CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, April 23, 1998

Appeal No. AP-97-073

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

AND IN THE MATTER OF three decisions of the Deputy Minister of National Revenue dated May 2, 1997, with respect to requests for re-determination under section 77 of the *Customs Act*.

DECISION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby concludes that it does not have jurisdiction to hear appeals from decisions not to grant a refund made pursuant to section 77 of the *Customs Act*. Consequently, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

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

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
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Secretary

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AND IN THE MATTER OF three decisions of the Deputy Minister of National Revenue dated May 2, 1997, with respect to requests for re-determination under section 77 of the *Customs Act*.

REASONS FOR DECISION

This is an appeal from three decisions of the Deputy Minister of National Revenue not to grant a refund under section 77 of the *Customs Act*[1] (the Act). The appeal was filed with the Tribunal subject to the resolution of the Tribunal's jurisdiction to hear this matter.[2]

The goods in issue are stainless steel pipe or tubing. Three requests for refund were filed, under paragraph 77(1)(*a*) of the Act, claiming the benefits of the statutory concessionary provisions of Code 1573 of Schedule II to the *Customs Tariff*[3] (1997 edition). This code provides for duty relief, inter alia, on materials for use in the manufacture of goods of Chapter 73, which covers the goods in issue before the Tribunal.

Subsection 77(1) reads, in part, as follows:

> 77. (1) Subject to this section, where duties have been paid on imported goods and before any use is made of the goods in Canada other than by their incorporation into other goods the goods or the other goods into which they have been incorporated are
>
> (*a*) sold or otherwise disposed of to a person who would have been entitled to obtain release of the goods free of duty or at a reduced rate of duty,
>
> the Minister may make a refund to the person by whom the duties were paid, in an amount equal to the difference between the duties paid thereon and the duties, if any, that would have been payable on the goods if at the time the goods were released they had been released to the person to whom they were sold or otherwise disposed of or released for the use to which they were diverted. (Emphasis added)

These requests for refund were rejected by officials of the Department of National Revenue (Revenue Canada). Subsequently, requests for re-determination under section 63 of the Act were filed by the appellant. Revenue Canada's response was in each case: "Claim cancelled. You cannot put in K14D's for

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. Tribunal's letter to the appellant dated September 18, 1997.
3. R.S.C. 1985, c. 41 (3rd Supp.).

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authority 77. These are over the time limit for section 77.[4]" A "K14D" is a computer code for re-determination under section 63 of the Act.

It was the appellant's position that the refusal to grant a refund under section 77 of the Act can be appealed to the Tribunal because "a redetermination under section 77 of the *Customs Act* is equivalent to a redetermination under section 60 or 61 of the *Customs Act*.[5]" (Emphasis added) The appellant notes that the definition of "tariff classification" under subsection 2(1) of the Act provides as follows:

> "tariff classification" means the classification of imported goods under a tariff item in Schedule I to the *Customs Tariff* and, where applicable, under a code in Schedule II or VII to that Act or under any order made pursuant to section 62 or 68 of that Act. (Emphasis added)

The appellant argued that, because the Tribunal deals with tariff classification appeals (which, incidentally, may include consideration of tariff codes), it stands to reason that it must have jurisdiction to deal with this case, as it too is a "tariff classification" matter.

The appellant pointed out that even Revenue Canada's own documentation acknowledges that applications under section 77 of the Act "affect the manner in which goods are classified in the *Customs Tariff*.[6]" But the appellant argued that Revenue Canada, later on in that memorandum, misinterprets the provisions of section 77 when it states that the decisions rendered against section 77 "are not in any way linked to the re-determination of tariff classification provisions contained in section 60 or 63 of the *Customs Act*. These authorities are not interchangeable for the purposes of having refund claims processed by Customs.[7]"

The appellant stated: "Decisions on tariff classification matters are redeterminations or they are not. The Department cannot set aside the prescriptions of the *Customs Act* and omit the administrative guidelines that regulate section 77 of the [Act].[8]" The appellant went on to state that "[t]he legislation and guidelines apply to ALL tariff classification decisions.[9]" Furthermore, "[a]s Atlas imported the goods under certain tariff items and subsequently sought to apply code 1573 it was, according to the above-mentioned definition [subsection 2(1) of the Act], seeking a new tariff classification for the stainless steel pipe or tubing.[10]" Consequently, a right of appeal to the Tribunal exists.

