Ottawa, Tuesday, May 7, 1996

IN THE MATTER OF a preliminary issue of jurisdiction in an appeal filed on behalf of Fisher Scientific Ltd., in Appeal No. AP-94-324, 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 to refuse to entertain a request for re-determination of a tariff classification pursuant to paragraph 64(*a*) of the *Customs Act*.

DECISION OF THE TRIBUNAL

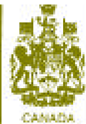
The Canadian International Trade Tribunal hereby concludes that it does not have jurisdiction to hear Appeal No. AP-94-324, as the decision of the Deputy Minister of National Revenue to refuse to entertain the request for re-determination of the tariff classification pursuant to paragraph 64(*a*) of the *Customs Act* does not constitute a decision for purposes of section 67 of the *Customs Act*. Consequently, the appeal is dismissed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary



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AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue to refuse to entertain a request for re-determination of a tariff classification pursuant to paragraph 64(*a*) of the *Customs Act*.

REASONS FOR DECISION

This appeal was filed with the Canadian International Trade Tribunal (the Tribunal) under section 67 of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue (the respondent) to cancel[2] a request for re-determination of the tariff classification of goods described as "automated immunoassay systems" or "AIA-Pack" test kits. The goods in issue were imported on April 26, 1993, and were classified under classification No. 3822.00.00.20 of Schedule I to the *Customs Tariff*.[3] On October 20, 1994, Fisher Scientific Ltd. (the appellant) requested a re-determination of the tariff classification pursuant to paragraph 64(*a*) of the Act. On November 29, 1994, the appellant's request was cancelled on the grounds that the Minister of National Revenue (the Minister) did not deem it advisable to make a re-determination. The detailed adjustment statement also stated that "a re-determination of the tariff classification ... by the Deputy Minister cannot be made in this instance."

The Tribunal was of the view that this appeal raised the following jurisdictional issues: (1) whether a decision of the respondent to refuse to entertain a request for re-determination of the tariff classification pursuant to paragraph 64(*a*) of the Act constitutes a decision for purposes of section 67 of the Act, i.e. whether the Tribunal has jurisdiction to hear the appeal; and (2) in the event that the Tribunal finds that the decision does not constitute a decision for purposes of section 67 of the Act, whether it has the jurisdiction to compel the respondent to exercise his statutory duty. By letter dated June 7, 1995, the Tribunal requested both the appellant and the respondent to make submissions on these issues. As counsel for the respondent had already addressed the jurisdictional issues in his original brief, only the appellant filed an additional brief.

For purposes of clarity, the Tribunal finds it necessary to reproduce, in part, the following provisions of sections 60, 63, 64 and 67 of the Act:

> *60. (1) The importer or any person who is liable to pay duties owing on imported goods may, after any duties thereon have been paid or security satisfactory to the Minister has been given in respect of the duties owing,*

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1. R.S.C. 1985, c. 1 (2nd Supp.).
2. This is the term used by the Department of National Revenue in its correspondence with the appellant to describe the disposition of its request for re-determination. It is clear from the context that it meant that the Department of National Revenue was simply not prepared to consider the request on its merits.
3. R.S.C. 1985, c. 41 (3rd Supp.).

(a) within ninety days, or

(b) where the Minister deems it advisable, within two years

after the time the determination or appraisal was made in respect of the goods under section 58, request a re-determination of the tariff classification or a re-appraisal of the value for duty.

63. (1) 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.

64. The Deputy Minister may re-determine the tariff classification or re-appraise the value for duty of imported goods

(a) within two years after the time a determination or an appraisal was made under section 58, where the Minister deems it advisable,

(b) at any time after a re-determination or re-appraisal was made under subsection 63(3), but before an appeal under section 67 is heard, on the recommendation of the Attorney General for Canada, where the re-determination or re-appraisal would reduce duties payable on the goods,

...

