Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Wednesday, March 31, 2004

Application No. EP-2003-006

IN THE MATTER OF an application made by Ingram Micro Inc. under section 60.2 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, for an extension of time to make a request for a further re-determination.

ORDER OF THE TRIBUNAL

The Canadian International Trade Tribunal grants the application for an extension of time and gives Ingram Micro Inc. six weeks from the date of this order to make a request for a further re-determination under section 60 of the *Customs Act*.

Ellen Fry
Ellen Fry
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

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TRIBUNAL: ELLEN FRY, Presiding Member
JAMES A. OGILVY, Member
MERIEL V. M. BRADFORD, Member

STATEMENT OF REASONS

BACKGROUND

From 2001 to 2002, Ingram Micro Inc. (Ingram) imported shipments of electronic goods. On July 18 and 29 and August 20, 2002, further to the submission of requests for a further re-determination by Ingram, the Commissioner of the Canada Customs and Revenue Agency (CCRA) re-determined the tariff classification and value for duty of the imported goods. This represented 36 decisions in total.

On May 26, 2003, the CCRA received the application, dated May 14, 2003, from Ingram for an extension of time under section 60.1 of the *Customs Act*[1] for a re-determination of the classification and value for duty pursuant to section 60. On July 7, 2003, the CCRA denied Ingram's application on the basis that the conditions for granting the application were not met.

On August 15, 2003, Ingram filed an application with the Tribunal under section 60.2 of the *Act* for an extension of time to make a request for a further re-determination by filing a copy of the above application under section 60.1 and of the CCRA's notice of refusal.

On September 24, 2003, the Tribunal invited the CCRA to comment on Ingram's application under section 60.2 of the *Act*. The CCRA filed its response on October 28, 2003.

On November 19, 2003, the Tribunal invited Ingram to respond to the CCRA's comments. On November 27, 2003, Ingram filed its comments.

ANALYSIS

Section 60.2 of the *Act* reads as follows:

> **60.2** (1) A person who has made an application under section 60.1 may apply to the Canadian International Trade Tribunal to have the application granted after either
>
> (*a*) the Commissioner has refused the application: or

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

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(*b*) ninety days have elapsed after the application was made and the Commissioner has not notified the person of the Commissioner's decision.

If paragraph (*a*) applies, the application under this subsection must be made within ninety days after the application is refused.

(2) The application must be made by filing with the Commissioner and the Secretary of the Canadian International Trade Tribunal a copy of the application referred to in section 60.1 and, if notice has been given under subsection 60.1(4), a copy of the notice.

(3) The Canadian International Trade Tribunal may dispose of an application by dismissing or granting it and, in granting an application, it may impose any terms that it considers just or order that the request be deemed to be a valid request as of the date of the order.

(4) No application may be granted under this section unless

(*a*) the application under subsection 60.1(1) was made within one year after the expiry of the time set out in section 60; and

(*b*) the person making the application demonstrates that

(i) within the time set out in section 60, the person was unable to act or to give a mandate to act in the person's name or the person had a *bona fide* intention to make a request,

(ii) it would be just and equitable to grant the application, and

(iii) the application was made as soon as circumstances permitted.

The above provision contains four tests, each of which an applicant must meet in order to succeed in an application to the Tribunal for an extension of time to make a request for a further re-determination by the CCRA.

However, before determining whether an applicant has met the four tests, the Tribunal must determine whether, pursuant to subsection 60.2(1) of the *Act*, the application for an extension of time was made within 90 days of the CCRA's refusal of the application. The Tribunal is satisfied that this requirement is met, given that the CCRA's refusal was made on July 7, 2003, and Ingram filed its application under section 60.2 on August 15, 2003.

The first test under paragraph 60.2(4)(*a*) of the *Act* requires the application to the CCRA under section 60.1 for a re-determination or further re-determination of a tariff classification to have been made within one year after the expiry of the time allowed to make a request under section 60. In this case, the 90-day periods to file requests for a re-determination under section 60 expired on October 16 and 28 and November 18, 2002. The applications under subsection 60.1(1) were received by the CCRA on May 26, 2002, well before the one-year deadline. Therefore, the first test is met. This was not disputed by the CCRA.

