Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2012-066

Wolseley Canada Inc.

v.

President of the Canada Border Services Agency

Order and reasons issued
Monday, June 17, 2013

Canada

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IN THE MATTER OF an appeal filed by Wolseley Canada Inc. on February 1, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c.1;

AND IN THE MATTER OF a request made by the President of the Canada Border Services Agency on May 15, 2013, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*, for an order dismissing the appeal on the basis that the Canadian International Trade Tribunal does not have jurisdiction to hear the appeal.

BETWEEN

WOLSELEY CANADA INC. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

ORDER

The request made by the President of the Canada Border Services Agency for an order dismissing the appeal for lack of jurisdiction is denied.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

1. On February 1, 2013, Wolseley Canada Inc. (Wolseley) filed an appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*.[1]

2. On May 15, 2013, the President of the Canada Border Services Agency (CBSA) made a request to the Tribunal, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,[2] for an order dismissing the appeal on the basis that the Tribunal does not have jurisdiction to hear the matter.

PROCEDURAL HISTORY

3. On September 30, 2011, Wolseley requested an advance ruling, pursuant to section 43.1 of the *Act*, on the appropriate tariff classification of a model of ceramic sink, namely, the "TOTO Rectangle Under-Counter Lavatory - LT191G" (the good in issue). In this regard, Wolseley requested that the good in issue be classified under tariff item No. 9979.00.00 of the schedule to the *Customs Tariff*.[3]

4. On October 20, 2011, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(*c*) of the *Act*, determining that the good in issue was properly classified under tariff item No. 6910.90.00 and that tariff item No. 9979.00.00 was not applicable.

5. On November 15, 2011, Wolseley requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*.

6. In a letter dated December 21, 2011, the CBSA informed Wolseley of its preliminary decision to affirm the advance ruling. The CBSA also invited Wolseley to submit further information before a final decision was rendered. Wolseley complied on January 16, 2012.

7. In the months that followed, Wolseley made periodic enquiries as to the status of its request.

8. In this respect, it noted that the CBSA first informed it verbally that the decision was on hold pending a decision from the Federal Court of Appeal (FCA) on the CBSA's appeal from a Tribunal decision in another matter. The date of this conversation is not known to the Tribunal.

9. The FCA decision in the matter referred to by the CBSA was issued on October 16, 2012.[4] Following a renewed enquiry from Wolseley, in an e-mail dated October 31, 2012, the CBSA informed Wolseley that it was waiting for directions from its litigation section before proceeding with Wolseley's request.

10. In response to a further enquiry from Wolseley in January 2013, the CBSA reiterated that it was waiting for directions, while acknowledging that Wolseley might feel compelled to seek alternative recourse. In particular, in an e-mail dated January 14, 2013, the CBSA stated the following:

> . . . we are awaiting guidance from our headquarters advisors. We will proceed when we receive that guidance. I understand your need to pursue this through alternate means.[5]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.O.R./91-499 [*Rules*].
3. S.C. 1997, c. 36.
4. *Canada Border Services Agency v. Masai Canada Limited*, 2012 FCA 260 (CanLII) [*Masai Canada*].
5. Tribunal Exhibit AP-2012-066-04A, tab 1 at 16.

11. Wolseley filed this appeal from the preliminary decision of December 21, 2011, with the Tribunal on February 1, 2013, taking the view that the CBSA's failure to issue a final decision "without delay", as it was required to do under subsection 60(4) of the *Act*, constituted a "non-decision" or a "negative decision", which is deemed to have affirmed the CBSA's advance ruling and that gives rise to appeal rights under subsection 67(1).

12. On April 30, 2013, the CBSA wrote to the Tribunal to inform it that, on April 23, 2013, it had issued a decision pursuant to subsection 60(4) of the *Act*, affirming its preliminary decision in this matter. The CBSA accordingly suggested that Wolseley withdraw from the current appeal and file an appeal in response to the April 23, 2013, decision.

13. With Wolseley indicating that it did not intend to withdraw the current appeal, the CBSA, on May 15, 2013, requested, pursuant to rule 23.1 of the *Rules*, a determination by the Tribunal that the appeal is not properly before it and that it therefore lacks jurisdiction to hear the appeal on the grounds that the decision that was sought by Wolseley under subsection 60(4) of the *Act* had now been rendered by the CBSA.

