Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2003-051

EMI Music Canada

v.

President of the Canada Border Services Agency

Order and reasons issued
Tuesday, June 22, 2004

Canada

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IN THE MATTER OF an appeal under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a motion by the President of the Canada Border Services Agency dated March 5, 2004, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, for an order dismissing the appeal on the basis that the Canadian International Trade Tribunal lacks jurisdiction to consider the issue.

BETWEEN

EMI MUSIC CANADA **Appellant**

AND

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

ORDER

The motion is granted, and the appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Ellen Fry
Ellen Fry
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Tribunal Members:	Patricia M. Close, Presiding Member Pierre Gosselin, Member Ellen Fry, Member
Counsel for the Tribunal:	John Dodsworth
Clerk of the Tribunal:	Anne Turcotte
Parties:	Rick H. Kesler and Robb C. Heintzman, for the appellant Anne M. Turley, for the respondent

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STATEMENT OF REASONS

BACKGROUND

1. This concerns the motion of the President of the Canada Border Services Agency (CBSA) of March 5, 2004, requesting that the Tribunal order the dismissal of this appeal.

2. This appeal, which was filed with the Tribunal on December 5, 2003, is from two decisions of the Commissioner of the Canada Customs and Revenue Agency (CCRA) (now the CBSA) dated September 10 and November 4, 2003. EMI Music Canada (EMI) asked that this appeal be combined with two other appeals that it had initiated, Appeal Nos. AP-92-270 and AP-95-309, on the basis that, in its view, a more expeditious resolution of the matters at issue would result. The Tribunal held Appeal Nos. AP-92-270 and AP-95-309 in abeyance pending the decision of the Supreme Court of Canada in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*[1]

3. The CCRA first requested that this appeal be dismissed for lack of jurisdiction, in correspondence dated December 10, 2003. On January 30, 2004, EMI replied to the CCRA's letter. On March 1, 2004, the Tribunal scheduled a hearing for August 11, 2004. The Tribunal also provided the parties with a schedule for filing briefs and stated that the jurisdictional issue would be dealt with during the hearing.

4. The parties subsequently requested the Tribunal to provide a ruling, as a preliminary matter, regarding its jurisdiction in the appeal. On March 5, 2004, the CBSA clarified that it wished the Tribunal to consider its challenge to the Tribunal's jurisdiction to hear this appeal as a preliminary motion pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*[2] and requested the Tribunal to make an order dismissing this appeal. On March 12, 2004, the Tribunal postponed the hearing of this appeal and informed the parties that briefs did not need to be filed, pending the resolution of the motion.

5. The parties subsequently informed the Tribunal that they did not wish to make any further submissions with respect to the issues in this preliminary motion.

ARGUMENT

6. In its December 10, 2003, correspondence, the CCRA indicated that the issues in Appeal Nos. AP-92-270 and AP-95-309 had been settled and that a refund of all duties paid by EMI in respect of these appeals had been made in the decision dated September 10, 2003, from which EMI appealed in this appeal. In its November 4, 2003, decision, the CCRA refunded EMI interest that had accumulated on these duties while Appeal Nos. AP-92-270 and AP-95-309 were being held in abeyance.

7. The CCRA argued that Appeal Nos. AP-92-270 and AP-95-309 were moot since the issues had been settled and a refund of the duties had been made. Further, the CCRA argued that the Tribunal lacked jurisdiction to hear this appeal since the only issue is the amount of interest that the CCRA owed EMI in respect of the refund of the duties. The CCRA argued that the Tribunal lacked the jurisdiction to consider an appeal involving the application of the refund provisions of the *Customs Act*[3] and its regulations. The CCRA referred to the decision in *Amersham Health Inc. v. Commissioner of the CCRA*,[4] in which the Tribunal concluded that it did not have jurisdiction to determine whether the CCRA was required to pay interest on

1. [2001] 2 S.C.R. 100.
2. S.O.R./91-499.
3. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
4. (10 March 2003), AP-2001-093 (CITT) [*Amersham*].

anti-dumping duties collected pursuant to the *Special Import Measures Act*[5] that were refunded in *Amersham*.