Second, subparagraph 60.2(4)(*b*)(i) of the *Act* requires the applicant to demonstrate that, within the 90-day period prescribed in section 60, the applicant was unable to act in response to the CCRA's determination or re-determination or give a mandate to someone else to act in the applicant's name. Alternatively, the applicant could demonstrate that the applicant had a *bona fide* intention to make a request for re-determination within the 90-day prescribed period. The evidence on the record[2] shows that Ingram hired counsel in 2001 for "tariff classification appeal" advice and that extensive legal services were rendered throughout 2001 and 2002 by both external and in-house counsel. This clearly indicates that Ingram

2. Copies of invoices from legal firm, request for extension of time filed with the Tribunal on August 18, 2003.

intended to pursue its efforts to get duty refunds from the CCRA through all applicable legal mechanisms, as indicated by its legal advice, which would include re-determination where applicable.

In its position paper, the CCRA relied heavily on the decision of the Tax Court of Canada in *McIndless v. The Queen*[3] in support of its position that Ingram could not form a *bona fide* intention to make a request without the awareness that there were decisions issued under subsection 59(1) of the *Act*. Indeed, the CCRA submitted that Ingram did not realize the outcome of the decisions or the legislative basis for them until November 27, 2002, which is several weeks after the limitation period for filing a request for a further re-determination under subsection 60(1) had expired.

McIndless is a case concerning section 167 of the *Income Tax Act*[4] and, therefore, is of limited relevance to the decision before the Tribunal under section 60.2 of the *Act*. Furthermore, the Tribunal does not consider that the facts in *McIndless* are sufficiently similar to those of the current case to be helpful. Indeed, by omitting to quote the first part of the relevant paragraph, the CCRA has provided an incomplete picture of the circumstances of that case. The complete paragraph reads as follows:

> In the case of *Marion D'Arcy v. The Queen*, with facts similar to the present case, Christie A.C.J.T.C. said the following:
>
> > *It is perfectly clear that what precipitated the applicant's desire to object to the Minister's assessment was the fact of the decision of the Federal Court of Appeal in Thibaudeau.*[5] *That decision was made public on May 3, 1994. Prior to that date it would have been treated in strict confidence by members of the Court and its employees.* Whatever may be the scope of clause (A) I do not think that a taxpayer can demonstrate an inability to serve a notice of objection or not instruct another to do so by a prescribed date if prior to that time there is to her knowledge nothing in existence that would motivate her to adopt that course of action. The existence of inability to act or to instruct another to act with reference to serving a notice of objection presupposes the presence, prior to the time limit imposed by the Act, of a desire on the part of a taxpayer to effect such service.
> >
> > Further I cannot appreciate how, in the circumstances just described, a taxpayer could go through the mental process of forming a bona fide intention to object to an assessment. At the time the applicant was required to have that intention she was oblivious to the existence of the fact that subsequently impelled her desire to object.
>
> [Emphasis added]

In *McIndless*, the issuance of the decision of the Federal Court of Canada in *Thibaudeau* triggered the filing of the notice of objection. Before the issuance of the decision, there was clearly no *bona fide* intention to file a notice of objection, given that the taxpayer was not even aware that a ground of appeal existed. The facts of the present case can easily be distinguished from those of *McIndless* on the basis that, as previously mentioned, Ingram intended to pursue its efforts to get duty refunds from the CCRA through all applicable legal mechanisms, as indicated by the legal advice that it received, which would include requests for re-determination where applicable.

Accordingly, the Tribunal finds that Ingram had a *bona fide* intention to make a request for re-determination within the 90-day prescribed period, and the second test is met.

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3. [1995] 1 C.T.C. 2924 [*McIndless*].
4. R.S.C. 1985 (5th Supp.).
5. *Thibaudeau v. M.N.R.,* [1994] 3 F.C. 189 (C.A.) [*Thibaudeau*].

