Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2011-001

J. R. McNenly

Order and reasons issued
Friday, February 10, 2012

Canada

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IN THE MATTER OF an application made by Mr. J. R. McNenly, pursuant to section 67.1 of the *Customs Act*, for an order extending the time to file a notice of appeal pursuant to subsection 67(1) of the *Customs Act* with respect to a decision of the President of the Canada Border Services Agency dated September 15, 2010.

ORDER

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

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

BACKGROUND

1. This is an application made by Mr. J. R. McNenly to the Canadian International Trade Tribunal (the Tribunal), pursuant to section 67.1 of the *Customs Act*,[1] for an order extending the time to file a notice of appeal pursuant to subsection 67(1) with respect to a decision, dated September 15, 2010, made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. On April 23, 2009, Mr. McNenly took delivery of a used 2008 Winnebago Journey motor home (the 2008 motor home), which he purchased from a dealership in Marysville, Washington, for US$153,000. However, the net purchase price of the vehicle was US$63,000, as Mr. McNenly obtained a trade-in allowance of US$90,000 for his 2007 Winnebago Adventurer motor home (the 2007 motor home), which he had purchased in 2006 in Kelowna, British Colombia.

3. On April 27, 2009, at the time of entry into Canada, the CBSA assigned a value for duty of CAN$183,290 to the 2008 motor home (i.e. the full purchase price of US$153,000 converted into Canadian dollars) in order to determine the amount of duties and taxes owed. Although no duties were payable, Mr. McNenly did have to pay CAN$9,164.50 in GST (i.e. 5 percent of the full purchase price).

4. On April 14, 2010, Mr. McNenly filed a request for a refund of the GST paid on the portion of the purchase price of the 2008 motor home represented by the trade-in allowance for the 2007 motor home. In essence, Mr. McNenly was requesting that the value for duty of the 2008 motor home be calculated by deducting the trade-in allowance for the 2007 motor home from the full purchase price of the 2008 motor home.

5. On April 29, 2010, the CBSA denied Mr. McNenly's request for a refund. This denial was considered a re-determination under paragraph 59(1)(*a*) of the *Act*.

6. On July 8, 2010, Mr. McNenly requested a further re-determination of the value for duty of the 2008 motor home pursuant to subsection 60(1) of the *Act*. He argued that, as he had already paid GST on the 2007 motor home, the payment of GST on the full purchase price of the 2008 motor home constituted double taxation.

7. On September 15, 2010, the CBSA issued its decision pursuant to subsection 60(4) of the *Act*, which denied the request for further re-determination and confirmed its prior re-determination. The CBSA took the position that the value for duty of the 2008 motor home was the full purchase price without a deduction for the trade-in allowance of the 2007 motor home.

8. On November 24, 2010, Mr. McNenly purported to appeal the CBSA's decision of September 15, 2010. However, instead of sending his notice of appeal to the Tribunal, as required by subsection 67(1) of the *Act*, he sent it to the CBSA's Regional Appeals Unit in Vancouver, British Colombia. In his notice of appeal, he requested that, until February 15, 2011, all correspondence regarding the matter be sent to an address in California.

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

9. By way of a letter dated February 23, 2011, the CBSA advised Mr. McNenly that, as a decision under subsection 60(4) of the *Act* had already been rendered, it could no longer consider the additional information that he had submitted. It noted that an appeal could be made to the Tribunal pursuant to section 67 but that, since more than 90 days had elapsed since the CBSA's decision of September 15, 2010, he may need to apply to the Tribunal for an extension of time pursuant to section 67.1.

10. According to Mr. McNenly, after having travelled with no fixed address beginning on February 15, 2011, he arrived back in Canada on April 12, 2011, and took notice of the CBSA's letter of February 23, 2011. On April 18, 2011, he sent a notice of appeal to the Tribunal with respect to the CBSA's decision of September 15, 2010. The notice of appeal was received by the Tribunal on May 3, 2011.

11. On May 6, 2011, further to being advised by the Tribunal on May 4, 2011, that his notice of appeal had been filed beyond the 90-day time period set out in subsection 67(1) of the *Act*, Mr. McNenly sent the Tribunal an application pursuant to section 67.1 for an order extending the time to file a notice of appeal pursuant to subsection 67(1). The application was received by the Tribunal on May 18, 2011.

