CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, October 10, 1997

Appeal No. AP-96-121

IN THE MATTER OF a preliminary issue of jurisdiction in an appeal filed on behalf of Newman's Valve Limited under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated October 31, 1996, with respect to requests for re-determination under section 63 of the *Customs Act*.

DECISION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby concludes that it does not have jurisdiction to hear the appeal. Consequently, the appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
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

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, October 10, 1997

Appeal No. AP-96-121

IN THE MATTER OF a preliminary issue of jurisdiction in an appeal filed on behalf of Newman's Valve Limited under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated October 31, 1996, with respect to requests for re-determination under section 63 of the *Customs Act*.

REASONS FOR DECISION

On December 2, 1996, the appellant filed an appeal with the Canadian International Trade Tribunal (the Tribunal) under section 67 of the *Customs Act*[1] (the Act) from decisions of the Deputy Minister of National Revenue dated October 31, 1996, made under section 63 of the Act.

On March 25, 1997, counsel for the respondent filed a notice of motion with the Tribunal under rule 24 of the *Canadian International Trade Tribunal Rules*[2] (the Tribunal Rules) for an order dismissing the appeal on the grounds that the appeal is moot and that the appellant's brief discloses no reasonable grounds of appeal. On April 1, 1997, counsel for the appellant sent a letter to the Tribunal opposing counsel for the respondent's notice of motion. On April 23, 1997, counsel for the respondent filed a motion record, which included a memorandum of argument and an affidavit of Mr. Daniel Anctil, Senior Program Officer, Program and Audit Services, Valuation Division of the Department of National Revenue (Revenue Canada), in support of his notice of motion. On May 12, 1997, counsel for the appellant filed a motion record, which included a memorandum of argument and an affidavit of Mr. Gerry Awde, President of Newman's Valve Limited, in support of the appellant's opposition to the notice of motion.

On May 16, 1997, the Tribunal heard argument on the motion. Mr. Anctil testified at the hearing.

The appellant is in the business of buying and selling valves, fittings and flanges. The appellant is one of the wholly owned subsidiaries of Newman's Incorporated, which operates out of Tulsa, Oklahoma (Newman US). The appellant orders new valves from an unrelated offshore manufacturer, which ships them directly to the appellant, which pays for the valves. The appellant is the importer of record and pays all duties and taxes on the valves. For customs valuation purposes, the price payable is the price shown on the commercial invoice between the appellant and the manufacturer. The appellant obtains accounting, clerical, purchasing and banking services from Newman US.

Between January 1, 1994, and December 31, 1995, the appellant imported valves into Canada from offshore suppliers. The appellant calculated the value for duty of the goods using the transaction value method based on the sale price paid by the appellant to the offshore suppliers. On January 5, 1996, after conducting a review of the value for duty of the imported valves, Revenue Canada issued National Customs Ruling CV-V-10147 which determined that there was no sale for export to Canada at the time of importation and that, therefore, the transaction value method of valuation could not be applied. Revenue Canada advised

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912.

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

that the appropriate method of valuation was the deductive value method. On February 19, 1996, pursuant to section 61 of the Act, Revenue Canada issued detailed adjustment statements with respect to the importation of valves by the appellant under three different transactions. The total amount of duty determined to be payable was $351,426.55.

On April 4, 1996, the appellant requested a re-appraisal of the value for duty pursuant to section 63 of the Act. Following this request, Revenue Canada conducted another review of the value for duty of valves imported by the appellant. On October 18, 1996, Revenue Canada issued National Customs Ruling 7110-2(DA) V-6253-1, which determined that the appellant was a "purchaser in Canada" and that the transaction value method should be used in calculating the value for duty of valves imported by the appellant. However, Revenue Canada found that the appellant purchases the valves from Newman US and that the sale for export to Canada takes place between these two companies and not between the appellant and the offshore manufacturer. Revenue Canada also advised the appellant that the ruling was binding on its future transactions until rescinded.

On October 31, 1996, the respondent issued decisions under section 63 of the Act with respect to the valves imported under the three transactions at issue which allowed the appellant's request for a re-appraisal. In the decisions, the respondent indicated that the appellant should refer to National Customs Ruling 7110-2(DA) V-6253-1 dated October 18, 1996. The appellant obtained a refund for the full amount of duty, i.e. $351,426.55. The appellant appealed the decisions to the Tribunal, seeking a declaration that the relevant "sale for export" to Canada is between the appellant and the offshore manufacturer and not between the appellant and Newman US to accurately reflect the decisions of Revenue Canada. In his affidavit, Mr. Awde explains that, to allow a full refund, Revenue Canada must have calculated the duty on the price paid by the appellant to the offshore manufacturer, instead of using a fictitious price paid between the appellant and Newman US.

