In the Tribunal's view, the Deputy Minister erred in concluding that the appellant's requests could have been filed within the prescribed time limit. The sequence of events leading up to the present appeal is as follows:

- (1) January 17 to July 5, 1989 - the appellant imported the goods in issue, and the origin of the goods was determined under section 57.2 of the Act;<sup>8</sup>
- (2) April 20 and December 4, 1989, and January 10, 1990 - the appellant filed requests for re-determination under section 60 of the Act;

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8. The dates of import were: January 17, February 2, February 9, March 7, April 5, April 26, May 31, June 12 and July 5, 1989.

- (3) January 17, 1990 - one year from determination made under section 57.2 of the Act and the date by which a request for further re-determination under paragraph 63(1)(b) of the Act, under the first criterion, had to have been made in respect of the first import;
- (4) June 18, 1990 - three requests for re-determination made under section 60 of the Act are denied; and
- (5) October 25, 1990 - the appellant requested a further re-determination under paragraph 63(1)(b) of the Act, under the third criterion (i.e. after one year from the date of the determination under section 57.2 of the Act due to "exceptional circumstances").

With respect to all but the last of the import transactions, the appellant did not receive the Deputy Minister's re-determination decision under section 60 of the Act until more than one year after the decision under section 57.2 of the Act. The appellant could not request a further re-determination under paragraph 63(1)(b) of the Act, under the first criterion, until after it had received the decision under section 60 of the Act. In effect, by virtue of the delay in obtaining a decision under section 60 of the Act, the appellant was precluded from requesting a further re-determination under paragraph 63(1)(b) of the Act, under the first criterion. In the Tribunal's view, therefore, the Deputy Minister's decision not to allow a further re-determination to proceed on the basis that the request could have been filed within the prescribed time limit represents an exercise of discretion based on a misapprehension of the facts.

Subsection 67(3) of the Act grants the Tribunal the authority to "make such order, finding or declaration as the nature of the matter may require." As noted above, it is the Tribunal's view that, in using these words, Parliament has conferred broad appellate jurisdiction on the Tribunal. In light of the error underpinning the Deputy Minister's exercise of discretion, the Tribunal is of the view that this appeal should be allowed with respect to those import transactions for which the appellant was precluded from requesting a further re-determination under paragraph 63(1)(b) of the Act, under the first criterion.<sup>9</sup>

For the foregoing reasons, the appeal is allowed in part.

Desmond Hallissey  
Desmond Hallissey  
Presiding Member

Charles A. Gracey  
Charles A. Gracey  
Member

Lise Bergeron  
Lise Bergeron  
Member

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9. The dates of import were: January 17, February 2, February 9, March 7, April 5, April 26, May 31 and June 12, 1989.