(d) at any time, where the re-determination or re-appraisal would give effect to a decision of the Canadian International Trade Tribunal, the Federal Court or the Supreme Court of Canada made in respect of the goods, and

(e) at any time, where the re-determination or re-appraisal would give effect in respect of the goods, in this paragraph referred to as the "subsequent goods", to a decision of the Canadian International Trade Tribunal, the Federal Court or the Supreme Court of Canada, or of the Deputy Minister under paragraph (b), made in respect of

(i) other like goods of the same importer or owner imported on or prior to the date of importation of the subsequent goods, where the decision relates to the tariff classification of those other goods.

67. (1) 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 by filing a notice of appeal in writing with the Deputy Minister and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

The appellant's representative argued that the respondent's decision to cancel the request for re-determination is a decision for purposes of section 67 of the Act and that, as such, the Tribunal has jurisdiction to hear the appeal. He relied on the Tribunal's decision in *Walker Exhausts, Division of Tenneco Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*[4] in support of his argument. He also argued that the re-determination by the respondent pursuant to paragraph 64(*a*) of the Act is not restricted or implied to be restricted to the respondent's own initiative. In his view, when a form is

4. Appeal No. AP-93-063, July 6, 1994.

prescribed for a purpose, it should be used whenever such purpose is designated in the legislation, unless the intention to deviate and use other documents is expressed with "irresistible clearness." The representative submitted that Form B 2 is the appropriate form for a request to the respondent in the circumstances of tariff classification wherever contained in the Act. He argued that, the criteria published as ministerial policy having been satisfied, the respondent had no choice but to consider the appellant's request for re-determination of the tariff classification. In his brief, he reviewed a number of cases, which, he argued, support this argument.

The appellant's representative also argued that the decision of the Federal Court of Canada (the Federal Court) in *Mueller Canada Inc. v. The Minister of National Revenue and The Deputy Minister of National Revenue*[5] supports his position. He requested that the respondent's decision to cancel the request for re-determination be set aside. In addition, he argued that it may not be necessary to send the matter back to the respondent in light of paragraph 64(*c*) of the Act, which allows the respondent to re-determine the tariff classification at any time, where the person who accounted for the goods under subsection 32(1), (3) or (5) of the Act has failed to comply with any provisions of the Act.

Counsel for the respondent argued that the Tribunal has no jurisdiction to consider whether imported goods satisfy criteria stated as a matter of policy by the Minister for cases in which he will deem it advisable for the respondent to make a re-determination and whether, if the appellant has a right to a re-determination, the goods are of a kind not produced in Canada and should be re-determined so as to permit the application of Code 2510 of Schedule II to the *Customs Tariff*. Counsel argued that an importer has no right, under section 64 of the Act, to request a re-determination of the tariff classification. The respondent may do so at his own initiative and where the Minister deems it advisable. Counsel submitted that the only appealable decision that the respondent can make under section 64 of the Act is a re-determination or re-appraisal. Other actions apparently taken in relation to section 64 of the Act, such as a refusal to entertain a request for re-determination, may be reviewable by the Federal Court, but not by the Tribunal. Accordingly, counsel argued that the rejection of the appellant's request for re-determination was not a decision that would give rise to a right of appeal under section 67 of the Act.

Counsel for the respondent argued that an order requiring the respondent to make a re-determination under section 64 of the Act would be an order of *mandamus* and that only the Federal Court has jurisdiction to make such an order. He, therefore, argued that the Tribunal has no jurisdiction to grant the appellant's request. In addition, counsel argued that, as the Tribunal's jurisdiction is wholly statutory, the issue of whether the appellant satisfies criteria published as ministerial policy is a question that falls outside the Tribunal's jurisdiction. Furthermore, counsel submitted that, if the appellant seeks to require the respondent to apply a policy, the Tribunal is without jurisdiction to make such an order, being an order of *mandamus*, even if it should find that the appellant satisfies the policy's criteria for qualification. Counsel also argued that the Tribunal is without jurisdiction to interpose its own interpretation of criteria set out as a matter of policy by the Minister. Counsel requested that the appeal be dismissed on the grounds that the Tribunal does not have jurisdiction to hear the appeal. In the alternative, should the Tribunal find that it has the necessary jurisdiction, counsel requested that the matter be referred back to the respondent for re-determination.

