CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, December 12, 2000

Appeal No. AP-94-143

IN THE MATTER OF an appeal made under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a motion by the appellant requesting that the Tribunal strike out parts of the respondent's brief.

BETWEEN

LIZ CLAIBORNE (CANADA) LTD. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The motion is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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Appeal No. AP-94-143

LIZ CLAIBORNE (CANADA) LTD. **Appellant**

AND

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

TRIBUNAL: PIERRE GOSSELIN, Presiding Member

REASONS FOR DECISION

This decision is with respect to a preliminary motion in an appeal under section 67 of the *Customs Act*.[1] The appeal is from a decision of the Deputy Minister of National Revenue for Customs and Excise (now the Commissioner of the Canada Customs and Revenue Agency) dated April 22, 1994, in which the respondent determined that royalty payments made by the appellant should form part of the value for duty of the goods imported by the appellant.

The appeal was filed with the Tribunal on July 19, 1994. At that time, the appellant requested that the appeal be held in abeyance pending the decision of the Federal Court of Canada — Trial Division in *Reebok Canada* v. *DMNRCE*,[2] which request was granted by the Tribunal on July 25, 1994. On August 15, 1997, the Tribunal informed the parties that the appeal would proceed, given the judgement in *Reebok*. On December 5, 1997, given that a number of other cases relating to value for duty were being heard by the Federal Court of Appeal, the hearing of the appeal was again postponed. The appeal was subsequently recommenced, and a hearing date was set for May 4, 2000. The appellant filed its brief with the Tribunal on December 17, 1999.

In its brief, the appellant argued that royalty payments that it made should not be added to the price paid or payable for the purposes of determining value for duty. In support of its position, the appellant referred to the decision of the Federal Court of Appeal in *DMNR* v. *Mattel Canada*.[3] The appellant stated, at that time, that it reserved the right to file a supplementary brief in respect of the appeal, as the circumstances may warrant, given potential litigation before the Supreme Court of Canada. The respondent filed its brief in the appeal on March 27, 2000.

ARGUMENT

In the present motion, filed with the Tribunal on April 4, 2000, the appellant seeks an order striking out parts of the respondent's brief, on the ground that the Tribunal does not have jurisdiction to hear evidence or argument contained therein. In the alternative, the appellant seeks an order directing that the respondent bear the onus of proof at the hearing of the appeal.

1. R.S.C. 1985 (2d Supp.), c. 1.
2. (1997), 131 F.T.R. 102 [hereinafter *Reebok*].
3. (1999), 236 N.R. 285 [hereinafter *Mattel*].

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The appellant argued that, in his brief, the respondent raised new factual allegations and a new legal theory of control that contradicts that used in the respondent's assessment. Further, the appellant alleges that the position taken in the appeal is based on statutory provisions not previously relied upon by the respondent at the time that the assessment was made. The appellant suggests that proceeding to a hearing during which the respondent is permitted to substantially alter the assessment under appeal would constitute a denial of natural justice and that the Tribunal would exceed its jurisdiction by so doing. For these reasons, the appellant requests that the Tribunal strike those paragraphs of the respondent's brief that contain new allegations of fact and statutory provisions not relied upon by the respondent at the time of his re-assessment. In the alternative, the appellant requests that the Tribunal order that the respondent bear the onus of proof with respect to such allegations.

The respondent argued that it would be inappropriate for the Tribunal to grant the motion. The respondent submitted that he may present new arguments before the Tribunal, given that the proceeding is an appeal and not a judicial review. The respondent argued that only his decision is under appeal, not the reasons for that decision, and that the appellant has inappropriately based its motion on the reasons for the decision, not the decision itself. In this regard, the respondent submits that the fact that duties are payable constitutes the decision and that the reasons for which royalties are dutiable constitute the reasons for that decision.

DECISION

The grounds for the motion brought by the appellant raise the question of whether the respondent, on an appeal, may present new facts, allegations and statutory grounds for his decision that did not form the basis for the assessment. The Tribunal notes that this procedural question has been raised, on motion, in other recent appeals brought before the Tribunal.[4]

The Tribunal also notes that there has been significant delay in proceeding with this appeal, which was launched in 1994 and postponed twice since then. These delays were due to the fact that the issues in the appeal were, at the time, also being considered in cases before the Federal Court of Canada. The judicial consideration of the issues that led to these prior postponements continues, as leave to appeal has been granted by the Supreme Court of Canada in *Mattel*.[5] As such, the Tribunal is of the view that the hearing on the merits of this appeal should be postponed until such time as a decision is reached by the Supreme Court of Canada in *Mattel*.

The appellant has expressed its interest in maintaining the right to file a supplementary brief in this appeal to address any issues that may arise in the decision of the Supreme Court of Canada in *Mattel*. The Tribunal is of the view that there is no "right" enjoyed by the parties to file new briefs after the time periods for doing so have expired, pursuant to the *Canadian International Trade Tribunal Rules*.[6] The Tribunal may permit a party in an appeal to file a supplementary brief, and afford a response from the other party, solely at the Tribunal's discretion. The Tribunal will do so in extraordinary situations where it is of the view that issues essential to the proper determination of the appeal have arisen subsequent to the filing of the briefs.

In this regard, the Supreme Court of Canada's decision in *Mattel* will have an important bearing on the issues before the Tribunal in the present appeal. Therefore, the Tribunal wishes the parties to have an

4. *GFT Mode Canada* v. *DMNR* (18 May 2000), AP-96-046 and AP-96-074 (CITT); and *Tommy Hilfiger Canada* v. *DMNRCE* (13 July 2000), AP-96-050 (CITT).
5. Leave to appeal granted on March 16, 2000.
6. S.O.R./91-499.

opportunity to address that decision in written submissions. However, the Tribunal is of the view that to proceed by way of supplementary briefs would not be efficient and would add an element of confusion to the appeal. The Tribunal is of the view that the most efficient and fair manner to proceed in this regard would be for the parties to file new, complete briefs once the Supreme Court of Canada has rendered its decision in *Mattel*. As such and in light of the Tribunal's jurisdiction to control its own procedure, the Tribunal orders that the briefs filed by the parties, currently on the record, be removed.

As a result of its order that all briefs currently on the record be removed, the Tribunal is of the view that it is unnecessary to consider the issues raised in the motion at this time.

Consequently, the motion is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member