Canadian International Trade Tribunal

Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2005-008

Costco Wholesale Canada Ltd.

Order and reasons issued
Thursday, October 5, 2006

Canada

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1
BACKGROUND 1
ANALYSIS 2
DECISION 5

IN THE MATTER OF an application made by Costco Wholesale Canada Ltd., under section 60.2 of the *Customs Act*, for an order extending the time to make a request for a further re-determination.

ORDER

Having found that Costco Wholesale Canada Ltd. did not meet the requirements of subsection 60.2(4) of the *Customs Act*, the Canadian International Trade Tribunal dismisses the application for an order extending the time to make a request for a further re-determination.

Serge Fréchette
Serge Fréchette
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

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

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

BACKGROUND

1. On April 30, 2003, the President of the Canada Border Services Agency (CBSA) issued an advance ruling under section 43.1 of the *Customs Act*[1] (the first advance ruling) which rejected the claim made by Costco Wholesale Canada Ltd. (Costco) that the product that it was seeking to import, namely, Kirkland Signature Trail Mix (trail mix), was of NAFTA origin.

2. On June 10, 2003, Costco filed an application for a review of the first advance ruling, pursuant to subsection 60(2) of the *Act*.

3. While the review of the first advance ruling was pending before the CBSA, on July 2, 2003, the CBSA informed Costco that the approach that it had taken in challenging the first advance ruling, although appropriate if the goods had not yet been imported, did not protect its rights with respect to time limits for any request for re-determination of origin of any goods already imported. With respect to such goods, Costco was directed to follow procedures outlined in Memorandum D11-6-7.[2]

4. Between July 24 and September 9, 2003, in order to comply with the outcome of the first advance ruling, Costco filed 205 "B2" voluntary amendment forms under subsection 32.2(1) of the *Act* for goods that it had already imported between February 18, 1999, and January 7, 2003. It is these 205 transactions that are at issue.

5. Between September 8, 2003, and August 16, 2004,[3] adopting the same line that it had in its decision contained in the first advance ruling, the CBSA issued decisions under subsection 59(2) of the *Act* on the 205 transactions at issue. These decisions accepted Costco's voluntary amendments with respect to the 205 transactions at issue and affirmed that the goods were not eligible for the more favourable United States Tariff rate. The goods were accordingly determined to qualify for the Most-Favoured-Nation Tariff rate. Each of the DASs for the 205 transactions at issue that communicated these decisions also advised Costco as follows: "A REQUEST FOR A FURTHER RE-DETERMINATION RESPECTING THIS DECISION MAY BE MADE WITHIN 90 DAYS OF THE DATE OF DECISION ON THIS NOTICE, ON FORM B2 PURSUANT TO SUBSECTION 60(1) OF THE CUSTOMS ACT."

6. On October 17, 2003, the CBSA issued its decision with respect to Costco's application for review of the first advance ruling. The decision upheld the CBSA's earlier finding that the Trail Mix was not of NAFTA origin. On November 27, 2003, Costco filed an appeal of the first advance ruling with the Tribunal under section 67 of the *Act*.[4] At the request of the parties, that matter is being held in abeyance pending the outcome of the Tribunal's order in the present proceedings.

7. An ensuing period of negotiations between the parties appears to have brought new facts to light. In a letter dated April 30, 2004, the CBSA changed its position and advised Costco that the trail mix could be considered as being of NAFTA origin. To confirm this new position, Costco sought a new advance ruling, which was issued on August 12, 2004 (the second advance ruling). The second advance ruling, in accordance with the facts that were discovered during the period of negotiations between the parties, confirmed that the trail mix was of NAFTA origin.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. Canada Border Services Agency, "Importers' Dispute Resolution Process for Origin, Tariff Classification, and Value for Duty of Imported Goods" (4 May 1998).
3. See list of detailed adjustment statements (DASs) appended to letter from Mr. Raahool Watchmaker to the Tribunal dated May 3, 2006.
4. Appeal No. AP-2003-041.

8. On November 25, 2004, Costco applied to the CBSA, under section 60.1 of the *Act*, for an extension of time to make requests for re-determination relative to the 205 transactions at issue. On September 13, 2005, after various exchanges of correspondence between the parties, the CBSA refused Costco's application.

9. On October 27, 2005, Costco applied to the Tribunal under section 60.2 of the *Act* contesting that decision.

10. Given that there was sufficient information on the record to decide whether the application should be granted, the Tribunal decided that a hearing was not required and disposed of this matter on the basis of the information on the record.

