



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2009-002

National Food Distribution Centre

*Order and reasons issued
Friday, March 12, 2010*

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IN THE MATTER OF an application made by National Food Distribution Centre, pursuant to section 67.1 of the *Customs Act*, for an order extending the time within which a notice of appeal may be filed pursuant to section 67 of the *Customs Act*.

ORDER

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

André F. Scott
André F. Scott
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

BACKGROUND

1. This concerns an application pursuant to section 67.1 of the *Customs Act*¹ made by National Food Distribution Centre (National Food) for an order extending the time to file a notice of appeal pursuant to subsection 67(1). The application concerns 21 decisions made by the President of the Canada Border Services Agency (CBSA) on June 25, 2008, pursuant to section 60. These decisions affirmed the tariff classification of goods for which National Food had sought advance rulings pursuant to section 43.1. Each of the CBSA's decisions of June 25, 2008, contained the following notice:

This letter represents a decision of the . . . CBSA made under section 60 of the *Customs Act*.

You may appeal this decision to the Canadian International Trade Tribunal [the Tribunal], under section 67 of the *Act*, by filing a written notice with both the [Tribunal] and the . . . CBSA within **90 days** from the date of this letter. (In exceptional circumstances, the [Tribunal] may extend the time limit for filing an appeal up to an additional year under section 67.1 of the *Act*.)

2. The notice was followed by the addresses of the Tribunal and the CBSA as well as an indication on how further information could be obtained from the Tribunal. The Tribunal notes that the notice is clear and unambiguous.

3. National Food did not file an appeal pursuant to section 67 of the *Act* by the prescribed date of September 23, 2008.²

4. Instead, on June 23, 2009, nearly one year after the decisions, National Food wrote to the Tribunal making the present application for an extension of time pursuant to section 67.1 of the *Act* to file a notice of appeal beyond the statutory time frame provided in section 67. That application was incomplete at that time because it was not accompanied by the CBSA's decisions. Accordingly, in a letter dated July 3, 2009, the Tribunal requested the missing information from National Food. On August 27, 2009, the Tribunal received the requested decisions. On September 8, 2009, the Tribunal requested that the CBSA make, by October 8, 2009, its representations, if any, with respect to National Food's application. The CBSA filed representations on October 7, 2009, opposing the application.

5. The Tribunal decided that an oral hearing was not required and disposed of the matter on the basis of the written information on the record.

LEGISLATION

6. Subsection 67(1) of the *Act* reads as follows:

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.

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

2. By application of the rule at subsection 27(5) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which reads as follows: "Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day."

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 [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

8. Subsection 67.1(4) of the *Act* sets out five conditions that must be met in order for the Tribunal to grant the application for the extension of time that is being sought by National Food. 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.

9. The first condition is set out under paragraph 67.1(4)(a) of the *Act*. According to this test, 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 last day to do so would have been September 24, 2009. National Food made the present application on June 23, 2009. As indicated above, the application was incomplete at that time because of missing information and, therefore, could not be considered properly filed until the requested additional information was received by the Tribunal on August 27, 2009. Irrespective of this, the initial correspondence of June 23, 2009, and the additional information received on August 27, 2009, were both filed with the Tribunal before the statutory deadline of September 24, 2009. Accordingly, the condition set out under paragraph 67.1(4)(a) has been met.

10. The second condition is set out under subparagraph 67.1(4)(b)(i) of the *Act*. According to this test, National Food must demonstrate that, within the 90-day period prescribed in subsection 67(1), it was unable to act in response to the CBSA's decisions or to give a mandate to act in its name. Alternatively, the *Act* allows National Food to prove that it had a *bona fide* intention to appeal under subsection 67(1) within the time frame provided for in that subsection, but was unable to do so. In other words, subparagraph 67.1(4)(b)(i) sets out three permissible grounds for not having acted within the normal statutory time frame: (1) inability to act; (2) inability to give a mandate; and (3) *bona fide* intention to appeal in a timely manner.

11. For the reasons that follow, the Tribunal is of the view that National Food's application does not meet any of the grounds under subparagraph 67.1(4)(b)(i) of the *Act*.