8. The CCRA added, in its December 10, 2003, correspondence, that the decisions incorrectly cited paragraph 64(*b*) of the *Act* as the authority for the refunds and that it should have been indicated that they were decisions made under subparagraph 61(1)(*a*)(i). Further, the CCRA stated that, typically, a single decision is issued to make a refund of duties and interest owing, but that the refund of interest had been made in a separate decision to allow the parties time for settlement negotiations. In its January 30, 2004, response to the CCRA's December 10, 2003, letter, EMI argued that the Tribunal was entitled to determine its own jurisdiction as a matter of administrative law. It was of the view that the issue of interest owing "[was] based on and [flowed] directly and automatically from the re-determination decision made by the [CCRA] under section 60 or 61". According to EMI, the refund of both the duties and interest was made in the decision issued pursuant to section 61. Since, pursuant to section 67, the Tribunal has jurisdiction to hear appeals of decisions made pursuant to sections 60 and 61, EMI argued that the Tribunal had jurisdiction to hear this appeal.

9. EMI argued that the fact that the CCRA admitted that the refund of both the duties and interest should have been made by way of a single decision "reveals the interconnected nature of the two issues. The close connection between these two issues demonstrates the fact that, if the CCRA's position were correct that no appeal lies to the [Tribunal] with respect to the proper amount of statutory interest payable to a party receiving a refund, it would equally follow that no appeal would lie to the [Tribunal] if the [CCRA] fails to repay the statutorily mandated amount of principal based on a re-determination under section 61."

10. EMI argued that the Tribunal's decision in *Amersham* is distinguished from this appeal, since the Tribunal decided that there had been no re-determination under section 60 or 61 of the *Act* in that case. Consequently, there was no appeal from the decision at issue to the Tribunal under section 67. In contrast, the CCRA's September 10 and November 4, 2003, decisions were clearly made pursuant to section 61. EMI also submitted that *Amersham* related to duties paid under *SIMA*, which does not include a statutory entitlement to interest. In contrast, the *Act* includes a refund provision.

DECISION

11. With respect to Appeal Nos. AP-92-270 and AP-95-309, the CCRA stated that the issues had been settled and that they are, therefore, moot. The Tribunal may strike an appeal on a preliminary basis if it determines that it is "plain and obvious" or "beyond doubt" that the pleading discloses no reasonable cause of action.[6] If all the issues in those appeals have been resolved, the Tribunal might well be inclined to dismiss the appeals. However, given that EMI wishes these appeals to be joined, it is not entirely clear whether all the issues raised have been addressed. The Tribunal will therefore not dismiss Appeal Nos. AP-92-270 and AP-95-309 in this motion. Instead, the Tribunal expects that EMI will withdraw those appeals if, in fact, the issues have been resolved.

12. The CCRA asserted that the only dispute in this appeal was the amount of interest that it paid subsequent to the November 4, 2003, decision in respect of the duties refunded. It further asserted that it did not dispute the amount of the duties that were refunded. EMI does not dispute this assertion. In its January 30, 2004, correspondence, EMI stated, in reference to this appeal: "It is EMI's position that the *Customs Act* . . ., the *Canadian International Trade Tribunal Act* . . . and the Detailed Adjustment

5. R.S.C. 1985, c. S-15 [*SIMA*].
6. *GFT Mode Canada Inc. v. Deputy M.N.R.* (18 May 2000), AP-96-046 and AP-96-074 (CITT).

Statements . . . which contain the decisions EMI has appealed confer jurisdiction on the [Tribunal] to hear EMI's appeals with respect to its statutory entitlement to interest." In this appeal, EMI has made no allegation with respect to the decisions themselves or the amount of the duties that have been refunded.

13. In this appeal, the two decisions issued by the CCRA were made pursuant to subparagraph 61(1)(*a*)(i) of the *Act*,[7] which states:

> 61.(1) The Commissioner may
>
> (*a*) re-determine or further re-determine the origin, tariff classification or value for duty of imported goods
>
> (i) at any time after a re-determination or further re-determination is made under paragraph 60(4)(*a*), but before an appeal is heard under section 67, on the recommendation of the Attorney General of Canada, if the re-determination or further re-determination would reduce duties payable on the goods.

