Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2012-005

Masai Canada Limited

Order and reasons issued
Thursday, July 4, 2013

Canada

TABLE OF CONTENTS

IN THE MATTER OF an application made by Masai Canada Limited, pursuant to section 60.2 of the *Customs Act*, for an order extending the time to file requests for further re-determinations of tariff classification pursuant to sections 60 and 61 of the *Customs Act*.

ORDER

The Canadian International Trade Tribunal denies the application for an extension of time to file requests for further re-determinations of tariff classification pursuant to sections 60 and 61 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 pursuant to section 60.2 of the *Customs Act*[1] made by Masai Canada Limited (Masai) for an order extending the time to file requests for further re-determinations.

2. Between January 17 and February 12, 2008, Masai completed the four importations of therapeutic shoes which are the subject of this application (the goods in issue).[2]

3. Following these importations, on June 18, 2009, Masai filed a request for an advance ruling of the tariff classification of certain therapeutic sport shoes which are similar to or substantially the same as the goods in issue. In its request for an advance ruling, Masai sought the benefit of tariff item No. 9979.00.00, which allows for certain goods to be imported duty-free. On August 4, 2009, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(*c*) of the *Act* but did not grant Masai the benefit of duty-free treatment under tariff item No. 9979.00.00. On August 11, 2009, Masai requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*. On May 6, 2010, the CBSA re-determined the tariff classification of the goods in issue under tariff item No. 6404.11.99, again without the benefit of duty-free treatment under tariff item No. 9979.00.00.

4. On July 5, 2010, Masai filed an appeal with the Tribunal pursuant to section 67 of the *Act*. On August 5, 2011, the Tribunal allowed Masai's appeal and granted certain therapeutic sport shoes the benefit of duty-free treatment under tariff item No. 9979.00.00. The Tribunal's decision was upheld by the Federal Court of Appeal (the Court) on October 16, 2012.

5. On March 5, 2012, Masai filed adjustment requests pursuant to subsection 74(1) of the *Act* for the goods in issue.[3] Masai asked that these requests be held in abeyance pending the resolution of its request for an advance ruling with respect to similar or substantially the same goods at the Court.

6. On April 3, 2012, the CBSA issued B2 reject notifications indicating that Masai's adjustment requests were made beyond the applicable four-year time limit provided for in subparagraph 74(3)(*b*)(i) of the *Act*. The notification specified that Masai's adjustment requests were being rejected without decision.

7. On October 31, 2012, Masai asked the CBSA to give effect to the Court's decision of October 16, 2012, by applying the benefit of tariff item No. 9979.00.00 to the goods in issue. Masai cited subparagraph 61(1)(*a*)(iii) of the *Act* as the CBSA's authority for taking such an action. At the same time, Masai acknowledged that its requests may be considered late and asked for an extension of time to file the requests pursuant to section 60.1 of the *Act*.

8. On December 11, 2012, the CBSA rejected Masai's requests as invalid. It indicated that, as Masai had not received any notice under subsection 59(2) of the *Act*, it was not entitled to request a further re-determination under subsection 60(1) and therefore there was no basis for requesting an extension of time

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. The goods in issue were imported under original transaction Nos. 13946380569933, 13946380573392, 13946380572698 and 13946380573074.
3. Masai initially alleged that these requests were filed on January 27, 2012. However, the CBSA submitted, and the date stamp on these requests indicates, that they were received by the CBSA on March 5, 2012. Masai has made no additional representations with respect to this issue nor provided any documentation to support the assertion that the adjustment requests were indeed filed on January 27, 2012.

under section 60.1. In addition, the CBSA indicated that subparagraph 61(1)(*a*)(iii) of the *Act* did not apply as the Court's decision related to an advance ruling for certain therapeutic sport shoes and was not in respect of the specific goods for which Masai sought a refund. The rejection notice specified that it did not constitute a decision under any section of the *Act*.

9. On March 5, 2013, Masai Canada applied to the Tribunal for an extension of time to file requests for re-determinations pursuant to sections 60 and 61 of the *Act*.

LEGAL FRAMEWORK

10. Section 59 of the *Act* reads as follows:

> **59.** (1) An officer, or any officer within a class of officers, designated by the [CBSA] for the purposes of this section may
>
> (*a*) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods at any time within
>
> (i) four years after the date of the determination, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1, or
>
> (ii) four years after the date of the determination, if the Minister considers it advisable to make the re-determination; and
>
> (*b*) further re-determine the origin, tariff classification or value for duty of imported goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 that is conducted after the granting of a refund under paragraphs 74(1)(*c.1*), (*c.11*), (*e*), (*f*) or (*g*) that is treated by subsection 74(1.1) as a re-determination under paragraph (*a*) or the making of a correction under section 32.2 that is treated by subsection 32.2(3) as a re-determination under paragraph (*a*).
>
> (2) 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.
>
> . . .

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

> **60.** (1) 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.

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

> **60.1** (1) If no request is made under section 60 within the time set out in that section, a person may make an application to the [CBSA] for an extension of the time within which the request may be made, and the [CBSA] may extend the time for making the request.