12. National Food made the following submissions in support of its application:

We are appealing this ruling, and under section 67.1 section 1 of the Customs Act are requesting that the time extension for up to one year be granted for the following reasons: we made this appeal as soon as the circumstances permitted us; we were unable to act prior to this because we did not have all the information necessary and in particular we were waiting for direction from Health Canada as well as ensuring that the information from other sources was complete. When we received the notice in 2008, we had a bona fide intention to appeal, but the grounds had not been adequately define at that time. Now we believe that we have reasonable grounds to appeal. Due to discussions that I have had with various parties including Health Canada, I wanted a clarification of the definition of these foods under various national and international statutes. In view of the above, it would be just and equitable for you to grant the application's extension of time for the appeal.³

13. National Food alleged "inability to act" because it "... did not have all the information necessary and in particular ... [was] waiting for direction from Health Canada as well as ensuring that the information and other sources was complete." On this ground, the CBSA submitted that "... lacking completeness in information does not render one 'unable to act or give a mandate to someone else to act'. Missing or incomplete documentation or difficulty in obtaining the necessary documentation would not prevent [National Food] from filing its appeal within the prescribed time limit, and requesting from the Tribunal that it grant [it] time to provide the additional information."⁴

14. The Tribunal agrees with the submissions made by the CBSA on this ground. In the Tribunal's view, none of the reasons given by National Food in its submissions demonstrate an inability to file a notice of appeal. Being "unable to act" necessarily requires an element of irresistible and compelling restraint beyond one's own free will.⁵ There is no evidence on the record that convinces the Tribunal that National Food found itself in such a situation at any time during the time frame in which it could have filed a notice of appeal pursuant to subsection 67(1) of the *Act*. In this instance, the Tribunal finds that National Food, for whatever reason that it believed valid, has simply purposely *chosen* not to act within the 90-day time frame prescribed by subsection 67(1).

15. National Food makes no claim of any "inability to give a mandate" and, therefore, the Tribunal cannot examine this ground.

16. National Food bases its alleged *bona fide* intention to appeal in a timely manner on a claim that "... the *grounds* had not been adequately defined *at that time*" and that "[n]ow we believe that we have reasonable *grounds* to appeal" [emphasis added], and because it was in discussions with "... various parties including Health Canada, [it] wanted a clarification of the definition of these foods under various national and international statutes". The CBSA argued that these submissions do not demonstrate that a *bona fide* intention to appeal existed during the time frame provided for under subsection 67(1) of the *Act*. The Tribunal agrees with the position advanced by the CBSA on this ground.

17. As it has stated previously, the Tribunal is of the view that an intent to appeal must crystallize within the 90-day period provided for under subsection 67(1) of the *Act* and not after.⁶ The Tribunal cannot accept that a *bona fide* intention to appeal within that period existed in this instance, since National Food refrained from filing an appeal during the requisite time frame and was uncertain as to whether it had

3. Applicant's brief, Tribunal Exhibit EP-2009-002-01.

4. Respondent's brief, Tribunal Exhibit EP-2009-002-06A.

5. An exhaustive list of circumstances that would qualify as giving rise to an inability to act is not known to the Tribunal. Whether circumstances qualify as such remains to be determined on a case-by-case basis.

6. *Costco Wholesale Canada Ltd.* (5 October 2006), EP-2005-008 (CITT).

grounds to appeal “at that time”. The Tribunal understands that a decision to appeal was made outside of the 90-day period because National Food states that only then did it decide that it had what it felt to be valid grounds to appeal. In the Tribunal’s view, the wording of section 67.1 clearly does not allow potential appellants additional time to reflect on whether it is opportune for them to challenge decisions of the CBSA.

18. Since National Food’s application does not meet the test of subparagraph 67.1(4)(b)(i) of the *Act*, the Tribunal need not examine the arguments made regarding the conditions set out at subparagraphs 67.1(4)(b)(ii) to (iv).

DECISION

19. For the reasons given above, the Tribunal denies the application for an extension of time to file a notice of appeal pursuant to section 67 of the *Act*.

André F. Scott
André F. Scott
Presiding Member