Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application No. EP-2014-001

Dealers Ingredients Inc.

Order and reasons issued
Friday, August 29, 2014

Canada

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IN THE MATTER OF an application made by Dealers Ingredients Inc., 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 section 60 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 under section 60 of the *Customs Act*.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Jason W. Downey
Jason W. Downey
Member

Ann Penner
Ann Penner
Member

STATEMENT OF REASONS

INTRODUCTION

1. This is an application filed by Dealers Ingredients Inc. (DI), pursuant to subsection 60.2(1) of the *Customs Act*,[1] from a decision issued by the President of the Canada Border Services Agency (CBSA) on March 20, 2014, pursuant to subsection 60.1(4). In its decision, the CBSA denied DI an extension of time to file a request under subsection 60(1) for a further re-determination of the tariff classification of imported goods.

BACKGROUND

2. On April 15, 2013, the CBSA, pursuant to subsection 59(2) of the *Act*, issued Detailed Adjustment Statements (DASs) regarding re-determinations of the tariff classification for 10 transactions that took place between January 13 and December 7, 2011.[2]

3. Following these decisions, DI, pursuant to subsection 60(1) of the *Act*, had 90 days to file a request for a further re-determination of the tariff classification. However, no such request was filed within the 90-day time frame.

4. On or after September 13, 2013, DI filed an application with the CBSA under section 60.1 of the *Act* for an extension of time to file the request for further re-determination.[3]

5. The CBSA issued its preliminary decision on February 21, 2014, denying DI's application for an extension of time to file the request for further re-determination on the basis that DI did not meet two of the conditions set out in subsection 60.1(6) of the *Act* for the granting of the application.[4] On March 20, 2014, the CBSA issued 10 final DASs that confirmed its preliminary decision.[5]

6. On April 9, 2014, DI filed the present application with the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 60.2(1) of the *Act*.[6]

7. On May 12, 2014, the CBSA filed its submissions.[7] The same day, DI requested permission from the Tribunal to make further submissions in response to new arguments raised by the CBSA.[8] The Tribunal granted the request on May 16, 2014,[9] and DI filed its reply submissions on June 4, 2014.[10]

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit EP-2014-001-01, tab 1 at para. 1, Vol. 1.
3. Exhibit EP-2014-001-04A, tab 4, Vol. 1. The CBSA alleges that the complete application was submitted on October 4, 2013. See Exhibit EP-2014-001-04A at para. 8, Vol. 1.
4. Exhibit EP-2014-001-01, tab 2, Vol. 1.
5. *Ibid.*, tab 4.
6. Exhibit EP-2014-001-01, Vol. 1.
7. Exhibit EP-2014-001-04, Vol. 1.
8. Exhibit EP-2014-001-05, Vol. 1.
9. Exhibit EP-2014-001-06, Vol. 1.
10. Exhibit EP-2014-001-07, Vol. 1.

STATUTORY FRAMEWORK

8. The relevant provisions of the *Act* are 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. . . .
>
> . . .
>
> **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 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.
>
> . . .
>
> (6) No application may be granted unless
>
> (*a*) the application is 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
>
> **60.2**(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 either
>
> (*a*) the President has refused the application; or
>
> (*b*) ninety days have elapsed after the application was made and the President has not notified the person of the President's decision.
>
> If paragraph (*a*) applies, the application under this subsection must be made within ninety days after the application is refused.
>
> . . .
>
> (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.

POSITIONS OF PARTIES

9. The parties agreed that DI's application met two of the four conditions set out in subsection 60.2(4) of the *Act* for the granting, by the Tribunal, of an application for an extension of time, namely:

- DI filed its application for an extension of time under subsection 60.1(1) within one year and 90 days of the issuance of the decisions of April 15, 2013, made pursuant to subsection 59(1), as required by paragraph 60.2(4)(*a*); and
- Within the time period set out in section 60, DI had a *bona fide* intention to make the application, as required by subparagraph 60.2(4)(*b*)(i).[11]

DI

10. DI submitted that its application met all the conditions for the granting of an application for an extension of time.

11. In this respect, DI advanced two distinct arguments in support of its contention that the "just and equitable" criterion in subparagraph 60.2(4)(*b*)(ii) of the *Act* had been met.

12. Firstly, DI maintained that the CBSA based its denial of an extension of time solely on Interim Memorandum D11-6-9,[12] which treats a request for an extension of time flowing from the failure by a representative of an applicant to file, in a timely manner, a request for re-determination as a breach of the "just and equitable" criterion as it would be unjust and inequitable to other importers.[13] In DI's view, by relying on its own administrative guidelines rather than putting its mind to the facts of DI's case, the CBSA has fettered its discretion.[14]

13. Secondly, DI contended that the CBSA cannot simply rely on its own administrative practice that granting the application would be unfair to other taxpayers without identifying which classes of taxpayers would be adversely affected, and without considering whether DI's situation is different from the situations that would affect other taxpayers.[15]

