



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2011-002

Volpak Inc.

*Order and reasons issued
Thursday, February 2, 2012*

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IN THE MATTER OF an application made by Volpak Inc., pursuant to section 60.2 of the *Customs Act*, for an order extending the time to file a request for a further re-determination of tariff classification pursuant to section 60 of the *Customs Act*.

ORDER

The Canadian International Trade Tribunal denies the application for an extension of time to file a request for a further re-determination under section 60 of the *Customs Act*.

Stephen A. Leach

Stephen A. Leach
Presiding Member

Dominique Laporte

Dominique Laporte
Secretary

STATEMENT OF REASONS

BACKGROUND

1. This concerns an application under section 60.2 of the *Customs Act*¹ made by Volpak Inc. (Volpak) for an order extending the time to file a request for a further re-determination under section 60.
2. The application relates to a re-determination made on February 3, 2010, by the President of the Canada Border Services Agency (CBSA), under subsection 59(1) of the *Act*, of the classification of chicken breasts imported by Volpak. As a result of the re-determination, the chicken breasts were classified under tariff item No. 0207.12.93 of the schedule to the *Customs Tariff*.² Prior to the re-determination, Volpak had been importing them under tariff item No. 0207.13.91. Pursuant to subsection 59(3) of the *Act*, Volpak offered security to the CBSA in lieu of paying the outstanding tariff duties and, under section 60 of the *Act*, requested a further re-determination of the tariff classification.
3. On June 10, 2010, the CBSA refused, under subsection 60(4) of the *Act*, to make the requested further re-determination, on the ground that Volpak had failed to offer security that was “satisfactory to the Minister” of National Revenue (the Minister) in accordance with subsection 59(3).
4. On July 7, 2010, Volpak applied to the Federal Court³ for judicial review of the CBSA’s refusal.
5. On August 9, 2010, Volpak appealed the CBSA’s refusal to the Canadian International Trade Tribunal (the Tribunal). On November 8, 2010, the Tribunal dismissed the appeal on the ground that providing security satisfactory to the Minister was “. . . an unmistakable condition precedent to making a request to the CBSA for a re-determination”;⁴ therefore, the CBSA’s refusal was not a “decision” over which the Tribunal had jurisdiction pursuant to subsection 67(1) of the *Act*.
6. On September 7, 2010, Volpak commenced an action in the Federal Court⁵ against the CBSA.
7. On January 18, 2011, Volpak made a further offer of security to the Minister under subsection 59(3) of the *Act* via the Department of Justice.
8. On February 17, 2011, Volpak filed an application to the CBSA under section 60.1 of the *Act* for an extension of time to request a further re-determination.
9. On April 20, 2011, the CBSA refused Volpak’s application on the ground, among other things, that it was not the proper process for proposing a new security. On June 28, 2011, the CBSA sent Volpak a “courtesy letter” explaining why the proposed security was unsatisfactory.
10. On May 27, 2011, Volpak filed the present application.

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

2. S.C. 1997, c. 36.

3. Federal Court File No. T-1074-10; the application was discontinued on February 17, 2011.

4. *Volpak Inc. v. President of the Canada Border Services Agency* (8 November 2010), AP-2010-031 (CITT) [*Volpak*] at para. 18.

5. Federal Court File No. T-1428-10; the action was discontinued on April 27, 2011.

PROCEDURAL ISSUE

11. Volpak objected to the admission into evidence of the CBSA's June 28, 2011, courtesy letter. According to Volpak, the letter did not form part of the record of the CBSA's April 20, 2011, refusal and was inadmissible, since the current application is arguably in the nature of judicial review and not a hearing *de novo*.

12. The Tribunal disagrees with Volpak that the current application is in the nature of a judicial review. Not only did Volpak fail to provide any authority for this position, but there are numerous authorities⁶ which conclude that, where an appeal is made to a specialized board with the power to hear from witnesses and otherwise consider evidence, the appeal constitutes a hearing *de novo*. Therefore, the objection to the admission of the letter is unfounded.

ADEQUACY OF SECURITY

13. The parties are in disagreement concerning the issue of whether satisfactory security must be offered before a request for further re-determination may be made under section 60 of the *Act*. Volpak submits that the obligation to tender an acceptable security does not "mature" until the Tribunal grants permission to file the request for an extension of time. The CBSA contends that an applicant must arrange for acceptable security before applying for the extension.

14. In the Tribunal's view, this issue is irrelevant to the current application, which is for an extension of time. In any event, as was stated clearly by the Tribunal in *Volpak*, the Tribunal does not have the requisite jurisdiction to deal with the matter.

POSITIONS OF PARTIES

15. Volpak claims that all four statutory conditions for granting the extension of time have been met:

- (a) It made the present application within 90 days of the CBSA's April 20, 2011, refusal under section 60.1 of the *Act*;
- (b) It had a *bona fide* intention to request a further re-determination of the CBSA's January 18, 2010, decision under subsection 59(2) of the *Act* within 90 days;
- (c) It would be just and equitable to grant the application, since there is no assertion of foul play, dishonesty or prejudice on its part, and all other conditions for the granting of the application have been met. Moreover, it would be unjust and inequitable to force it to pay the outstanding tariff duties without first having its say in court; and
- (d) The application was made as soon as the particular circumstances following the CBSA's June 10, 2010, refusal permitted. It was not sleeping on its rights. Rather, the Tribunal's jurisdiction over the issue of posting satisfactory security was uncertain, and it needed the time to exhaust other legal proceedings before filing the application.