12. On May 19, 2011, the Tribunal invited the CBSA to file representations on Mr. McNenly's application. The CBSA filed representations on June 17, 2011, opposing the application.

13. On June 21, 2011, the Tribunal invited Mr. McNenly to file comments on the CBSA's representations. Mr. McNenly filed his comments on June 27, 2011.

LEGISLATION

14. Subsection 67(1) of the *Act* provides as follows:

> **67.** (1) A person aggrieved by a decision of the [CBSA] made under section 60 or 61 may appeal from the decision to the [Tribunal] by filing a notice of appeal in writing with the [CBSA] and the Secretary of the [Tribunal] within ninety days after the time notice of the decision was given.

15. Section 67.1 of the *Act* provides 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 [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 [CBSA] and the Secretary of the [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.

ANALYSIS

16. Subsection 67.1(4) of the *Act* sets out five conditions that must be met in order for the Tribunal to grant an application for an order extending the time within which a notice of appeal may be filed, such as is currently being sought by Mr. McNenly. The *Act* clearly establishes that each of these conditions is mandatory; therefore, failure to meet any one of them will cause the application to fail.

17. First, paragraph 67.1(4)(*a*) of the *Act* requires that the application for an extension of time be made within one year after the expiry of the 90-day time period set out in subsection 67(1). In this case, the 90-day time period to file an appeal of the CBSA's decision of September 15, 2010, expired on December 14, 2010. Accordingly, the last day to file the application was December 14, 2011. The Tribunal received Mr. McNenly's application on May 18, 2011, and is thus satisfied that the first condition has been met.

18. Second, subparagraph 67.1(4)(*b*)(i) of the *Act* requires the applicant to demonstrate that, within the 90-day time period set out in subsection 67(1), the applicant was unable to act or to give a mandate to someone else to act in the applicant's name or, alternatively, that the applicant had a *bona fide* intention to appeal.

19. The CBSA submitted that Mr. McNenly was responsible for appealing the CBSA's decision of September 15, 2010, to the correct body and within the applicable time period identified in subsection 67(1) of the *Act*. It added that Mr. McNenly's responses to the various determinations that predated the CBSA's decision of September 15, 2010, demonstrate that he was well informed as to what time limits applied and took the opportunity to challenge each of those determinations in the proper forum and time period.

20. In his response to the CBSA's submissions, Mr. McNenly stated that he now understood where he had made his mistake and that his November 24, 2010, notice of appeal should have been sent to the Tribunal instead of the CBSA's Regional Appeals Unit in Vancouver. He submitted that, while he did make a mistake, he has demonstrated his intention to appeal this matter.

21. The Tribunal is of the view that Mr. McNenly's November 24, 2010, notice of appeal, which was sent to the CBSA instead of the Tribunal, clearly evinces a *bona fide* intention to appeal the CBSA's decision of September 15, 2010, within the 90-day time period set out in subsection 67(1) of the *Act*. If Mr. McNenly had no intention of contesting the CBSA's decision of September 15, 2010, he would never have prepared and sent the November 24, 2010, notice of appeal. The Tribunal believes that Mr. McNenly made an honest mistake and that this should not be confused with a lack of intention to appeal on his part. The second condition has therefore been met.

22. Third, subparagraph 67.1(4)(*b*)(ii) of the *Act* requires the applicant to demonstrate that it would be just and equitable to grant the application. The CBSA objected to the granting of the application on the basis that Mr. McNenly has failed to demonstrate any extenuating circumstances warranting his delay in bringing an appeal to the Tribunal.

23. As stated above, the Tribunal believes that Mr. McNenly's delay in bringing an appeal to the Tribunal was the result of an honest mistake and that he clearly had a *bona fide* intention to appeal the CBSA's decision of September 15, 2010, within the 90-day time period set out in subsection 67(1) of the *Act*. Had he not made this mistake, an appeal under subsection 67(1) would have been properly commenced. In the Tribunal's view, it would not be just and equitable for Mr. McNenly to be deprived of his recourse in such circumstances. The third condition has therefore been met.

24. Fourth, subparagraph 67.1(4)(*b*)(iii) of the *Act* requires the applicant to demonstrate that the application was made as soon as the circumstances permitted. The CBSA submitted that, although Mr. McNenly returned to Canada in early April 2011, he did not take steps to "rectify the situation" until May 18, 2011, and only after the Tribunal advised him that he would need to file an application for an extension of time pursuant to section 67.1.