14. With respect to the final condition, namely, that its application was filed "as soon as circumstances permitted", DI highlighted that it relied on Tribunal jurisprudence to establish that its application under section 60.1 of the *Act* was filed "as soon as circumstances permitted".[16] It argued that the CBSA cannot dismiss these precedents as fact-specific but must provide an ". . . explanation as to how the facts in Applicant's situation differed from those in the Tribunal decisions cited . . . ."[17]

15. With regard to the circumstances leading to the failure to file the request for re-determination, in a timely manner, DI submitted that it verbally instructed its customs broker to file such a request, but that the broker failed to do so.[18] DI maintained that, when it discovered that a request for further re-determination

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11. Exhibit EP-2014-001-01 at para. 8, Vol. 1; Exhibit EP-2014-001-04A at paras. 17-18, Vol. 1.
12. "Applications to the Commissioner for an Extension of Time to File a Dispute Notice" (22 May 2002).
13. Exhibit EP-2014-001-01 at para. 12, Vol. 1.
14. *Ibid.* at paras. 13-17.
15. *Ibid.* at paras. 18-19.
16. *Ibid.* at para. 24; see, also, Exhibit EP-2014-001-01, tab 1 at para. 9, Vol. 1.
17. Exhibit EP-2014-001-01 at para. 24, Vol. 1.
18. Exhibit EP-2014-001-01, tab 1, Vol. 1; Exhibit EP-2014-001-04A, tab 3, Vol. 1.

had not been filed, it immediately instructed its legal counsel to take action.[19] In this regard, it claimed that the delay in filing the request was the result of a "miscommunication" between itself and its customs broker.[20]

CBSA

16. The CBSA countered that DI failed to meet the third and fourth conditions for an extension of time set out in subsection 60.2(4) of the *Act* and that, consequently, the application should be denied.[21]

17. With respect to the third criterion, as set out in subparagraph 60.2(4)(*b*)(ii) of the *Act* (i.e. that it is "just and equitable" to grant the application), the CBSA contended that DI's only reason for the delay is the alleged failure of its customs broker to follow instructions.[22] The CBSA argued that granting the application on this basis would not be fair to other importers, insofar as it would ". . . unfairly absolve the importer of the responsibility to ensure that their representatives file applications in time."[23] In this connection, it noted that Federal Court of Appeal decisions support the conclusion that ". . . it is just and equitable to ensure that statutorily mandated timelines [be] adhered to."[24]

18. In regard to the fourth criterion, as set out in subparagraph 60.2(4)(*b*)(iii) of the *Act* (i.e. that the application be made "as soon as circumstances permitted"), the CBSA relied on two recent Tribunal decisions denying applications for extensions of time on this ground if the applicants could have filed applications earlier.[25]

19. The CBSA noted that DI's only explanation for the delay of more than 60 days was its customs broker's failure to file the request for re-determination. In the CBSA's view, this explanation is unsubstantiated and too vague to ascertain DI's diligence in ensuring that the request was filed.[26] In particular, it noted the lack of evidence regarding the hiring of the customs broker, the role of counsel or how it came to DI's attention that the request had not been filed. It further noted the failure of DI's affidavit to address which customs broker was hired, who specifically was instructed, what follow-up steps were taken and by whom.[27]

20. Finally, the CBSA, referring to two decisions of the Federal Court, argued that DI's unsubstantiated reason for missing the deadline for filing the request does not explain why the request could not have been filed sooner and that, for this reason alone, the Tribunal should deny the application.[28]

19. Exhibit EP-2014-001-01, tab 1, Vol. 1.
20. *Ibid.*, tab 1 at para. 3.
21. Exhibit EP-2014-001-04A at para. 2, Vol. 1.
22. *Ibid.* at para. 22.
23. *Ibid.* at para. 23.
24. *Ibid.* at para. 24, citing *Canada v. Berhad*, 2005 FCA 267 (CanLII).
25. Exhibit EP-2014-001-04A at para. 27, Vol. 1, citing *Hydraulic Source Inc.* (31 August 2012), EP-2012-002 (CITT) at paras. 18-22, and *Volpak Inc.* (2 February 2012), EP-2011-002 (CITT) [*Volpak*] at paras. 25-29.
26. Exhibit EP-2014-001-04A at para. 28, Vol. 1.
27. *Ibid.* at para. 29.
28. *Ibid.* at paras. 30-33.

TRIBUNAL'S ANALYSIS

Preliminary Issue

21. DI asserted that the CBSA invoked new arguments in its submissions and argued that these should not be permitted, as the current appeal is not a *de novo* proceeding, being based on an application under section 60.1 of the *Act*.[29] In particular, it submitted that the CBSA, under the "just and equitable criterion", had argued that it would be unfair to other importers to allow an applicant to rely on an error made by its representative in filing an application under section 60.1, but contended, in this appeal, that granting an application for an extension of time would unfairly absolve the importer of the responsibility to file applications on time.[30] In addition, it noted that the CBSA is now questioning the affidavit of its representative for the first time in these proceedings.[31]

22. In *Volpak*, the Tribunal concluded that an application for an extension of time under the *Act*, like other appeals made to specialized boards with the power to hear from witnesses and otherwise consider evidence, is a hearing *de novo*.[32] As such, each party may dispute any fact or raise new arguments. Accordingly, the Tribunal rejects DI's argument that the CBSA must not be permitted to raise new arguments.