ANALYSIS

11. 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
>
> (*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

> **60.2** (1) La personne qui a présenté une demande de prorogation en vertu de l'article 60.1 peut demander au Tribunal canadien du commerce extérieur d'y faire droit :
>
> *a*) soit après le rejet de la demande par le commissaire;
>
> *b*) soit à l'expiration d'un délai de quatre-vingt-dix jours suivant la présentation de la demande, si le commissaire ne l'a pas avisée de sa décision.
>
> La demande fondée sur l'alinéa *a*) est présentée dans les quatre-vingt-dix jours suivant le rejet de la demande.
>
> (2) La demande se fait par dépôt, auprès du commissaire et du secrétaire du Tribunal canadien du commerce extérieur, d'une copie de la demande de prorogation visée à l'article 60.1 et, si un avis a été donné en application du paragraphe 60.1(4), d'une copie de l'avis.
>
> (3) Le Tribunal canadien du commerce extérieur peut rejeter la demande ou y faire droit. Dans ce dernier cas, il peut imposer les conditions qu'il estime justes ou ordonner que la demande de révision ou de réexamen soit réputée valide à compter de la date de l'ordonnance.
>
> (4) Il n'est fait droit à la demande que si les conditions suivantes sont réunies :
>
> *a*) la demande de prorogation visée au paragraphe 60.1(1) a été présentée dans l'année suivant l'expiration du délai prévu à l'article 60;
>
> *b*) l'auteur de la demande établit ce qui suit :
>
> (i) au cours du délai prévu à l'article 60, il n'a pu ni agir ni mandater quelqu'un pour agir en son nom, ou il avait

the person had a *bona fide* intention to make a request,	véritablement l'intention de présenter une demande de révision ou de réexamen,
(ii) it would be just and equitable to grant the application, and	(ii) il serait juste et équitable de faire droit à la demande,
(iii) the application was made as soon as circumstances permitted.	(iii) la demande a été présentée dès que possible.

12. Subsection 60.2(4) of the *Act* lists the four conditions that must be met before the Tribunal can grant an application under subsection 60.2(3).

13. The Tribunal notes that the application was made within the time frame set out in paragraph 60.2(4)(*a*) of the *Act* and that the parties did not dispute that that requirement had been met.

14. The CBSA argued however that Costco failed to demonstrate that, within the time set out in section 60 of the *Act*, it had a *bona fide* intention to make a request for re-determination or further re-determination under section 60, as required by subparagraph 60.2(4)(*b*)(i).

15. After having considered the arguments of the parties and reviewed the evidence on the record, the Tribunal is of the view that Costco failed to demonstrate that it had such an intention.

16. In arguing that it did, Costco relied on four arguments. First, it relied on what it wrote on the 205 "B2" voluntary amendment forms that it filed between July 24 and September 9, 2003. These forms indicated that the importer was appealing the First advance ruling.[5] Second, Costco relied on the fact that it filed an appeal with the Tribunal on the first advance ruling. Third, Costco relied on the fact that it had retained the services of a customs broker and external counsel throughout the relevant period. Fourth, Costco claimed that the CBSA knew of "the Applicant's actions throughout the period of more than three years of negotiations between them."[6]

17. The CBSA argued that the advance rulings did not pertain to the 205 transactions at issue and that Costco had been advised by letter dated July 2, 2003, to follow the procedures outlined in Memorandum D11-6-7 if the goods had already been imported. The CBSA further indicated that the DASs pertaining to each of the 205 transactions at issue also advised Costco of procedures and time limits that it was required to follow if it wished to appeal these decisions.

18. The Tribunal is of the view that proof of the *bona fide* intention that is required under subparagraph 60.2(4)(*b*)(i) of the *Act* requires specific proof of an intention to exercise the rights available to an applicant under section 60, *during the time* that a request under section 60 was still open to the applicant. In the Tribunal's view, the annotations that were included on each of the 205 "B2" voluntary amendment forms were filed in the context of section 32.2 and fall short of demonstrating an intention to do anything specific with respect to the 205 transactions at issue. The Tribunal views those annotations as nothing more than statements to the effect that Costco was seeking to have the first advance ruling overturned with respect to how the origin of *prospective* importations would be treated.

19. In and of itself, all that the annotation indicated was that Costco was involved in a separate process that, in law, had no effect in respect of the 205 DASs for which separate and timely actions were required.

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5. The forms submitted by Costco each read as follows: "THIS VOLUNTARY CORRECTION IS MADE AS A RESULT OF ADVANCE RULING NO. TRS 192614 (CASE NBR B0244042) HOWEVER, PLS NOTE THAT THE IMPORTER HAS APPEALED THIS ADVANCE RULING UNDER S. 60(2) OF THE *CUSTOMS ACT*. THIS APPEAL IS CASE NUMBER M0247533 HS CHANGE AS PER RULING PO5730403007".
6. Applicant's Reply Brief, para. 2.