The respondent's motion raises the following issues: (1) whether the Tribunal has the jurisdiction to dismiss an appeal under section 67 of the Act on a preliminary motion; and (2) in the event that it does, whether the appeal, in the present case, should be dismissed.

Counsel for the respondent argued that subsection 17(2) of the *Canadian International Trade Tribunal Act*[3] (the CITT Act), which provides that the Tribunal has all such powers, rights and privileges as are vested in a superior court of record for matters necessary or proper for the due exercise of its jurisdiction, gives the Tribunal the authority to dismiss an appeal on a preliminary motion. According to counsel, this authority is also found in rule 5 of the Tribunal Rules, which counsel refers to as the "gap rule," and paragraph 18(1)(*f*), which provides that the Tribunal may issue a decision before the hearing on any matter which would be conducive to the orderly conduct of the hearing.

Counsel for the respondent argued that a preliminary motion to dismiss an appeal before the Tribunal is analogous to a motion to strike out pleadings brought before the Federal Court of Canada pursuant to Rule 419(1)(*a*) of the *Federal Court Rules*.[4] This rule provides that the Federal Court of Canada may at any stage of an action order any pleading or anything in any pleading to be struck out on the ground that it discloses no reasonable cause of action or defence, as the case may be, and may order the action to be stayed or dismissed or judgment to be entered accordingly. Relying on the decision of the Supreme Court of Canada in *The Attorney General of Canada* v. *Inuit Tapirisat of Canada and the National Anti-poverty*

3. R.S.C. 1985, c. 47 (4th Supp.).
4. C.R.C. 1978, c. 663.

Organization,[5] counsel argued that the Tribunal should only strike out the appellant's brief and dismiss the appeal if it is satisfied beyond a doubt that it is plain and obvious that the brief discloses no reasonable cause of action. Furthermore, relying on the decision of the Federal Court—Trial Division in *Vernon A. Phillips* v. *The Queen*,[6] counsel argued that, though the Tribunal should be reluctant to dismiss an appeal on a preliminary motion, justice is not better served when an impossible appeal is allowed to proceed down the path of expensive and futile litigation.

Relying on the decision of the Supreme Court of Canada in *Borowski* v. *Canada (Attorney General)*,[7] counsel for the respondent argued that, when there is no live controversy between the parties, a case is said to be moot, and courts will decline to decide such cases where their decision would not have any practical effect on the rights of the parties. In counsel's view, this is the situation in the present case. Furthermore, consideration of the three criteria identified by the Supreme Court of Canada in *Borowski* in deciding whether to hear a moot case does not warrant a hearing in the present appeal. More particularly, whether the Tribunal might be intruding on the functions of the legislative branch of government is not a consideration that arises in this appeal. Furthermore, the issue raised by the appellant has little, if any, public importance which could transcend the interests of the parties and justify devoting scarce judicial resources to hearing this moot appeal. Finally, the fact that an adversarial context may exist in the future does not satisfy the first criterion which requires that an adversarial context exist in the present in spite of the fact that the issue in question is moot.

Counsel for the respondent also argued that the appellant is precluded from bringing the appeal under section 67 of the Act because it has not been aggrieved by a decision of the respondent made pursuant to section 63 of the Act, since the appellant was granted a refund for the full amount of the duty. In counsel's view, the appellant lacks standing to bring properly an appeal under section 67 of the Act. Finally, counsel submits that it is a fundamental premise of appellate review that an appeal is taken against the formal order and not against the reasons expressed for granting that order. If an appellant has obtained the order that it sought, it cannot then appeal on the ground that it would prefer obtaining the order that it sought for a different set of reasons.

Counsel for the appellant argued that the Tribunal does not have jurisdiction to dismiss an appeal under section 67 of the Act on a preliminary motion, as subsection 67(2) directs that, "[b]efore making a decision under this section, the … Tribunal shall provide for a hearing." Furthermore, there is no express authority under the legislation to dismiss an appeal summarily without holding a hearing, where the statutory criteria for holding a hearing under section 67 are satisfied. Counsel argued that the appellant has been aggrieved by a decision of the respondent made pursuant to section 63 and that, as such, it has the right to appeal the decision under section 67. Relying on the decision of the Supreme Court of Canada in *B.C. Development Corp.* v. *Friedmann (Ombudsman)*,[8] counsel argued that a person may be aggrieved by present or future injury and that the appellant deems itself so aggrieved. Relying on the decision of the Supreme Court of Canada in *Gray v. Kerslake*,[9] counsel argued that the respondent has the onus of disproving that the appellant deems itself aggrieved and that the respondent has not done so in the present case.