6. *Smith v. Minister of National Revenue*, [1965] SCR 582; *Bayside Drive-In Ltd. v. M.N.R.*, 1997 CanLII 85 (TCC) (not a trial *de novo*); *Canada (Minister of National Revenue) v. Rollins Machinery Ltd.*, 1999 CanLII 8763 (FCA); *Mendoza v. Canada (Public Safety and Emergency Preparedness)*, 2007 CanLII 68204 (IRB); *Stevens Estate v. Canada (Attorney General)*, 2011 FC 103 (CanLII).

16. The CBSA suggests that two of the necessary statutory conditions have *not* been met:
- (a) It would be unjust and inequitable to grant the application, since it would condone Volpak's ongoing refusal to comply with the statutory condition for making a request for a further re-determination, i.e. that the tariff duties must be paid or security satisfactory to the Minister must be offered. Granting the application would favour Volpak over other importers that do comply with the *Act*, would unnecessarily put the Crown's debt at risk and inappropriately put an administrative burden on the CBSA to collect it; and
 - (b) The application was not made as soon as circumstances permitted. During the eight months before Volpak filed the application, it chose to undertake three other legal proceedings: an appeal before the Tribunal, an application to the Federal Court for judicial review and an action against the CBSA. Nothing prevented Volpak from protecting its interests by filing an application for an extension of time under section 60.2 of the *Act* at the same time as the legal proceedings, and it alone is responsible for the delay.

LEGISLATION

17. Subsection 59(2) of the *Act* reads as follows:

An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.

18. Subsection 60(1) of the *Act* stipulates as follows:

A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid *or security satisfactory to the Minister* is given in respect of the total amount owing.

[Emphasis added]

19. Subsection 60.1(1) of the *Act* specifies as follows:

If no request is made under section 60 within the time set out in that section, a person may make an application to the President for an extension of the time within which the request may be made, and the President may extend the time for making the request.

20. Subsection 60.1(4) of the *Act* states as follows:

On receipt of an application, the President must, without delay, consider it and notify the person making the application, in writing, of the President's decision.

21. Section 60.2 of the *Act* provides as follows:

(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 . . .

(a) the President has refused the application; . . .

. . .

(2) The application must be made by filing with the President 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.

ANALYSIS

22. Subsection 60.2(4) of the *Act* sets out four conditions that must be met in order for the Tribunal to grant the application for the extension of time that Volpak is seeking. The *Act* clearly establishes that each of these conditions is mandatory. Failure to meet any one of them will cause the application to fail.

23. The first condition is set out in paragraph 60.2(4)(a) of the *Act*. According to this test, the application must be made within the 90-day time limit set out in subsection 60.1(1). In this case, the last day to do so would have been July 18, 2011. Volpak made the present application on May 27, 2011. The parties agree that this condition has been met.

24. The second condition is set out in subparagraph 60.2(4)(b)(i) of the *Act*. According to this test, Volpak must demonstrate that, within the 90-day period prescribed by section 60, it was unable to act in response to the CBSA's June 10, 2010, decision or give a mandate to act in its name. Alternatively, it may prove that it had a *bona fide* intention to request the further re-determination within the time frame provided for in that subsection but was unable to do so. The parties agree that this condition has also been met.

25. The Tribunal is of the view that Volpak's application does not meet the fourth condition set out in subparagraph 60.2(4)(b)(iii) of the *Act* and will therefore deal with it next. This ground requires that the application be made as soon as circumstances permitted. The parties agree that Volpak waited eight months before making the application for an extension of time to the CBSA under section 60. The Tribunal must determine if Volpak made its application as early as it could have under the particular circumstances.⁷

26. In this regard, Volpak contends that the uncertainty and complexity surrounding the Tribunal's jurisdiction to review the rejection of its security proposal required the filing of three discrete legal proceedings: an appeal to the Tribunal, an application for judicial review and an action in the Federal Court.

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

27. The CBSA noted in its submissions that all these legal proceedings concerned the same subject matter: the CBSA's refusal to consider the request for a further re-determination. The CBSA also noted that nothing prevented Volpak from filing an application for an extension of time with the CBSA under section 60 of the *Act* in order to protect its interests at the same time as the other proceedings.

28. The Tribunal agrees with the CBSA on this point. Even if Volpak were faced with uncertainty and complexity, it was definitely capable of filing an application for an extension of time with the CBSA at the same time as it pursued the other three legal avenues. Instead, Volpak waited for eight months. Furthermore, the Tribunal notes that Volpak waited for three months after receiving the Tribunal's order and reasons settling the question of jurisdiction before filing the application for an extension of time with the CBSA.

29. As mentioned, the Tribunal is therefore of the view that the fourth statutory condition has not been met. That being the case, it is unnecessary to deal with the third statutory condition, under subparagraph 60.2(4)(b)(ii) of the *Act*, that it would be just and equitable to grant the application.

DECISION

30. For the reasons given above, the Tribunal denies the application for an extension of time to file a request for a further re-determination under section 60 of the *Act*.

Stephen A. Leach
Stephen A. Leach
Presiding Member