13. 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 Tribunal to have the application granted after . . .

(*a*) the [CBSA] has refused the application . . . ,

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 [CBSA] and the Secretary of the 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 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.

14. The relevant portions of section 61 of the *Act* read as follows:

61. (1) The [CBSA] may

(*a*) re-determine or further re-determine the origin, tariff classification or value for duty of imported goods

. . .

(iii) at any time, if the re-determination or further re-determination would give effect to a decision of the [Tribunal], the Federal Court of Appeal or the Supreme Court of Canada made in respect of the goods,

. . .

(*c*) re-determine or further re-determine the origin, tariff classification or value for duty of imported goods (in this paragraph referred to as the "subsequent goods"), at any time, if the re-determination or further re-determination would give effect, in respect of the subsequent goods, to a decision of the [Tribunal], the Federal Court of Appeal or the Supreme Court of Canada, or of the [CBSA] under subparagraph (*a*)(i),

(i) that relates to the origin or tariff classification of other like goods imported by the same importer or owner on or before the date of importation of the subsequent goods . . . .

15. Finally, the relevant portions of section 74 of the *Act* specify as follows:

74. (1) Subject to this section, section 75 and any regulations made under section 81, a person who paid duties on any imported goods may, in accordance with subsection (3), apply for a refund of all or part of those duties, and the Minister may grant to that person a refund of all or part of those duties, if

. . .

(*e*) the duties were paid or overpaid as a result of an error in the determination under subsection 58(2) of origin (other than in the circumstances described in paragraph (*c.1*) or (*c.11*)), tariff classification or value for duty in respect of the goods and the determination has not been the subject of a decision under any of sections 59 to 61;

. . .

(1.1) The granting of a refund under paragraph (1)(*c.1*), (*c.11*), (*e*) or (*f*) or, if the refund is based on tariff classification, value for duty or origin, under paragraph (1)(*g*) is to be treated for the purposes of this Act, other than section 66, as if it were a re-determination made under paragraph 59(1)(*a*).

. . .

(3) No refund shall be granted under subsection (1) in respect of a claim unless

(*a*) the person making the claim affords an officer reasonable opportunity to examine the goods in respect of which the claim is made or otherwise verify the reason for the claim; and

(*b*) an application for the refund, including such evidence in support of the application as may be prescribed, is made to an officer in the prescribed manner and in the prescribed form containing the prescribed information within

(i) in the case of an application for a refund under paragraph (1)(*a*), (*b*), (*c*), (*c.11*), (*d*), (*e*), (*f*) or (*g*), four years after the goods were accounted for under subsection 32(1), (3) or (5)

. . .

(4) A denial of an application for a refund of duties paid on goods is to be treated for the purposes of this Act as if it were a re-determination under paragraph 59(1)(*a*) if

(*a*) the application is for a refund under paragraph (1)(*c.1*) or (*c.11*) and the application is denied because at the time the goods were accounted for under subsection 32(1), (3) or (5), they were not eligible for preferential tariff treatment under a free trade agreement; or

(*b*) the application is for a refund under paragraph (1)(*e*), (*f*) or (*g*) and the application is denied because the origin, tariff classification or value for duty of the goods as claimed in the application is incorrect.

(5) *For greater certainty, a denial of an application for a refund under paragraph (1)(c.1), (c.11), (e), (f) or (g) on the basis that complete or accurate documentation has not been provided, or on any ground other than the ground specified in subsection (4), is not to be treated for the purposes of this Act as if it were a re-determination under this Act of origin, tariff classification or value for duty.*

. . .

[Emphasis added]

ANALYSIS

16. In an application for an extension of time to file a request for re-determination, the Tribunal must consider whether the mandatory conditions set out in subsection 60.2(4) of the *Act* have been met. However, the parties in this case have raised preliminary considerations which the Tribunal must address before turning to the conditions of section 60.2 of the *Act*.

17. To begin with, the CBSA argued that the Tribunal does not have the jurisdiction to grant the requested extension of time to Masai because certain prerequisites required by the *Act* have not been met. The CBSA submitted that, since Masai has received no notice under subsection 59(2) of the *Act*, there is no legislative authority for Masai to request a re-determination or further re-determination under section 60 nor is there any basis for submitting a request for an extension of time to file such a request under sections 60.1 or 60.2.

18. For its part, Masai acknowledged that it did not receive any notice under subsection 59(2) of the *Act* in respect of the goods in issue.[4] Nonetheless, Masai argued that the goods in issue should be granted, via section 61 of the *Act*, the same benefit as the shipments that were the subject of the previous Tribunal decision in *Masai Canada Inc.*[5] It submitted that for there to be no re-determination of the goods in issue creates a gap in the legislative scheme and creates an unjust outcome for Masai.