20. In assessing whether or not Costco had the necessary intention for the purpose of subparagraph 60.2(4)(*b*)(i) of the *Act*, it is particularly significant for the Tribunal that, on July 2, 2003, or 22 days prior to the filing of the first annotated "B2" voluntary amendment form, the CBSA informed Costco and its solicitors of the very distinct administrative processes that were involved with respect to, on one hand, the first advance ruling and, on the other, an eventual challenge of the 205 transactions at issue.

21. Indeed, the third paragraph of the letter that the CBSA sent to Costco's solicitors (with a copy to Costco) on July 2, 2003, reads as follows:

> The approach that you have taken is appropriate if the goods have still not been imported. Indeed, other than the fact that we are missing a copy of the actual Advance Ruling, you have complied with the data requirements of D11-4-16 Advance Rulings Appendix A. However, in accordance with Paragraph 37 of this same memo, if the mix has already been imported you are advised to follow procedures outlined in Memo D11-6-7. This is due to the fact that this request for review does **not** protect your time limits with respect to any goods already imported. In other words, you should harmonize this review with any actual appeals under Section 60(1) of the Customs Act. This implies that we will also need a copy of the Exporter's Certificate of Origin for the KS Trail Mix, if it is in existence.

22. In addition, the procedure for requesting a re-determination was also outlined on each of the subsequent DASs pertaining to the 205 transactions at issue.

23. The Tribunal is therefore of the view that Costco knew, or ought to have known, that its challenge of the first advance ruling was purely prospective and, irrespective of outcome, would have had no retroactive effect generally in respect of importations that had already taken place, or specifically with respect to the 205 transactions at issue.

24. Consequently, the Tribunal is not convinced that Costco has demonstrated that it had, at the requisite time provided for in the *Act*, a *bona fide* intention to exercise its rights pursuant to section 60, and therefore the present application must fail.

25. In addition, the Tribunal does not accept Costco's argument that the negotiations that it had with the CBSA can be used to signify that the CBSA had any specific knowledge of Costco's intentions with respect to the 205 transactions at issue. In the Tribunal's view, the CBSA had properly informed Costco of the requisite steps that it had to take with respect to an eventual challenge of the determinations made relative to the 205 transactions at issue. The Tribunal notes that those steps were not taken and that there does not appear to have been the formation of a sufficiently clear *bona fide* intention to do anything with respect to those transactions within the prescribed time frame of section 60 of the *Act.* Costco did indeed show a clear intention with respect to its challenge of the first advance ruling pertaining to future importations. The Tribunal cannot find however any such intention in the evidence with respect to any past importations and, notably, not with respect to the 205 transactions at issue.

26. Rather, it appears to the Tribunal that Costco's intention to pursue the re-determination of the 205 importations at issue seems only to have been formed after the expiry of the time frame provided for under section 60 of the *Act*. Indeed, the evidence on file appears to show that the catalyst for doing anything concrete with respect to the 205 importations at issue was the issuance of the second advance ruling, which this time was favourable to Costco. This view is supported by the letter, dated November 25, 2004, from PBB Global Logistics Inc., Costco's customs agent, to the CBSA, which reads as follows:

> . . .
>
> The extension is required as a result of a decision rendered by CBSA, TRS # 201916, August 12, 2004 entitling the "*Kirkland Signature Trail Mix*" to the benefits of a NAFTA preferential tariff treatment under the accumulation provisions of Article 404.
>
> . . .

27. In the Tribunal's opinion, this excerpt clearly indicates that the motivation for Costco's request under section 60.1 of the *Act* only crystallized upon the issuance of the positive determination contained in the second advance ruling. This application made by its customs agent on November 25, 2004, was however beyond the 90-day deadline of November 14, 2004, to file a request under section 60 of the *Act* with respect to the last DAS that had been issued.[7]

28. For the foregoing reasons, the application is dismissed.

DECISION

29. Having found that Costco did not meet the requirements of subsection 60.2(4) of the *Act*, the Tribunal dismisses the application for an order extending the time to make a request for a further re-determination.

Serge Fréchette
Serge Fréchette
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

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

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7. Pursuant to subsection 60(1) of the *Act*, Costco had 90 days from the date of each DAS to file a request for further re-determination. The last DAS was issued on August 16, 2004. Accordingly, the last day for filing a request for further re-determination of even the DAS dated August 16, 2004, would have been November 14, 2004, which was a Sunday. According to section 26 of the *Interpretation Act*, R.S.C. 1985, c. I-21, "Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday." Sunday November 14, 2004, being a holiday, Costco would have had until Monday November 15, 2004, to file a request under section 60 of the *Act* with respect to that last DAS. Other DASs having been issued before August 16, 2004, would already have been statute-barred from proceeding pursuant to subsection 60(1) of the *Act*.