In *Mueller*, an application was filed with the Federal Court for a declaration that certain decisions made by the respondent pursuant to subsections 60(3) and 63(3) of the Act were "decisions" under the relevant sections of the Act. Alternatively, the applicant sought an order of *mandamus* compelling the respondent to exercise his statutory duty in respect of the requests for re-determination. On May 1, 1990,

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5. Unreported, Trial Division, Court File No. T-746-93, November 15, 1993.

certain amendments were made to the *Customs Tariff*. The applicant, being of the opinion that this change affected the classification of the goods imported by it, filed a request for re-determination pursuant to sections 60 and 72.1 of the Act. The request under section 60 was rejected. The respondent found that consideration could not be given to the request, as the goods were not covered by the retroactive tariff amendment and as there was no other criteria for consideration. The applicant filed a request for further re-determination pursuant to section 63 of the Act, which was rejected by the respondent. The request was considered invalid on the basis that the time limit for filing such a request had expired and that no decision had been made in respect of the rejection of the request for re-determination under section 60 of the Act.

The Federal Court found that, in forming the opinion that the retroactive amendment did not apply to the applicant's goods, the respondent had to go through a tariff classification exercise. In the view of the Federal Court, this constituted a disguised decision on the merits. By characterizing the decisions as "no decisions" rather than negative decisions, the respondent thwarted the applicant's rights of appeal under sections 60 and 63 of the Act. The Federal Court, therefore, allowed the application.

On the basis of *Mueller*, the Tribunal is of the view that there clearly must be a decision from the respondent with respect to the merits of the tariff classification in order to give the Tribunal jurisdiction under section 67 of the Act. This is not the case in this appeal. Relying on *Mueller*, the Tribunal is of the view that the respondent's refusal to entertain a request for re-determination under section 64 of the Act does not constitute a decision for purposes of section 67 of the Act.

The appellant's representative made several arguments in his attempt to convince the Tribunal that the respondent's decision to cancel the request for re-determination constitutes a decision for purposes of section 67 of the Act and that, as a result, the Tribunal has jurisdiction to hear the appeal. The Tribunal has considered all of the representative's arguments and finds that they are without merit. Two of these arguments deserve special attention from the Tribunal: (1) the argument that Form B 2 has been prescribed to allow requests to be made by importers under section 64 of the Act; and (2) his reliance on the Tribunal's decision in *Walker Exhausts*.

The usual procedure by which an importer deals with an unsatisfactory determination is to request a designated officer to make a re-determination under section 60 of the Act. The Act specifically provides for such a request. It must be made within 90 days after the time the determination or appraisal was made under section 58 of the Act. An importer deals with an unsatisfactory re-determination by requesting the respondent to make a further re-determination under section 63 of the Act. The request must be made within 90 days after the time the importer was given notice of a decision under section 60 or 61 of the Act. When the importer complies with these statutory requirements, the respondent must make a further re-determination and must give notice of that decision to the importer.

Where a request under section 60 or 63 of the Act is made after 90 days, but within two years, the respondent must make a re-determination where the Minister deems it advisable. In addition, a determination made under section 58 of the Act may be re-determined by the respondent at his own initiative and where the Minister deems it advisable under section 64 of the Act. There is no statutory provision for the importer to make a request for such a re-determination under section 64 of the Act. The respondent has no duty to make such a re-determination, though, where he does so, he must send notice of that decision to the importer.

