CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, December 18, 1997

Appeal No. AP-95-224

IN THE MATTER OF a preliminary issue of jurisdiction in an appeal filed on behalf of Philips Electronics Ltd. 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 requests for re-determination of tariff classifications pursuant to 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 this appeal, as the decision of the Deputy Minister of National Revenue to refuse to entertain requests for re-determination of tariff classifications pursuant to 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.

Patricia M. Close
Patricia M. Close
Presiding Member

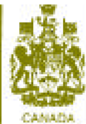
Raynald Guay
Raynald Guay
Member

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

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439



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REASONS FOR DECISION

On June 15, 1992, the Tribunal issued its decision in *Philips Electronics Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*.[1] The Tribunal found that "remote controlled converters for use with television sets" were properly classified under tariff item No. 8529.90.30 of Schedule I to the *Customs Tariff*[2] as parts suitable for use solely or principally with the apparatus of heading Nos. 85.25 to 85.28, which include domestic television receivers. That appeal dealt with 16 importations by the appellant. The first importation was made on May 4, 1989. Subsequently, the respondent made re-determinations under paragraph 64(*e*) of the *Customs Act*[3] (the Act) with respect to a large number of importations to give effect to the Tribunal's decision. The respondent refused to make re-determinations with respect to importations which were made prior to May 4, 1989. In the respondent's view, the goods imported prior to May 4, 1989, were not "subsequent goods" within the meaning of subparagraph 64(*e*)(i) of the Act.

By letter dated May 24, 1995, the appellant filed an appeal with the Tribunal with respect to five importations which were made between January 20, 1988, and April 12, 1989, i.e. prior to May 4, 1989. The Tribunal was of the view that the present appeal raised the following jurisdictional issues: (1) whether a decision of the respondent to refuse to entertain requests for re-determination of tariff classifications pursuant to 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 (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 May 28, 1997, the Tribunal requested that both the appellant and the respondent file written submissions on these issues. Briefs were subsequently filed by both parties.

For purposes of this appeal, the following provisions of sections 64 and 67 of the Act are relevant:

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

1. Appeal No. AP-90-211.
2. R.S.C. 1985, c. 41 (3rd Supp.).
3. R.S.C. 1985, c. 1 (2nd Supp.).

> (*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, when the conditions in Memorandum D11-6-3[4] (the Memorandum) are met, the respondent must make a decision. He argued that, with the publication of the Memorandum, the respondent's authority is no longer permissive, but rather mandatory. Since the appellant met all of the conditions, the respondent should have made a decision. The representative 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*[5] in support of his argument that the respondent's decision to cancel all requests for re-determination of the tariff classifications of importations made prior to May 4, 1989, is a decision for purposes of section 67 of the Act and that, as such, the Tribunal has jurisdiction to hear the appeal. He argued that subparagraph 64(*e*)(i) of the Act covers goods imported on or prior to the date of importation of the goods subject to an appeal to the Tribunal or the Federal Court of Canada (the Federal Court). Therefore, the respondent should have reclassified the goods in issue.

Counsel for the respondent relied on the Tribunal's decisions in the eyewear appeals[6] and *Fisher Scientific Ltd.* v. *The Deputy Minister of National Revenue*[7] in support of her argument that the Tribunal does not have jurisdiction to hear this appeal. In both these cases, the Tribunal held that a refusal of the respondent to exercise his discretion under section 64 of the Act is not a decision within the meaning of section 67 of the Act. Only a decision under section 64 of the Act with respect to the tariff classification of goods can be appealed to the Tribunal. Other actions taken in relation to section 64 of the Act may be reviewed by the Federal Court, but not by the Tribunal.

Counsel for the respondent argued that the Tribunal's decision in *Walker Exhausts* can be distinguished from the present case, because it dealt with an appeal of a decision of the respondent under section 63 of the Act. She also noted that the Tribunal, in the aforementioned cases, refused to follow *Walker Exhausts*. Counsel argued that, under section 64 of the Act, an importer has no right to request a re-determination and that the respondent has no duty to consider it. She argued that the Memorandum sets out the procedures by which the respondent may make a re-determination or a re-appraisal pursuant to subparagraph 64(*e*)(i) of the Act, but that the practice set out therein does not confer a right on importers to make requests under section 64 of the Act.

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4. *Administrative Policy Respecting Re-Determinations/Re-Appraisals Made Pursuant to Paragraph 64(e) of the Customs Act*, Department of National Revenue, July 20, 1994.
5. Appeal No. AP-93-063, July 6, 1994.
6. May 7, 1996.
7. Appeal No. AP-94-324, May 7, 1996.

Again relying on the eyewear appeals and *Fisher Scientific*, counsel for the respondent argued that the Tribunal has no power to compel the respondent to make a re-determination. She argued that any order directing the respondent to make a re-determination would be an order of *mandamus*, an equitable relief that the Tribunal has no authority to grant.

In the eyewear appeals and *Fisher Scientific*, the Tribunal held, on the basis of the decision of the Federal Court in *Mueller Canada Inc.* v. *The Minister of National Revenue and The Deputy Minister of National Revenue*,[8] that there clearly must be a decision of the respondent with respect to the merits of the tariff classification in order to give the Tribunal jurisdiction to hear an appeal under section 67 of the Act. As in the eyewear appeals and *Fisher Scientific*, it is not the case in this appeal. The Tribunal adopts its reasoning in both these cases and is of the view that the respondent's refusal to entertain requests for re-determination of tariff classifications under section 64 of the Act does not constitute a decision for purposes of section 67 of the Act.

In the eyewear appeals and *Fisher Scientific*, the Tribunal addressed both arguments raised by the appellant's representative in this matter, i.e. his argument with respect to the importance of the Memorandum and his reliance on the Tribunal's decision in *Walker Exhausts*. The Tribunal adopts its reasoning in the eyewear appeals and *Fisher Scientific* in dismissing both these arguments. In these cases, the Tribunal held that the Memorandum sets out the procedures by which the respondent may make a re-determination or a re-appraisal pursuant to subparagraph 64(*e*)(i) of the Act, but that the practice set out therein does not confer a right on importers to make requests under section 64 of the Act. The Tribunal stated that, under section 64 of the Act, an importer has no right to request a re-determination and that the respondent has no duty to consider it. With respect to *Walker Exhausts*, the Tribunal held that 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.[9] The Tribunal also held that, in any event, the facts in *Walker Exhausts* were sufficiently different from those in the eyewear appeals and *Fisher Scientific*. The Tribunal was of the view that the decision of the Federal Court in *Mueller* was much more relevant and was, therefore, relied on by the Tribunal.

Finally, the Tribunal is of the view that any order directing the respondent to make a re-determination would be an order of *mandamus*, an equitable relief that the Tribunal has clearly no authority to grant. Section 18 of the *Federal Court Act*[10] 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 requests for re-determination of tariff classifications pursuant to 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.

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8. 70 F.T.R. 197, Court File No. T-746-93, November 15, 1993.
9. *Domtar Inc.* v. *Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *supra* note 6 at 6; and *supra* note 7 at 6.
10. R.S.C. 1985, c. F-7.

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Presiding Member

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