



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2005-035

Electronic Liquidators Ltd.

*Order and reasons issued
Monday, November 6, 2006*

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IN THE MATTER OF an application made by Electronic Liquidators Ltd. under section 67.1 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, for an order extending the time to file a notice of appeal under subsection 67(1) of the *Customs Act*.

ORDER

The Canadian International Trade Tribunal denies the application for an extension of time to file a notice of appeal under subsection 67(1) of the *Customs Act*.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

BACKGROUND

1. This is an application under section 67.1 of the *Customs Act*¹ made by Electronic Liquidators Ltd. (Electronic Liquidators) for an order extending the time to file a notice of appeal under subsection 67(1) of the *Act*. The application concerns transaction Nos. 16154330235990 and 16154330239574 (the transactions in issue), dated June 8 and 21, 2004, respectively, which referenced importations made by Electronic Liquidators of various models of televisions, VCRs, DVD players, home theatres and brackets (the goods in issue). Electronic Liquidators claimed that these goods were of U.S. origin and therefore subject to United States Tariff (UST) treatment.
2. On July 30, 2004, Electronic Liquidators filed voluntary amendments pursuant to section 32.2 of the *Act* to correct the reference to the origin of the goods in issue and, thereby, change the tariff treatment from UST to Most-Favoured-Nation Tariff. The President of the Canada Border Services Agency (CBSA) issued a Detailed Adjustment Statement (DAS) on October 21, 2004, to reflect this change in the origin of the goods in issue and in the tariff treatment.
3. On November 25, 2004, Electronic Liquidators requested a re-determination of the origin of the goods in issue under subsection 60(1) of the *Act*. Pursuant to subsection 60(4), the CBSA denied the request for UST treatment for both transactions. The CBSA issued a DAS dated September 19, 2005, communicating its decision concerning transaction No. 16154330235990. On September 20, 2005, it issued a DAS communicating its decision concerning transaction No. 16154330239574.
4. On December 19, 2005, Electronic Liquidators filed a notice of appeal with the CBSA under subsection 67(1) of the *Act* relative to the CBSA's decisions dated September 19 and 20, 2005, but failed to notify the Tribunal, as required by the *Act*.² The CBSA forwarded a copy of this document to the Tribunal, which received it on January 25, 2006.
5. The Tribunal reviewed the documents forwarded by the CBSA and, on January 30, 2006, wrote Electronic Liquidators advising that it was in receipt of the notice of appeal that had been filed with the CBSA, but noting that Electronic Liquidators was statute-barred from filing. Given this, the Tribunal informed Electronic Liquidators that it would, instead, consider the documents that had been filed as a request under subsection 67.1 of the *Act* for an order extending the time to file a notice of appeal under subsection 67(1) of the *Act*. As indicated above, it is that request that is the issue of this proceeding.

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

2. The Tribunal remarks that, had Electronic Liquidators also filed its notice of appeal with the Tribunal, and not only with the CBSA, on December 19, 2005, the notice would have been timely, because that day marked the last day of the statutory deadline to appeal the transactions in issue. Ninety days from the decision dated September 20, 2005, falls on December 19, 2005. Ninety days from the decision dated September 19, 2005, falls on December 18, 2005, which was however a Sunday. Under section 26 of the *Interpretation Act*, R.S.C. 1985, c. I-21, “[w]here 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.” Electronic Liquidators would therefore have had until Monday, December 19, 2005, to file a notice under section 67 of the *Act* with respect to the CBSA's decision dated September 19, 2005. In law, neither the CBSA nor the Tribunal could remedy the oversight committed by Electronic Liquidators, save for examining this issue in the context of the application pursuant to section 67.1 of the *Act* that is the subject of this proceeding.

LEGISATION6. Subsection 67(1) of the *Act* reads 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.

[Emphasis added]

67.(1) Toute personne qui s'estime lésée par une décision du commissaire rendue conformément aux articles 60 ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du commissaire et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

[Nos italiques]

7. 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.

67.1(1) La personne qui n'a pas interjeté appel dans le délai prévu à l'article 67 peut présenter au Tribunal canadien du commerce extérieur une demande de prorogation du délai pour interjeter appel. Le tribunal peut faire droit à la demande et imposer les conditions qu'il estime justes.

(2) La demande de prorogation énonce les raisons pour lesquelles l'avis d'appel n'a pas été déposé dans le délai prévu.

(3) La demande de prorogation se fait par dépôt, auprès du commissaire et du secrétaire du Tribunal canadien du commerce extérieur, de la demande et de l'avis d'appel.

(4) Il n'est fait droit à la demande de prorogation que si les conditions suivantes sont réunies :

a) la demande est présentée dans l'année suivant l'expiration du délai d'appel prévu à l'article 67;

b) l'auteur de la demande établit ce qui suit :

(i) au cours du délai d'appel prévu à l'article 67, il n'a pu ni agir ni mandater quelqu'un pour agir en son nom, ou il avait véritablement l'intention d'interjeter appel,

(ii) il serait juste et équitable de faire droit à la demande,

(iii) la demande a été présentée dès que possible,

(iv) l'appel est fondé sur des motifs raisonnables.