14. The Tribunal notes however that there was a delay of approximately 18 months between the date of Wolseley's request under subsection 60(2) of the *Act* and the date of the CBSA's purported decision under subsection 60(4) and of more than 6 months from the issuance of the FCA decision, which was cited by the CBSA as the reason for the original delay.

POSITIONS OF PARTIES

CBSA

15. The CBSA argued that the only decision that properly gives rise to an appeal to the Tribunal is the decision made on April 23, 2013, and that the Tribunal cannot assert jurisdiction on the basis of a "non-decision" where an actual decision under subsection 60(4) of the *Act* in fact exists.

16. The CBSA further argued that the evidence does not support Wolseley's argument that there has been a "non-decision" or refusal to decide, but that, on the contrary, the CBSA consistently indicated its intention to issue a decision under subsection 60(4) of the *Act*. The CBSA submitted that this is distinguishable from the facts in *Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency*,[6] where the Tribunal assumed jurisdiction because no such decisions were issued up to the time of the hearing.

17. The CBSA did not directly address the issue of whether there actually was a delay inconsistent with the statutory timeliness requirement or the related question of the consequences, if any, of failing to comply with such requirement.

18. The CBSA suggested that an importer that is dissatisfied by the alleged failure to render a timely decision can apply to the Federal Court for an order of *mandamus* to compel the CBSA to issue a decision pursuant to subsection 60(4) of the *Act*, but cannot be allowed to rely on a preliminary decision to trigger appeal rights under section 67, thereby substituting the Tribunal as the decision-maker under section 60.

6. (21 December 2012), AP-2010-002 (CITT) [*Frito-Lay Canada*].

Wolseley

19. Wolseley argued that the CBSA's non-decision resulting from its refusal to act "without delay" constituted a deemed negative decision affirming the advance ruling under subsection 60(4) of the *Act*, which is reviewable as such by the Tribunal pursuant to subsection 67(1). That being the case, Wolseley claims that the CBSA was *functus officio* when it issued its purported April 23, 2013 decision. According to Wolseley, the Tribunal is not deprived of jurisdiction in the current appeal by that subsequent decision because, when it was made, the CBSA no longer had the authority to act under subsection 60(4).

20. Wolseley added that granting the CBSA's request would allow the CBSA to keep decisions pending until such time as the importer took the matter to the Tribunal and then to further delay the disposition of such matters by issuing late decisions under subsection 60(4) of the *Act*, thereby forcing appellants to restart their appeals.

LEGISLATION

21. Subsection 67(1) of the *Act* specifically allows for recourse to the Tribunal from decisions of the CBSA under subsection 60(4) in respect of a request under subsection 60(2) for the review of an advance ruling:

> 67.(1) A person aggrieved by a decision of the President 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 President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

22. In this respect, section 60 of the *Act* provides for the review of advance rulings, with the CBSA having the authority to affirm, revise or reverse same:

> (2) A person may request a review of an advance ruling made under section 43.1 within ninety days after it is given to the person.
>
> (3) A request under this section must be *made to the President* in the prescribed form and manner, with the prescribed information.
>
> (4) On receipt of a request under this section, the President shall, *without delay*,
>
> . . .
>
> (*b*) *affirm, revise or reverse the advance ruling*; or
>
> . . .
>
> (5) The President shall *without delay give notice of a decision made under subsection (4)*, including the rationale on which the decision is made, to the person who made the request.
>
> [Emphasis added]

23. As such, on receipt of a request under subsection 60(2) of the *Act*, the CBSA must, in accordance with subsections 60(4) and (5), act "without delay" in making and issuing the requested decision.

ANALYSIS

24. The FCA has confirmed that so-called "non-decisions" or refusals to exercise jurisdiction under the statutory regime of the *Act* are "decisions" that could be appealed to the Tribunal, with the Tribunal having the authority to decide whether it can hear a particular appeal.[7]

25. The Tribunal stated in *Frito-Lay Canada* that ". . . the failure of the CBSA to respond 'without delay', as it is statutorily required to do, to the requests for further re-determination . . . under subsection 60(1) of the *Act* . . . constitutes 'non-decisions' or 'negative decisions' under subsection 60(4) . . .",[8] with the Tribunal having jurisdiction to hear and dispose of appeals of such "non-decisions" or "negative decisions" under subsection 67(1).[9]

26. It is clear on the facts of this case that the CBSA failed to comply with the statutory requirement to make and issue its decision "without delay". When Wolseley filed this appeal on February 1, 2013—almost 15 months after it requested a review of the advance ruling—there was no final decision from the CBSA and no indication that a decision was imminent. Indeed, the CBSA's purported decision under subsection 60(4) of the *Act* was only issued 3 months thereafter (i.e. on April 23, 2013), or 18 months after the review was requested.