The appellant argued that Revenue Canada had to undertake a review of the merits of the application under section 77 of the Act in order to conclude that the provisions of Code 1573 did not apply. According to the appellant, this amounts to a disguised decision on the merits of the application and, as such, an appeal lies to the Tribunal. In support of this argument, the appellant cited the Federal Court - Trial Division's decision in *Mueller Canada Inc.* v. *The Minister of National Revenue and The Deputy Minister of National Revenue*.[11] In that case, an application for a re-determination was filed in order to benefit from a retroactive

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4. Detailed Adjustment Statements dated May 2, 1997.
5. Letter to the Tribunal dated August 15, 1997.
6. Memorandum D11-8-2, "Diversions—Section 77 of the *Customs Act*," Department of National Revenue, Customs, Excise and Taxation, February 18, 1994, at 4.
7. *Ibid*. at 4-5.
8. Letter to the Tribunal dated August 15, 1997.
9. *Ibid.*
10. Letter to the Tribunal dated October 28, 1997.
11. 70 F.T.R. 197, Court File No. T-746-93, November 15, 1993.

legislative change. The respondent refused to even consider the request. The Federal Court concluded that the respondent's response, characterized as a "non-decision," was in fact a disguised decision on the merits.

Finally, the appellant noted that the Tribunal, in a previous decision, concluded that a right of appeal to the Tribunal existed in a matter relating to the *Excise Tax Act*,[12] where Revenue Canada contended that no such right existed.[13] In that case, the Tribunal stated that, "[a]side from the law, the Tribunal considers it good policy for a taxpayer to have the right to appeal to the Tribunal from a reconsideration of a determination.[14]" And so, in this case, for there not to be some form of redress is simply unfair and leaves too much discretion in the hands of officials of Revenue Canada.

The respondent's position was succinct. The Tribunal, as a creature of statute, can only adjudicate those matters permitted in the legislation. The Tribunal's jurisdiction to hear and decide matters under the Act is found in section 67, which only authorizes it to hear appeals from decisions made by the respondent under sections 63 and 64:

> 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 respondent, in his submissions, formulated his authority and, consequently, the Tribunal's jurisdiction as follows:

> The Deputy Minister shall render a decision under section 63 when a person requests a review of an advance ruling made under section 43.1, of a notice of a marking determination made under section 57.01, a notice of decision made under section 60 or 61, or, when the Minister deems it advisable, a review a determination or appraisal made under section 58. Section 63 does not permit a person to request a review of a decision made under section 77.
>
> The Deputy Minister may render a decision under section 64 when the Minister deems it advisable for a determination or appraisal made under section 58, when the Attorney General of Canada recommends a re-determination or re-appraisal made under subsection 63(3), when a person who has accounted for goods under subsection 32(1), (3) or (5) or a person who was given notice of a marking determination under section 57 has failed to comply with the *Act* or regulations, when a person, who accounted for goods under subsection 32(1), (3) or (5) has made an application under section 76 of *Customs Tariff* and when a re-determination or re-appraisal would give effect to a decision of this Tribunal or the court. The Deputy Minister may not render a decision under 64 with respect to a decision made under section 77 of the Act.[15]

Having reviewed all the submissions, it is the Tribunal's view that it does not have jurisdiction to consider appeals from the respondent's decision not to grant a refund under section 77 of the Act. The Tribunal's jurisdiction is limited to what is stipulated in its enabling legislation. In matters under the Act, the Tribunal's jurisdiction is limited to appeals from the respondent's decisions made pursuant to sections 63

12. R.S.C. 1985, c. E-15.
13. *Erin Michaels Mfg. Inc.* v. *The Minister of National Revenue*, Appeal No. AP-94-330, January 10, 1997, at 2.
14. *Ibid.* at 3.
15. Letter to the Tribunal dated October 6, 1997.

and 64 of the Act. Neither of these provisions authorizes the respondent or the Tribunal to review a refund application made pursuant to section 77.

