



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2003-010

TFB & Associates Limited

*Order and reasons issued
Thursday, June 3, 2004*

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IN THE MATTER OF an application made by TFB & Associates Limited pursuant to section 67.1 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, for an order extending the time within which a notice of appeal may be filed under section 67.

ORDER OF THE TRIBUNAL

The Canadian International Trade Tribunal denies the application for an extension of time to file a notice of appeal under section 67 of the *Customs Act*.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

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

Susanne Grimes
Susanne Grimes
Acting Secretary

STATEMENT OF REASONS

BACKGROUND

1. On June 2, 2003, the Commissioner of the Canada Customs and Revenue Agency (CCRA) re-determined the tariff classification of cough drops imported by TFB & Associates Limited (TFB).
2. On February 12, 2004, TFB filed an application with the Tribunal under section 67.1 of the *Customs Act*¹ for an extension of time to file a notice of appeal with the Tribunal under section 67.
3. On February 19, 2004, the Tribunal invited the Canada Border Services Agency (CBSA) (formerly the CCRA) to comment on TFB's application. On March 22, 2004, the CBSA filed its comments. On March 24, 2003, the Tribunal invited TFB to respond to the CBSA's comments. On April 13, 2004, TFB filed its response.

ANALYSIS

4. Section 67 of the *Act* reads in part as follows:

67. (1) A person aggrieved by a decision of the Commissioner made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the Commissioner and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.
5. Section 67.1 of the *Act* reads as follows:

67.1 (1) If no notice of appeal has been filed within the time set out in section 67, a person may make an application to the Canadian International Trade Tribunal for an order extending the time within which a notice of appeal may be filed, and the Tribunal may make an order extending the time for appealing and may impose any terms that it considers just.

 - (2) The application must set out the reasons why the notice of appeal was not filed on time.
 - (3) The application must be made by filing with the Commissioner and the Secretary of the Canadian International Trade Tribunal the application accompanied by the notice of appeal.
 - (4) No order may be made under this section unless
 - (a) the application is made within one year after the expiry of the time set out in section 67; and
 - (b) the person making the application demonstrates that
 - (i) within the time set out in section 67 for appealing, 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 appeal,
 - (ii) it would be just and equitable to grant the application,
 - (iii) the application was made as soon as circumstances permitted, and
 - (iv) there are reasonable grounds for the appeal.
6. An applicant must meet all five conditions in section 67.1 of the *Act* to succeed.
7. With regard to subparagraph 67.1(4)(b)(i) of the *Act*, TFB did not provide any evidence that it was unable to act within the prescribed period of time.

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

8. However, TFB did submit that it was unable to give a mandate to act within the 90-day period. TFB argued that the CCRA took four years to render its decision in order to treat all importers uniformly; yet, at the same time, unbeknownst to TFB, the Tribunal had before it *Pfizer Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency*.² *Pfizer* concerned appeals of the tariff classification of cough drops. The Tribunal's decision in *Pfizer* was made on October 9, 2003, after the 90-day deadline for an appeal by TFB. The CBSA argued that TFB did not provide evidence with respect to TFB's actions during the 90-day period, nor any evidence that could support a finding that TFB was unable to appeal within the 90-day period.

9. In the Tribunal's view, TFB has not demonstrated how the amount of time that the CCRA took to render its decision could conceivably have had any bearing on TFB's ability to give a mandate to act in respect of that decision within the 90-day period.

10. In addition, while the outcome of *Pfizer* may have been of interest to TFB, TFB has failed to show how *Pfizer* rendered TFB incapable of giving a mandate to act in respect of its own case. If TFB wished to await the outcome of *Pfizer*, TFB could have filed a notice of appeal within the 90-day period and requested a postponement pending the outcome of *Pfizer*.³ TFB has failed to provide any evidence that it was awaiting the outcome of *Pfizer* in order to file an appeal. On the contrary, while TFB indicated that it considered an appeal to the Tribunal after the Tribunal's decision in *Pfizer*, which was clearly after the 90-day period had elapsed, it gave no evidence that it could not have given a mandate to act before that time.

11. Consequently, the Tribunal finds that TFB has not demonstrated that it was unable to act or to give a mandate to act in its name within the 90-day period.

12. TFB also submitted that it had a *bona fide* intention to appeal during the 90-day period. The CBSA submitted that TFB did not provide clear evidence of its intention during the 90-day period.

13. The Tribunal agrees that TFB has not provided clear evidence that it had a *bona fide* intention to appeal during the 90-day period. On the contrary, it appears from TFB's evidence that it only formulated an intention to appeal after the 90-day period ended, when it learned of the Tribunal's decision in *Pfizer* and subsequently sought advice.

14. In *McIndless v. The Queen*,⁴ the Tax Court of Canada denied an extension of time to file a notice of objection under section 167 of the *Income Tax Act*⁵ because the intention to object arose after the prescribed period, when the applicant learned of the favourable decision in *Thibaudeau v. M.N.R.*⁶ The Tribunal declined to apply *McIndless* in *Ingram Micro Inc.*⁷ The Tribunal's reasons were as follows:

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

2. (9 October 2003), AP-2002-038 to AP-2002-090 (CITT) [*Pfizer*].

3. See rule 26 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499.

4. [1995] 1 C.T.C. 2924 [*McIndless*].

5. R.S.C. 1985 (5th Supp.).

6. [1994] 3 F.C. 189 (C.A.) [*Thibaudeau*].

7. (31 March 2004), EP-2003-006 (CITT) [*Ingram*].

the CCRA through all applicable legal mechanisms, as indicated by the legal advice that it received [within the 90-day period]⁸

15. In the Tribunal's view, the circumstances of TFB's application appear to be more broadly similar to those in *McIndless* than to those in *Ingram*. Ingram retained legal counsel within 90 days with a view to an appeal, but TFB has not presented any clear evidence of an intention to appeal during the 90-day period.

16. The same is true of *Rounding v. Canada*.⁹ The applicant in that case filed an objection after the 90-day period when she learned of the decision in *Thibaudeau*. The Tax Court of Canada found that the applicant had not agreed with her tax assessment and had a desire to file a notice of objection during the 90-day period, but did not do so because she thought such an action would be futile. Nevertheless, the Tax Court of Canada held that the applicant did not have a *bona fide* intention to object during the 90-day period because it was the subsequent decision in *Thibaudeau* that triggered the filing.

17. In light of these cases, TFB's own evidence indicating that it filed the notice of appeal in reaction to the decision in *Pfizer*, and the lack of clear evidence of TFB's intention during the 90-day period, the Tribunal finds that TFB has not demonstrated that it had a *bona fide* intention to appeal within the 90-day period.

18. Consequently, the Tribunal finds that TFB has not met the condition prescribed under subparagraph 67.1(4)(b)(i) of the *Act*.

19. Since an applicant must meet all five conditions under section 67.1 of the *Act* in order for the application to succeed, it is not necessary for the Tribunal to assess whether TFB has met the remaining conditions. TFB's application is therefore denied.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

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

8. *Ibid.* at 3.

9. [1995] T.C.J. No. 530.