25. The Tribunal notes that, on April 18, 2011 (only six days after his return to Canada), Mr. McNenly sent a notice of appeal to the Tribunal with respect to the CBSA's decision of September 15, 2010 (this notice was received by the Tribunal on May 3, 2011). At that time, Mr. McNenly firmly—but mistakenly—believed that his notice of appeal was being filed within the proper time period.[2] On May 4, 2011, he was advised by the Tribunal that his notice of appeal had been filed beyond the 90-day time period set out in subsection 67(1) of the *Act*. Accordingly, on May 6, 2011, he sent the Tribunal an application for an extension of time pursuant to section 67.1. The application was received by the Tribunal on May 18, 2011.

26. The Tribunal is of the view that, by having made his application for an extension of time on May 6, 2011, only two days after he became aware that he needed to do so, Mr. McNenly can be considered as having made his application as soon as the circumstances permitted. The fourth condition has therefore also been met.

27. Fifth, subparagraph 67.1(4)(*b*)(iv) of the *Act* requires the applicant to demonstrate that there are reasonable grounds for the appeal. The Tribunal has previously held that, although an application for an extension of time ". . . is not the appeal proper, the nature of this condition requires the Tribunal to deal with certain aspects of the substance of the appeal."[3]

28. Mr. McNenly is of the view that, as GST has already been paid on the 2007 motor home, the payment of GST on the full purchase price of the 2008 motor home constitutes double taxation. As noted above, Mr. McNenly is essentially arguing that the value for duty of the 2008 motor home should be calculated by deducting the trade-in allowance for the 2007 motor home from the full purchase price of the 2008 motor home.[4]

29. The Tribunal notes that these grounds of appeal are, for all intents and purposes, identical to those that were raised in *John Draganiuk v. President of the Canada Border Services Agency*.[5] The issue in that appeal was whether the trade-in allowance of a 1991 Cadillac DeVille automobile should be deducted from the value for duty of a used 2000 Cadillac DeVille automobile imported by Mr. Draganiuk. The Tribunal ultimately determined that the valuation methods outlined in sections 48 to 53 of the *Act* either did not provide for an adjustment for a trade-in allowance in calculating the value for duty of the imported

2. It was only after he received the CBSA's submissions opposing his application for an extension of time that Mr. McNenly appears to have realized that his November 24, 2010, notice of appeal should have been sent to the Tribunal instead of the CBSA's Regional Appeal Unit in Vancouver. As of April 18, 2011, Mr. McNenly appears to have been under the impression that the 90-day time period set out in subsection 67(1) of the *Act* began on February 23, 2011, the date on which the CBSA sent him a letter essentially advising him that it could no longer consider the information that he had submitted and that an appeal could be made to the Tribunal.
3. See the Tribunal's order in *Electronic Liquidators Ltd.* (6 November 2006), EP-2005-035 (CITT) at para. 15.
4. The Tribunal's jurisdiction under the *Act* is limited to issues pertaining to the tariff classification, value for duty, origin and marking of imported goods. Thus, it is not within the Tribunal's jurisdiction to grant refunds of GST paid on imported goods on the claimed basis that there has been double taxation. However, to the extent that an appellant can argue that the value for duty of a certain imported good should be reduced, this will directly impact upon the amount of GST payable.
5. (27 September 2006), AP-2005-040 (CITT) [*Draganiuk*].

automobile or could not be applied. It therefore concluded that the value for duty of the imported automobile had been properly calculated by the CBSA as the full purchase price of the automobile without any adjustment for a trade-in allowance and dismissed the appeal.

30. In light of its decision in *Draganiuk*, the Tribunal is of the view that the grounds of appeal raised by Mr. McNenly in this matter are without merit and thus considers that reasonable grounds for the appeal have not been established. Mr. McNenly has therefore failed to meet the fifth condition.

31. As one of the five conditions necessary for the granting of an application for an extension of time pursuant to section 67.1 of the *Act* has not been met, Mr. McNenly's application must be denied.

DECISION

32. For the foregoing reasons, the Tribunal denies the application for an extension of time to file a notice of appeal pursuant to subsection 67(1) of the *Act*.

Stephen A. Leach
Stephen A. Leach
Presiding Member