27. Having determined that the April 23, 2013, decision was issued in breach of the statutory timeliness requirement, the Tribunal must determine whether it is nevertheless valid. If it is, the Tribunal would be deprived of jurisdiction in the current appeal. If, however, it is invalid, the Tribunal has the authority under subsection 67(1) of the *Act* to review the CBSA's "non-decision" or "negative decision" as a deemed affirmation under subsection 60(4) of the advance ruling issued on October 20, 2011.

28. The consequences of breaching a legislative provision establishing specific time limits or timeliness requirements in the performance of public duties depend on whether the provision is mandatory or directory in nature, which is to be determined in accordance with generally accepted rules of statutory interpretation.[10] Actions undertaken in breach of a mandatory direction are considered void, whereas actions in breach of a provision that is only directory in nature are not invalidated.[11]

29. The modern approach to statutory interpretation requires that one look at ". . . the words of an Act . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[12] In this respect, the Supreme Court of

7. *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII) at paras. 35, 49.
8. *Frito-Lay Canada* at para. 68.
9. *Frito-Lay Canada* at para. 69.
10. See, for example, *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41 at 123; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654 [*Alberta Teachers*] at paras. 73-74. See, also, R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. at 75-79; R.W. Macaulay and J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3 at 22-126.3 - 22-126.10.
11. *Alberta Teachers* at para. 73, citing R.W. Macaulay and J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3 at 22-126 - 22-126.1.
12. See, for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

Canada has stated that ". . . the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory . . . ."[13]

30. The *Act* establishes a detailed sequence of administrative steps that allow for the review of CBSA decisions and for appeals of those decisions, with respect to, *inter alia*, advance rulings on tariff classification.[14]

31. The Tribunal is of the view that one of the key objectives of this administrative scheme is to allow for the efficient and timely resolution of disagreements between the CBSA and importers or potential importers having regard, for instance, to the commercial implications of prolonged uncertainty as to the customs duty liability that they will incur on their importations. The Tribunal considers the interpretation of the direction in subsections 60(4) and (5) of the *Act* as mandating the CBSA to make and issue its decision "without delay" to be consistent with this objective.

32. By contrast, interpreting the timeliness requirement as directory only would allow the CBSA to withhold decisions indefinitely, contrary to the object/purpose of the administrative scheme. As long as the CBSA advised an aggrieved person that it *intends* to make a decision, there could arguably be no appeal to the Tribunal, because the facts would not indicate a *refusal* to exercise jurisdiction amounting to a non-decision or negative decision appealable under subsection 67(1) of the *Act*. Moreover, even in those situations where a timely decision under subsection 60(4) had not been issued by the time the appeal was filed, the CBSA could further frustrate resolution of the matter by issuing, as in this case, a tardy decision under subsection 60(4) in advance of the hearing, which would divest the Tribunal of jurisdiction and force the appellant to re-initiate the appeal process.

33. Interpreting the "without delay" requirement as being directory rather than mandatory in nature could cause serious inconvenience to businesses and individuals. As already stated, rulings in customs matters often carry important commercial and financial implications. Where the review of an advance ruling is in issue, as in this case, the failure to provide a timely, definitive answer on the customs treatment that would be accorded to imports perpetuates the very uncertainty that the advance ruling regime was designed to remedy.[15] Indeed, that advance ruling requests were intended to be definitively disposed of in an expeditious manner is made clear by the Regulatory Impact Analysis Statement issued in conjunction with the *Tariff Classification Advance Rulings Regulations*:[16]

> The new Regulations provide certainty to importers, exporters, producers or persons authorized to account for goods, in advance of goods being imported. . . . The availability of advance rulings is of key importance to traders, especially small- and medium-sized ones. It provides for certainty and predictability as to how a given good would be treated by Customs once the importation has taken place. It also provides advance knowledge, in a competitive marketplace, of how a particular good will be treated [at importation] . . . *These Regulations assist the CBSA in providing a more effective and efficient service to importers of goods into Canada*.
>
> [Emphasis added]