The appellant's representative referred to Memorandum D11-6-3[6] in support of his argument that Form B 2 is a prescribed form which allows an importer to make a request under section 64 of the Act. Memorandum D11-6-3 sets out the procedures by which the respondent may make a re-determination or a re-appraisal pursuant to paragraph 64(*e*) of the Act. It provides that, when an importer has filed an appeal before the Tribunal or the courts concerning tariff classification, that importer need no longer continue to request a re-determination or a re-appraisal under section 60 or 63 of the Act of subsequent importations of other like goods to those under appeal. It allows the respondent to issue decisions covering such goods. The like goods must have been imported by the same importer or owner on or after the date of importation of the goods which are the subject of the appeal. When all the appropriate procedures have been followed by the importer and a decision is issued by the Tribunal in his favour, the Department of National Revenue will consult with him to determine the best manner to resolve outstanding import transactions. Importers may be requested to submit Form B 2 to the Customs office in the region where the goods were released for each transaction. This practice does not, in the Tribunal's view, confer a right on importers to make requests under section 64 of the Act, as claimed by the appellant.

A decision made under section 64 of the Act may be appealed to the Tribunal pursuant to section 67 of the Act. However, the Tribunal is of the view, as stated above, that the only appealable decision that the respondent can make under section 64 of the Act is a re-determination or re-appraisal. Other actions taken in relation to section 64 of the Act, such as a refusal to consider a request for re-determination, may be reviewable by the Federal Court, but not by the Tribunal.

In *Walker Exhausts*, the appellant had filed a request for further re-determination of the origin of goods. Since its request 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 re-determination under paragraph 63(1)(*b*) of the Act. Appendix D to Memorandum D11-6-1[7] 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. The appellant relied on the third criterion. The respondent advised the appellant that a further re-determination had been deemed not advisable because the third criterion had not been met. Counsel for the respondent raised a preliminary issue concerning the Tribunal's jurisdiction to grant the appellant's request.

The Tribunal concluded that the respondent's preliminary assessment was a decision within the meaning of subsection 67(1) of the Act. In the Tribunal's view, the respondent's decision had the practical effect of bringing the appellant's case to an end and, therefore, constituted a final decision. 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 noted 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.

The Tribunal went on and found that it may grant relief in respect of a discretionary decision of the respondent 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 respondent.

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6. Administrative Policy Respecting Re-Determinations/Re-Appraisals Made Pursuant to Paragraph 64(*e*) of the *Customs Act*, Department of National Revenue, July 20, 1994.

7. Determination/Re-Determination and Appraisal/Re-Appraisal of Goods, Department of National Revenue, January 13, 1995.

The Tribunal reviewed the facts and concluded that the respondent'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 represented an exercise of discretion based on a misapprehension of the facts. It, therefore, allowed the appeal. The Tribunal's decision was appealed to the Federal Court. However, it was recently withdrawn by the respondent.

It is a recognized principle of administrative law that administrative tribunals are not bound by their previous decisions, although they should strive to be consistent.[8] In any event, the Tribunal is of the view that the facts in *Walker Exhausts* are sufficiently different from those in this case. The decision of the Federal Court in *Mueller* appears to be much more relevant and is relied on in this case.

Having found that the respondent's rejection under section 64 of the Act does not constitute a decision for purposes of section 67 of the Act, the Tribunal must determine whether it has jurisdiction to compel the respondent to exercise his statutory duty with respect to the re-determination. Any order directing the respondent to make a re-determination would, in the Tribunal's view, be an order of *mandamus*, an equitable relief that the Tribunal has clearly no authority to grant. Section 18 of the *Federal Court Act*[9] clearly provides that only the Federal Court has jurisdiction to make such an order.

The Tribunal, therefore, concludes that it does not have jurisdiction to hear this appeal, as the respondent's decision to refuse to entertain the request for re-determination of the tariff classification made pursuant to paragraph 64(*a*) of the Act does not constitute a decision for purposes of section 67 of the Act. Consequently, the appeal is dismissed.

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8. *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.
9. R.S.C. 1985, c. F-7.