19. The Tribunal finds that in the present circumstances section 60 of the *Act* has not been engaged and cannot provide Masai with the relief that it requires. Subsection 60(1) of the *Act* provides that *a person to whom notice is given under subsection 59(2) in respect of goods* may, within 90 days, request a re-determination or further re-determination of the origin, tariff classification, value for duty or marking. Subsection 60.1(1) of the *Act* indicates that, if no request is made under section 60 within the relevant time frame, a person may make an application to the CBSA for an extension of time to file such a request. Subsection 60.2(1) of the *Act* indicates that a person who has made an application for an extension of time to the CBSA and whose application was refused (or if 90 days have elapsed and the CBSA has not notified the applicant of its decision) may apply to the Tribunal to have the application granted.

20. A plain reading of the legislative scheme contemplated by these provisions makes it clear that a notice under subsection 59(2) of the *Act* must be given before a re-determination or further re-determination can be requested under section 60. It is acknowledged by both parties in this case that no such notice was given by the CBSA. It would therefore be illogical for the Tribunal to grant Masai an extension of time to file requests for re-determinations when Masai lacks the requisite authority to make such a request.

21. With respect to the applicability of section 61 of the *Act* to the goods in issue, the Tribunal finds that the extension of time provisions contained in sections 60.1 and 60.2 only apply with respect to requests for re-determinations or further re-determinations made under section 60. Neither sections 60.1 nor 60.2 of the *Act* make any mention of section 61 nor does section 61 contemplate any type of application process. The language of section 61 is such that the CBSA may initiate the types of re-determinations provided for in that section without any type of request from an importer. Moreover, paragraphs 61(1)(*a*) and (*c*) of the *Act* provide that the CBSA *may* re-determine or further re-determine the origin, tariff classification or value for duty of imported goods *at any time* provided that the other requirements of the *Act* have been met. If the CBSA may make the types of re-determinations or further re-determinations set out in section 61 of the *Act* at any time, there is no need for a provision allowing for an extension of time to make a request for this type of decision.

22. The Tribunal notes that the administrative mechanism that would provide Masai with the relief that it requires is section 74 of the *Act*. This section allows a person who paid duties on any imported goods to request a refund of all or part of the duties paid as a result of an error, including an error in the tariff classification of the goods. In addition, a denial of an application for a refund of duty is to be treated as a

4. Tribunal Exhibit EP-2012-005-07 at para. 5.18.
5. *Masai Canada Inc. v. President of the Canada Border Services Agency*, (5 August 2011) AP-2010-025 (CITT), affirmed by the Court in 2012 FCA 260 (CanLII) on October 16, 2012.

re-determination under section 59(1)(*a*) of the *Act*, thus allowing persons who believe they have paid duties in error, but who were refused a refund, the opportunity to request a further re-determination pursuant to section 60. Masai imported the goods in issue, paid duties on them and did not claim the benefit of tariff item No. 9979.00.00 at the time of importation; therefore, absent a notice of re-determination by the CBSA, Masai's only option was to file a request for a refund of the duties paid under section 74 of the *Act*.

23. Masai failed to avail itself of this administrative mechanism within the time frame provided for in subparagraph 74(3)(*b*)(i) of the *Act*, which is four years after the goods were accounted for. Masai's requests were filed between three and six weeks late. In effect, with this application, Masai is seeking an extension of time to file a request for a refund under section 74 of the *Act.* Unfortunately for Masai, Parliament has not provided for the ability to request an extension of time to make requests under that section of the *Act*. Recourse through sections 59, 60, and in an ancillary way, 60.1 and 60.2 of the *Act* is not an alternative for an importer who paid duties on goods but who failed to avail itself of the refund scheme provided for in the *Act* in a timely manner.

24. The Tribunal recognizes that Masai is left in a situation where it has apparently overpaid duty on the goods in issue. However, this is not the result of a gap in the legislative scheme, but the failure of Masai to file timely requests for refunds. A similar situation involving the overpayment of duties by an importer as a result of its failure to claim the most preferential tariff treatment was considered by the Court in *C.B. Powell Limited v. Canada (Border Services Agency)*. The Court stated as follows:

> Finally, the appellant suggests that the overall result reached by the Tribunal is unreasonable: the appellant is left in a situation where it has paid 12.5% duty on the goods it imported, when, in fact, no duty should have been paid. That is indeed the situation in which the appellant finds itself. But the appellant, alone, is responsible for that. In its initial declaration, the appellant stated a particular origin/tariff treatment for the goods (most favoured nation treatment), but later recognized that there was a better tariff treatment (NAFTA). It tried to change the tariff treatment by using the administrative appeal regime in Part III of the Act. But Parliament's plain words in sections 58, 59, 60 and 67 of the Act, as reasonably interpreted by the Tribunal, do not permit that. Further, Parliament has provided for importers to correct their declarations or pursue other recourses within a certain period of time in certain circumstances: see, for example, sections 32.2 and 74 of the Act. But the appellant did not avail itself of those routes. Therefore, looking at the overall result reached by the Tribunal, I cannot conclude that it is outside of the range of the acceptable or defensible.[6]

25. Therefore, on the basis of the foregoing, the Tribunal finds that section 60.2 is not the proper mechanism through which Masai can seek the relief that it requires.

DECISION

26. The application is dismissed.

Stephen A. Leach
Stephen A. Leach
Presiding Member

6. 2011 FCA 137 (CanLII) at para. 37.