5. [1980] 2 S.C.R. 735.
6. [1977] 1 F.C. 756.
7. [1989] 1 S.C.R. 342.
8. [1984] 2 S.C.R. 447.
9. [1958] S.C.R. 3.

In the view of counsel for the appellant, paragraph 18(1)(*f*) of the Tribunal Rules is specifically designed to afford an appellant a hearing. Furthermore, the statutory provisions to which the respondent referred are procedural in nature and cannot be interpreted to constitute a restriction on a statutory right of appeal. Relying on the decision of the Federal Court—Trial Division in *Mueller Canada Inc.* v. *The Minister of National Revenue and The Deputy Minister of National Revenue*,[10] counsel argued that the respondent should not be permitted to frustrate or thwart the statutory right of appeal by issuing a refund while maintaining and instructing the appellant to follow an incorrect classification of the relationship between the transacting parties in the future. In counsel's view, the procedural argument raised by the respondent, if accepted, would lead to a disguised decision on the merits. Furthermore, the respondent's decision to refund the duties is contrary to its own instructions issued as part of that decision, and, therefore, the respondent is estopped from relying on the mere fact that it has refunded the duties.

Counsel for the appellant argued that the test set out by the Federal Court of Appeal for striking out an originating notice of motion, i.e. that the motion be "bereft of any possibility of success ... and cannot include cases ... where there is simply a debatable issue … of the allegations in the notice of motion[11]" has not been met in the present case. Counsel argued that there is a debatable issue as to the present and future threat to the appellant's operations based on an erroneous decision of the respondent. Counsel submitted that the test for striking out a notice of appeal must be more than or as severe as a test for striking out a notice of motion, as striking out a notice of appeal is always a final order. Furthermore, striking out an appeal is specifically excluded from the ambit of Rule 419(1) of the *Federal Court Rules*. Rule 419(1) provides that "[t]he Court may at any stage of an action order any pleading or anything in any pleading to be struck out." Rule 2 defines "action" as "a proceeding in the Trial Division other than an appeal."

Counsel for the appellant submitted that the *Borowski* case has no application to the present appeal, as that case involved a constitutional challenge of a section of the *Criminal Code*[12] which had already been struck down. The facts and principles in that case are not at all similar to the issues in the present appeal. In the event that the Tribunal decides that the *Borowski* case does apply, counsel argued that the appeal is not moot, as the appellant has relief available and the raison d'être of the action has not disappeared. In counsel's view, there is a clear "live controversy" between the parties regarding the respondent's decision under appeal. The controversy between the parties should be resolved immediately and not be postponed until a future importation takes place.

Finally, counsel for the appellant argued that the appellant appeals the decision which specifically refers to National Customs Ruling 7110-2(DA) V-6253-1, which incorrectly characterizes the transactions as between the appellant and Newman US. Counsel notes that the detailed adjustment statements, which form part of the respondent's decision , expressly adopt and incorporate that ruling. They further direct that the ruling is to be followed by the appellant in all future similar transactions. Counsel argues that the Tribunal can order relief with respect to the decisions, as subsection 67(3) of the Act provides that it can "make such order, finding or declaration as the nature of the matter may require."

With respect to the first issue, the Tribunal clearly has the authority to determine whether it has jurisdiction to decide a matter.[13] The Tribunal notes that it is a well-established principle of administrative law that an administrative tribunal can dismiss an appeal for lack of jurisdiction at any time during the course of a proceeding. However, it is recommended that a challenge to jurisdiction be raised by preliminary motion

10. (1993), 70 F.T.R. 197, Court File No. T-746-93, November 15, 1993.
11. *David Bull Laboratories (Canada) Inc.* v. *Pharmacia Inc. (C.A.)*, [1995] 1 F.C. 588 at 600.
12. R.S.C. 1985, c. C-46.
13. *CTV Television Network Ltd.* v. *Canada (Copyright Board) (C.A.)*, [1993] 2 F.C. 115.

with proper notice, so that an administrative tribunal does not inquire into a matter that is beyond the authority given to it by Parliament.[14] Indeed, subrule 24(1) of the Tribunal Rules provides that any matter that arises in the course of a proceeding, including before the start of a hearing, and that requires a decision or order of the Tribunal shall be brought before the Tribunal by notice of motion.

Accordingly, the Tribunal is of the view that it has the authority to dismiss an appeal on a preliminary motion for lack of jurisdiction. Indeed, the Tribunal has on many occasions dismissed appeals under section 67 of the Act on preliminary motions for such a reason.[15] It is true that section 67 of the Act provides that, before making a decision under this section, the Tribunal shall provide for a hearing. However, a dismissal of an appeal for lack of jurisdiction is a decision of the Tribunal that it does not have the authority to consider the merits of the appeal. Therefore, if the Tribunal decides that it does not have jurisdiction to hear an appeal, the appellant has no right to a hearing on the merits.