Third, subparagraph 60.2(4)(*b*)(ii) of the *Act* requires the applicant to demonstrate that it would be just and equitable to grant the application. If this application is not granted, Ingram will lose the opportunity to argue that it is entitled to $66,500 in potential duty refunds. Moreover, Ingram stated that it erroneously submitted requests for re-determination without substantiating documentation, on the understanding that the CCRA would hold the files until the details of tariff classification were completed. Ingram could certainly have been more diligent in looking at the detailed adjustment statements and, hence, would have learned, within the 90-day time frame, about the decisions made under subsection 59(1). Nevertheless, the Tribunal believes that Ingram expected to receive decisions made under subsection 74(5) instead of decisions made under section 59 and that it did not learn about the latter decisions until November 27, 2002. Since Ingram received decisions made under both subsection 74(5) and section 59 in response to similar requests during the same period, it is credible that its reason for not looking at the detailed adjustment statements sooner was that it was under the impression that it would only receive decisions made under subsection 74(5).

In accordance with subparagraph 74(3)(*b*)(i) and subsection 74(5) of the *Act*, the denial of an application on the basis that complete or accurate documentation has not been provided does not preclude a person from re-applying for a refund, since it is not treated as if it were a re-determination of origin, tariff classification or value for duty. Consequently, had the denials of the refund been made under subsection 74(5), Ingram would have had the opportunity to resubmit its refund application within four years after the goods were originally accounted for, rather than within the much shorter period to apply for re-determination that applies to decisions under section 59.

The Tribunal also notes that it gave the CCRA an extension of time to file its submissions on this application because, in the absence of an employee from the office, the CCRA was not as diligent as it should have been in responding to the Tribunal's correspondence. This is somewhat similar to the type of latitude that Ingram is requesting. The third test is therefore met.

Fourth, subparagraph 60.2(4)(*b*)(iii) of the *Act* requires the applicant to demonstrate that the application was made as soon as circumstances permitted. In *Bernard Chaus Inc.*,[6] the Tribunal interpreted "application", in subparagraph 60.2(4)(*b*)(iii), as meaning an application under subsection 60.1(1), i.e. the application made to the CCRA. The Tribunal adopts the same interpretation in this case, for the reasons outlined in *Chaus*.

It was only on February 14, 2003, that the CCRA indicated that the way to proceed was to apply to the CCRA for an extension of time. Ingram applied about three months later, which was not unreasonable in light of the fact that the CCRA subsequently took about two months to respond.

The Tribunal notes that, for several months after Ingram learned about the decisions made under section 59, it was in discussions with the CCRA and it was reasonable for Ingram to consider that it did not need to apply for a re-determination while these discussions were ongoing. The discussions would reasonably have led Ingram to believe that the CCRA might be able to deal with the problem by simply changing the decisions made under section 59 to decisions made under subsection 74(5). Indeed, in July 2003, the CCRA did this in six instances.[7]

In light of the foregoing, the Tribunal is satisfied that Ingram made its application under subsection 60.1(1) of the *Act* as soon as circumstances permitted and, hence, the fourth test is met.

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6. (4 December 2003), EP-2003-001 (CITT) [*Chaus*].
7. Ingram's brief, Exhibit 7.

The Tribunal notes that the CCRA contended that "as soon as circumstances permitted" means unusual or exceptional circumstances beyond Ingram's control. As indicated in *Chaus*, the Tribunal considers that such a test is too strict and that the proper test is that an applicant must have made its application as early as, under the particular circumstances, it could reasonably be expected to get the application ready and present it to the CCRA.

Therefore, the Tribunal finds that Ingram has met all four statutory tests and that its application should be granted.

Finally, Ingram requested that the 36 decisions made under subsection 59(1) of the *Act* be changed to decisions made under subsection 74(5). Under subsection 60.2(3), the Tribunal's jurisdiction is limited to disposing of an application under section 60.2 by dismissing it or granting it and, in granting an application, imposing any terms that it considers just or ordering that the request be deemed to be a valid request as of the date of the order. Consequently, the Tribunal has no jurisdiction to order that the decisions made under subsection 59(1) be changed to decisions made under subsection 74(5).

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