

Ottawa, Tuesday, May 7, 1996

IN THE MATTER OF a preliminary issue of jurisdiction in an appeal filed on behalf of M & S X-Ray Services Ltd., in Appeal No. AP-94-337, 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 46(4)(c) of the former *Customs Act*, R.S.C. 1970, c. C-40, and paragraph 64(d) and subparagraph 64(e)(i) 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-94-337, 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 46(4)(c) of the former *Customs Act* and paragraph 64(d) and subparagraph 64(e)(i) 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



Ottawa, Tuesday, May 7, 1996

IN THE MATTER OF a preliminary issue of jurisdiction in an appeal filed on behalf of M & S X-Ray Services Ltd., in Appeal No. AP-94-337, 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 46(4)(c) of the former *Customs Act*, R.S.C. 1970, c. C-40, and paragraph 64(d) and subparagraph 64(e)(i) 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*<sup>1</sup> (the Act) from a decision of the Deputy Minister of National Revenue (the respondent) to cancel<sup>2</sup> a request for re-determination of the tariff classification of goods described as tables used by chiropractors in chiropractic diagnosis. The goods in issue were imported on July 15, 1986. On October 4, 1994, M & S X-Ray Services Ltd. (the appellant) requested a re-determination of the tariff classification pursuant to paragraph 46(4)(c) of the former *Customs Act*<sup>3</sup> (the former act) and paragraph 64(d) and subparagraph 64(e)(i) of the Act to have the goods in issue re-classified in accordance with a decision of the Tribunal involving similar goods. The respondent cancelled the request, as it was not filed within the prescribed time limit.

The Tribunal was of the view that this appeal raised the following jurisdictional issues: (1) whether the Tribunal has jurisdiction to hear this appeal under the former act; (2) whether a decision of the respondent to refuse to entertain a request for re-determination of the tariff classification pursuant to paragraph 64(d) and subparagraph 64(e)(i) 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 (3) 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. 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,*

---

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. 1970, c. C-40.

(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, having received a rejection of its request for a re-determination, the appellant took this as a decision of the respondent and filed an appeal with the Tribunal. In his view, there is no jurisdictional issue, as responsible officers indicated their entitlement to address the issue before them and to satisfy obligations pursuant to legislation. He argued that an appeal to the Tribunal of a decision issued pursuant to section 64 of the Act is not an attempt to have the Tribunal make an order of *mandamus*. It is the appellant's legal right under the Act to appeal the said decision when aggrieved. Since

two decisions have been issued to the appellant with respect to the goods in issue, it is aggrieved, and the Tribunal has a mandate pursuant to section 16 of the *Canadian International Trade Tribunal Act*<sup>4</sup> (the CITT Act) to hear such an appeal and to deal with it in making such order, finding or declaration, as the nature may require, as indicated in paragraph 16(c) of the CITT Act. According to the representative, the respondent's accountability for his actions, positive or negative, under certain other sections of the Act is to be considered by the Tribunal pursuant to section 67 of the Act, which does not limit impartial reconsideration of the respondent's decisions. Had Parliament intended a more narrow scope of review by the Tribunal, other wording would have been used. The representative requested that the appeal be heard on its merits, unless the respondent considered reviewing the matter and agreed with the appellant's position pleading no contest for the Tribunal's consideration.

Counsel for the respondent argued that the prerequisites for the Tribunal to hear an appeal respecting a matter arising under the former act have not been satisfied in this case and that no decision under section 63 or 64 of the Act has been issued by the respondent. Consequently, the Tribunal does not have jurisdiction to hear the appeal.

Counsel for the respondent argued that the Tribunal only has jurisdiction respecting tariff classification matters under the former act if: (1) a proceeding was instituted under the former act before the date on which the Act came into force, i.e. November 10, 1986, which could be continued and completed as if the Act had not been enacted; (2) the matter was pending before the Tariff Board before December 30, 1988, which, in the case of an appeal respecting tariff classification, would require a proper appeal to the Tariff Board from a decision of the respondent under subsection 46(4) and section 47 of the former act; and (3) the matter was not in the course of being heard by the Tariff Board on December 30, 1988, or had been heard before that date, but in respect of which a decision had not been rendered by the Tariff Board within one year of December 31, 1988.

According to counsel for the respondent, the appellant requested a re-determination of the tariff classification of the goods in issue pursuant to subsection 46(1) of the former act, and a Dominion customs appraiser issued a decision in response to that request on September 30, 1986. Therefore, it is submitted that a proceeding was commenced under the former act prior to November 10, 1986. The appellant, however, failed to appeal the decision of the customs appraiser within 90 days. There was, therefore, no decision issued by the respondent pursuant to subsection 46(4) of the former act. There was, therefore, no proceeding pending before the Tariff Board on December 30, 1988.

Finally, counsel for the respondent argued that no decision could be or has been issued by the respondent under section 63 or 64 of the Act. Counsel submitted that information from the Department of National Revenue advising the appellant that there is no statutory authority to entertain its request does not constitute a decision under those sections. Therefore, the Tribunal does not have jurisdiction to hear the appeal under section 67 of the Act.

The Tribunal agrees with counsel for the respondent's submissions regarding tariff classification matters under the former act and concludes that there was no proceeding pending before the Tariff Board. Accordingly, the Tribunal now deals with the two remaining issues.

---

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

In *Mueller Canada Inc. v. The Minister of National Revenue and The Deputy Minister of National Revenue*,<sup>5</sup> an application was filed with the Federal Court of Canada (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, certain amendments were made to the *Customs Tariff*.<sup>6</sup> 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, Division of Tenneco Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*.<sup>7</sup>

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

---

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

6. R.S.C. 1985, c. 41 (3rd Supp.).

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

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 of National Revenue (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<sup>8</sup> 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<sup>9</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. The appellant relied on the third criterion. The respondent advised the appellant that a further re-determination had been

---

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

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

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. 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.<sup>10</sup> 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. Although it is not clear what relief the Tribunal actually granted in *Walker Exhausts*, it would appear that the matter was sent back to the respondent so that he could make a 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*<sup>11</sup> clearly provides that only the Federal Court has jurisdiction to make such an order.

---

10. *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

11. R.S.C. 1985, c. F-7.

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(d) and subparagraph 64(e)(i) of the Act does not constitute a decision for purposes of section 67 of the 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