14. The decision made by the CCRA pursuant to section 61 of the *Act* was that royalty payments that had been paid by EMI were not to be added to the value of the goods. The decision contains a statement regarding the right to appeal from this decision to the Tribunal, pursuant to section 67. However, EMI has not indicated that it disputes this decision. Instead, EMI disputes the amount that it has paid as interest on the duties that were disputed in Appeal Nos. AP-92-270 and AP-95-309 and refunded on the basis of the November 4, 2003, decision.

15. However, paragraph 61(1)(*a*) of the *Act* does not encompass decisions by the CCRA in relation to interest on refunded duties. The Tribunal accepts the CCRA's submission that, instead, the duties were refunded and associated interest paid to EMI pursuant to section 65, which states in part:

> 65.(1) If a re-determination or further re-determination is made under paragraph 60(4)(*a*) or 61(1)(*a*) or (*c*) in respect of goods, such persons who are given notice of the decision as may be prescribed shall, in accordance with the decision,
>
> (*b*) be given a refund of any duties and interest paid (other than interest that was paid by reason of duties not being paid in accordance with subsection 32(5) or section 33) in excess of the duties and interest owing in respect of the goods.

16. Pursuant to section 67 of the *Act*, the Tribunal has jurisdiction to hear appeals from decisions made pursuant to section 60 or 61. Section 67 states in part:

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

17. The Tribunal does not have jurisdiction to hear appeals concerning interest on refunds made pursuant to section 65 of the *Act*. Therefore, the Tribunal is of the view that it lacks jurisdiction to consider this appeal.

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7. The Tribunal accepts the CCRA's submissions that the decisions were made pursuant to section 61 of the *Act*, not paragraph 64(*b*).

18. The Tribunal considered the same issue in *Amersham*, although the circumstances of the case were somewhat different. In *Amersham*, the Tribunal stated in part:

> Furthermore, as indicated above in relation to section 60, the issue in this case is not the amount of the value for duty, rather it is whether interest is payable on the duties remitted. *This is a matter that is not encompassed in section 61*. (Emphasis added)

19. EMI argued that, as a matter of administrative law, the Tribunal may determine its own jurisdiction. The Tribunal does not agree. While it has an obligation to ascertain the nature of its jurisdiction in any inquiry from its enabling legislation, consistent with the applicable principles of administrative law, that is not the same as the proposition that the Tribunal may **establish** its own jurisdiction. In *Deputy M.N.R.C.E. v. Unicare Medical Products Inc.,*[8] the Tribunal stated in part:

> As a statutory agency, its jurisdiction is entirely derived from Parliament. It only has the authority conferred explicitly or implicitly by its own enabling statute or other federal statutes that give it jurisdiction.[9]

20. While an administrative Tribunal may, in some instances, derive powers by implication from an explicit power,[10] the Tribunal is of the view that authority to hear appeals concerning origin, tariff classification, value for duty or marking determination of imported goods under section 67 of the *Act* does not imply a power to hear an appeal concerning the amount owing in interest in respect of a refund of duties. As noted above, such a payment of interest is made pursuant to a specific section of the *Act* that is not subject to appeal to the Tribunal.[11]

21. Given that the Tribunal lacks jurisdiction to consider the grounds of appeal, the motion is granted, and the appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Ellen Fry
Ellen Fry
Member

8. (30 April 1990), 2437, 2438, 2485, 2591 and 2592 (CITT).
9. *Ibid*. at 5.
10. In *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* [1989] 1 S.C.R. 1722, the Supreme Court of Canada held that the statutory power granted to the *Canadian Radio-Television and Telecommunications Commission* to issue an interim order meant that it also had an implicit power to review that interim order.
11. In *Gammon Trading Co. Ltd. v. Commissioner of the CCRA* (21 April 2004), AP-2003-012 (CITT), the Tribunal dismissed the appeal on a preliminary motion, given that the appellant disputed matters not within the Tribunal's jurisdiction to adjudicate, including the manner in which the CCRA had calculated interest.