The second issue, that is, whether the appeal should be dismissed, involves the interpretation of section 67 of the Act and the meaning to be attributed to the words "[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." The appellant is appealing the fact that it is bound in the future by National Customs Ruling 7110-2(DA) V-6253-1, which, although there may be an error in the date, appears to have been incorporated by reference in the respondent's decisions which are under appeal. In the Tribunal's view, this appeal raises the issue as to whether an appeal from a decision of the respondent can only be an appeal from the actual re-appraisal, i.e. the decision that the appellant owes money to Revenue Canada, or whether it can include an appeal from the reasons given or not given for arriving at such a decision.

In their book, *The Conduct of an Appeal*,[16] John Sopinka and Mark A. Gelowitz state the following:

> It is a fundamental premise in the law of appellate review that an appeal is taken against the formal judgment or order, as issued, and entered in the court appealed from, and not against the reasons expressed by the court for granting the judgment or order. Although the appellate court will frequently discover in the reasons for judgment errors of law that ultimately ground the reversal of the judgment or order, it is the correctness of the judgment or order that is in issue in the appeal, and not the correctness of the reasons.[17]

The Tribunal agrees with this passage and finds that it is directly applicable to the circumstances of the present case. The appellant's appeal is clearly not from the respondent's decision, but from the reasons expressed by the respondent for granting its request for a re-appraisal. The appellant was granted a refund for the full amount of duty. The respondent's decisions were rendered in the appellant's favour. In the Tribunal's view, the appellant has, therefore, not been "aggrieved" by the respondent's decision, as that term was intended to be used in section 67 of the Act.

In the Tribunal's view, the procedure surrounding customs rulings can be summarized as follows: Revenue Canada issues administrative rulings on the customs treatment of goods proposed to be imported into Canada. These rulings, known as National Customs Rulings, are issued either at the request of prospective importers or at the initiative of Revenue Canada and are binding on both the importer and Revenue Canada. There is no provision in the Act by which a customs ruling can be directly appealed if the

---

14. R.W. Macaulay and J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, Vol. 2 (Scarborough: Carswell, 1997) at 12-117-12-118.
15. See, for example, eyewear appeals, May 7, 1996.
16. (Toronto: Butterworths, 1993).
17. *Ibid*. at 4-5.

importer does not agree with the ruling. An importer's recourse in such cases is to import the goods according to the ruling, thereby establishing a deemed determination under section 58 of the Act, and then to file a request for re-determination under section 60 of the Act, setting out the alternative treatment that the importer believes to be correct. If Revenue Canada agrees with the importer's submission, a re-determination will be issued to supersede the National Customs Ruling, the accounting for the imported goods will be amended and a refund of duties together with interest calculated back to the date on which the duties were originally paid to Revenue Canada by the importer will be granted.[18] If Revenue Canada does not agree with the importer's submission, the importer can file a request for re-determination under section 63 of the Act. The respondent's decision to deny the importer's request can be appealed to the Tribunal under section 67 of the Act.

In the Tribunal's view, this is all about the payment and refund of duties paid or not paid at the time of importation. The appellant clearly does not agree with National Customs Ruling 7110-2(DA) V-6253-1 and Revenue Canada's position that the appellant purchases valves from Newman US and that the sale for export to Canada takes place between these two companies and not between the appellant and the offshore manufacturer. The appellant is, in effect, challenging Revenue Canada's decision to apply the ruling on its future transactions. Consequently, the appellant appears to have accepted that it has not been aggrieved by the respondent's decisions with respect to the transactions at issue. Although the respondent's reasoning may be flawed, the end result is that the appellant was successful in its request for a re-appraisal under section 63 of the Act. It was granted a full refund of duties. In the Tribunal's view, this appeal is therefore premature. If, on future importations, the appellant is assessed duties on the basis of a customs ruling with which it does not agree, it can appeal the respondent's decision to the Tribunal under section 67 of the Act. This appeal is, in effect, an appeal of the customs ruling and not an appeal from the respondent's decisions. As stated earlier, there is no direct appeal to the Tribunal from a customs ruling. The Tribunal, therefore, finds that it does not have jurisdiction to hear this appeal.

Accordingly, the appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

18. See, "Impacts of the Customs Act Changes On Rulings," IMPORTWEEK, Canadian Importers Association Inc., August 6, 1997, Vol. 104, No. 6 at 1 and 5.