13. See for example, *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para. 42.
14. *C.B. Powell Limited v. President of the Canada Border Services Agency* (11 August 2010), AP-2010-007 and AP-2010-008 (CITT) at para. 20. In this case, the Tribunal considers that, in light of the many diverse areas covered by the statute, it is appropriate, in discerning the scheme and object, to look not to the *Act* as a whole, but to those portions of the *Act* which deal with or relate to the regime of reviews and appeals. The Tribunal already accepted this proposition, put forward in that case by the CBSA, in *BalanceCo v. President of the Canada Border Services Agency* (3 May 2013), AP-2012-036 (CITT) [*BalanceCo*] at para. 46.
15. See *BalanceCo* at para. 51.
16. S.O.R./2005-256.

34. The delayed rendering and issuance of a decision by the CBSA may have onerous financial consequences, as the importer must immediately pay all duties determined to be due by the CBSA (or provide adequate security). The importer remains so encumbered through the review process.[17]

35. The Tribunal therefore finds that reading the timeliness requirement in subsection 60(4) of the *Act* as mandatory is consistent with the scheme of the *Act* and that to hold otherwise could cause serious and costly inconvenience to importers by allowing for the impedance of timely recourse to, and disposition of, appeals, which would be contrary to the object/purpose of the advance rulings regime created under the *Act* and related regulations.

36. In reaching this conclusion, the Tribunal is mindful of the fact that the requirement for the rendering of a decision "without delay" is not temporally quantified and that the CBSA will require sufficient time to conduct a review before making a decision under subsection 60(4) of the *Act*. However, as discussed above, the words "without delay", contextually read, indicate that the CBSA is required to act with dispatch in rendering decisions under subsection 60(4). Whether or not the CBSA has complied with the "without delay" requirement will of course depend upon the particular facts of each case, taking into account both the needs of the applicant and the operational requirements of the CBSA.[18]

37. In the particular circumstances of this appeal, however, the Tribunal has no hesitation in concluding that a delay of 18 months goes well beyond the timeliness requirement mandated by the *Act*, with the evidence not disclosing extenuating circumstances justifying a delay of such magnitude. The Tribunal notes, in this regard, that the purported April 23, 2013, decision was issued 6 months after the issuance of the FCA decision,[19] which was cited by the CBSA as the cause for its original delay. In any event, the CBSA is expected to apply the law as established in Tribunal decisions, unless and until such decisions are overturned on appeal by the FCA. The Tribunal therefore concludes that, in order to have complied with the mandatory requirements under subsections 60(4) and (5) of the *Act* to make and issue decisions "without delay", the CBSA would have had to have acted well before April 23, 2013.

38. With the CBSA's refusal to make and issue a decision "without delay" constituting a negative decision and a deemed affirmation of the advance ruling, the Tribunal finds the CBSA's subsequent (i.e. April 23, 2013) purported decision under subsection 60(4) of the *Act* to be invalid.

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17. As prescribed in paragraph 59(3)(*a*) and subsection 59(4) of the *Act*.
18. It is the Tribunal's task to determine, in any particular case, whether the "without delay" requirement has been breached, consistently with the scheme of the *Act* and section 67. Indeed, the *Act* tasks the Tribunal with determining, in every case, the correctness and validity of CBSA decisions. See *Grodan Inc. v. President of the Canada Border Services Agency* (1 June 2012), AP-2011-031 (CITT) at para. 33, where the Tribunal determined that the CBSA decision under section 60 was invalid because the underlying decision under section 59 was untimely and, therefore, invalid. Where, in the particular circumstances surrounding a request under subsection 60(2) for the review of an advance ruling issued under section 43.1, the Tribunal finds that the CBSA is not in breach of the "without delay" requirement in subsection 60(4), an appeal will not lie to the Tribunal until the process under that subsection is exhausted, *in accordance with the statutory scheme*, either through the issuance by the CBSA of an actual decision or through a non-decision (resulting from the CBSA's failure to act "without delay") that is deemed to affirm the original ruling.
19. *Masai Canada*.

39. On the basis of the foregoing, the Tribunal finds that it has jurisdiction to hear the present appeal.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member