8. Subsection 27(5) of the *Interpretation Act* reads as follows:

27(5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.	27(5) Lorsqu'un acte doit être accompli dans un délai qui suit ou précède un jour déterminé, ce jour ne compte pas.
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ANALYSIS

9. Section 67.1 of the *Act* sets out five conditions that must be met in order for the Tribunal to grant such an application. The *Act* clearly establishes that all five conditions must be met, and the failure to meet any one condition will cause the application to fail.

10. First, under paragraph 67.1(4)(a) of the *Act*, the application must be made within one year after the expiry of the 90-day time limit set out in subsection 67(1). In this case, the application under section 67.1 was made on January 25, 2006, well before the deadline to do so.³

11. Second, under subparagraph 67.1(4)(b)(i) of the *Act*, Electronic Liquidators must demonstrate that, within the 90-day period prescribed in subsection 67(1), it was unable to act in response to the CBSA's decision, or to give a mandate to act in its name. Alternatively, this provision of the *Act* gave Electronic Liquidators the opportunity to prove that it had a *bona fide* intention to make a request under subsection 67(1) within the time frame provided for in that subsection, but was unable to do so. The Tribunal accepts Electronic Liquidators' submission to the CBSA on December 19, 2005, of a notice of appeal pursuant to subsection 67(1) as evidence of such a *bona fide* intention.

12. Third, under subparagraph 67.1(4)(b)(ii) of the *Act*, Electronic Liquidators must demonstrate that it would be just and equitable to grant the application that it made. The CBSA denied the application on this ground. Electronic Liquidators submitted that, between September and December 2005, it was in the process of changing customs brokers and that there was resultant confusion as to who should have been responsible for filing appeals of the CBSA's decisions dated September 19 and 20, 2005. According to the CBSA, it was not "just and equitable" to grant the application merely in order to offset errors or lack of diligence.

13. The Tribunal is convinced that Electronic Liquidators intended to appeal the transactions in issue when it filed its notice of appeal with the CBSA on December 19, 2005. As indicated above, its appeal was not properly filed because the notice of appeal was not also filed with the Tribunal. Had Electronic Liquidators filed that document with the Tribunal on that date, an appeal under subsection 67(1) of the *Act* would have been properly commenced. In the Tribunal's view, this amounts to a minor technical breach of the *Act*. The Tribunal does not believe that it would be just and equitable for Electronic Liquidators to be deprived of its recourse because of such an error.⁴ And, indeed, the Tribunal already recognized this when it decided to accept the notice of appeal that was submitted to the CBSA, and transmitted by the CBSA to the Tribunal, as the application that is the subject of this proceeding.

14. Fourth, under subparagraph 67.1(4)(b)(iii) of the *Act*, the applicant must demonstrate that the application was made as soon as circumstances permitted. Electronic Liquidators has indicated that, during the 90-day appeal period, it changed customs brokers and that there was confusion as to which firm would

3. Electronic Liquidators would have had until December 20, 2006, to file its application. Under the *Interpretation Act*, one year from the CBSA's decisions dated September 19 and 20, 2005, would be deemed to be December 20, 2006, because of the combined impact of section 26 and subsection 27(5).

4. *Bernard Chaus Inc.* (4 December 2003), EP-2003-001 (CITT).

represent it in its appeal. The CBSA considers this condition to have been met. And, again, the Tribunal notes that it was at its own initiative that it decided to accept the notice of appeal that was submitted to the CBSA, and transmitted by the CBSA to the Tribunal, as the application that is the subject of this proceeding. Accordingly, the Tribunal accepts that the condition set out in subparagraph 67.1(4)(b)(iii) has been met.

15. Fifth, under subparagraph 67.1(4)(b)(iv) of the *Act*, there must be reasonable grounds for the appeal. Although the application is for an extension of time and is not the appeal proper, the nature of this condition requires the Tribunal to deal with certain aspects of the substance of the appeal.

16. Electronic Liquidators submitted evidence relating to invoices and certificates of origin for the goods in issue. The CBSA argued that the certificates of origin submitted by Electronic Liquidators did not relate to the goods in issue.

17. Having examined the evidence on the record, the Tribunal is unable to establish with certainty the relation between the invoice reference codes submitted and the codes on the certificates of origin that purportedly correspond to them. Although the reference codes in some instances are very similar, they are not identical in any instance. Since an appeal would turn on Electronic Liquidators' ability to establish the origin of the goods, it is the Tribunal's view that the lack of positive identification in the documentation submitted means that the reasonable grounds have not been established. Electronic Liquidators thus fails to meet this condition.

18. All conditions set out in subsection 67.1(4) of the *Act* must be met before the Tribunal can grant an application for an extension of time to file an appeal pursuant to section 67. Failure to meet any one of these conditions is fatal to the application.

DECISION

19. For the foregoing reasons, the application is denied.

James A. Ogilvy
James A. Ogilvy
Presiding Member