Section 77 of the Act stands by itself and gives the Minister of National Revenue (the Minister) the discretion to make a refund if certain conditions are met. Consideration by the Minister of the applicability of section 77 does not, contrary to what the appellant states, constitute a re-determination or re-appraisal. Other provisions in Part IV of the Act (in which section 77 is found) provide for abatements, refunds, drawbacks and remissions. In some of those provisions,[16] specific reference is made to the remedies available to a taxpayer whose application for a refund is denied. In at least some of the provisions in Part IV of the Act, therefore, it would appear that Parliament has specifically turned its mind to the issue of recourse available in the case of an unfavourable decision. Unfortunately for the appellant, no such provision appears in section 77. It may be that parties, such as the appellant in this case, have a remedy in another forum, but it is not with the Tribunal.

The fact that appeals may be filed with the Tribunal pursuant to section 63 or 64 of the Act on matters involving a tariff code does not assist the appellant. Those appeals are launched when an importer disagrees with Revenue Canada about the classification of goods and/or the applicability of a tariff code. While the effect of one of the Tribunal's classification decisions could be that a refund is given, it is not within the Tribunal's jurisdiction to adjudicate claims for refunds. The Tribunal simply decides whether or not the respondent's decision with respect to classification is correct.

There is a fundamental difference between the objectives in section 77 of the Act and those found in the sections of the Act dealing with tariff classification. Sections 58 through 68 establish procedures for determinations, re-determinations and appeals regarding tariff classification matters. The purpose of section 77 is to provide a refund, where the Minister deems it appropriate, in cases where the imported goods are sold, or disposed of, to someone who would have been able to take advantage of a lower or free rate of duty or when those goods have been diverted to a use that would have entitled someone to obtain them at a lower or free rate of duty. In the case before the Tribunal, there is no dispute about the applicability of the tariff code. The dispute is whether the appellant is entitled to obtain a refund from the Minister. While both processes inevitably touch on the tariff code, they are clearly different in nature.

The appellant's reliance on the wording of Memorandum D11-8-2 as support for its position is not persuasive. First, these administrative documents do not override the legislative provisions; they are simply an administrative aid which "outlines and explains the circumstances under which refund claims may be filed under section 77 of the *Customs Act*.[17]" Second, that document makes it very clear that applications under section 77 "are not in any way linked to the re-determination of tariff classification provisions found in section 60 or 63 of the *Customs Act*.[18]" It is impossible, therefore, to read this document as lending any support to the appellant's view that a refund request under section 77 should be treated the same for the purposes of an appeal.

The present case is distinguishable from the *Mueller* case. In *Mueller*, the Federal Court concluded that Revenue Canada had to undertake a review of the substantive merits of the application in order to come to the conclusion to which it did. Consequently, this review amounted to a decision on the merits, which, in

16. For example, see subsections 74(4) and (4.1) of the Act.
17. *Supra* note 6 at 1.
18. *Ibid.* at 4-5.

accordance with the scheme of the Act, would have given rise to appeal rights to the Tribunal. The *Mueller* case and this one are in no way similar.

Erin Michaels does not assist the appellant either. Following a hearing before the Tribunal[19] which dealt with the applicability of a federal sales tax rebate, the Tribunal remitted the matter back to Revenue Canada for calculation of the amount owing to the appellant. The appellant disagreed with Revenue Canada's subsequent calculation and appealed again to the Tribunal. Revenue Canada argued that the Tribunal had no jurisdiction to review the matter again. However, under the particular circumstances of that case, the Tribunal felt that a right of appeal did exist. It was as if the second appeal was, in fact, an extension of the first appeal. The *Erin Michaels* case was particular to its specific facts and the provisions of the *Excise Tax Act* and, once again, is distinguishable from the present case.

In conclusion, the Tribunal does not have jurisdiction to hear appeals from decisions not to grant a refund made pursuant to section 77 of the Act.

Consequently, the appeal is dismissed.

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19. *Erin Michaels Mfg. Inc.* v. *The Minister of National Revenue,* Appeal No. AP-89-233, March 10, 1992.