23. In any case, and in accordance with the principles of procedural fairness and natural justice, DI was afforded a reasonable opportunity to respond to all the arguments made by the CBSA.

Analysis

24. The time frames set out in the *Act* are not notional and must be respected. Subsection 60.2(4) lists the four statutory conditions that must be met before the Tribunal can grant an application for an extension of time under subsection 60.2(3). The *Act* clearly establishes that each of these conditions is mandatory, with the failure to meet any one of them being sufficient cause for the application to fail.

25. As previously noted, the parties agree that DI met the first two conditions, namely, that it filed its application for an extension of time in a timely manner and that it had a *bona fide* intention to make a request. The Tribunal finds no basis to disagree. Accordingly, the Tribunal need only address the issues of whether it would be just and equitable to grant the application and whether the application was made as soon as circumstances permitted.

– Whether it is just and equitable to grant the application

26. In previous cases, the Tribunal, in assessing whether it would be just and equitable to grant an application for an extension of time, weighed such factors as the length of the delay against the consequences to the applicant if the application was not granted,[33] the unfairness faced by other importers if the application was granted[34] and the reasons for the delay.[35]

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29. Exhibit EP-2014-001-07 at 2-3, Vol. 1.
30. *Ibid.* at 3.
31. *Ibid.*
32. *Volpak* at para. 12.
33. *Bernard Chaus Inc.* (4 December 2003), EP-2003-001 (CITT); *Agripack* (16 February 2004), EP-2003-002 (CITT); *Ingram Micro Inc.* (31 March 2004), EP-2003-006 (CITT) [*Ingram*]; *General Motors of Canada Limited* (11 February 2009), EP-2008-002 (CITT) [*General Motors*]; *Mr. Gordon Grandison* (31 March 2004), EP-2003-007 (CITT) [*Mr. Grandison*].
34. *Agripack.*
35. *Ingram*; *General Motors*; *Mr. Grandison*.

27. In this case, DI filed the application 61 days after the deadline,[36] which the Tribunal considers to be an inordinately long period of time. On the other hand, the Tribunal also considers that a denial of the application would impose a harsh consequence on DI, given its resulting inability to challenge the significant amount of assessed duty. The Tribunal does not consider either to be determinative in the circumstances.

28. As mentioned above, DI argued that the failure to file the application on time was attributable to a "miscommunication" between itself and its broker.[37] In particular, it states that, following the receipt of the DAS and the payment of the duties owed, it ". . . verbally instructed [its] customs broker . . . to file a re-determination of the tariff classification . . . ."[38] However, DI does not indicate or provide any evidence that it followed up with its broker on whether the application had in fact been filed or that it took any other action with regard to the filing of the request until some considerable time after the deadline for filing had expired.

29. Furthermore, DI does not provide any indication that it attempted to communicate with the CBSA between April 17 (when it advised the CBSA that it authorized Mr. Kaylor to act on its behalf with respect to the tariff classification of certain goods) and September 13, 2013 (when DI filed its application under section 60.1). Indeed, there is no indication that DI took any further action with regard to its intent to challenge whether the assessed duties were indeed payable until September 6, 2013, when it discovered that no request for re-determination had been filed by its customs broker and when it contacted counsel to prepare the request for an extension of time, which was filed on September 13, 2013.

30. The Tribunal can only conclude from this that DI failed to exercise due diligence, with its passivity striking, given the amount of time that had elapsed after the filing deadline and the quantum of duty liability at stake.

31. In the Tribunal's view, DI cannot rely on this omission by its customs broker to justify the delay. Whether or not an agency relationship existed between DI and its customs broker, (and leaving aside any recourse that the former might have against the latter, which is outside the purview of the current application), DI remained ultimately responsible for the broker's failure to file a timely request for re-determination on its behalf.[39]

32. In previous cases with long delays in filing an application, the Tribunal found the granting of extensions of time to be justified where there were circumstances beyond the applicants' control.[40] This is not one of those situations. In this case, the matter was entirely within DI's control, and omissions could have been avoided through the exercise of basic diligence on its part. DI remained responsible to ensure that the request for re-determination was filed within the time frame set out in the *Act*.

33. Finally, the Tribunal considers that the evidence adduced by DI does not clearly and convincingly establish the facts of this case and, in particular, the specific steps taken by DI in relation to the filing of the request for re-determination. Courts and administrative tribunals have found unsubstantiated affidavit

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36. The CBSA issued the DASs under subsection 59(2) of the *Act* on April 15, 2013. The deadline for filing an application for further re-determination under subsection 60(1) is the 90th day after this date, which, in this case, was July 14, 2013. DI did not file an application for an extension of time with the CBSA until at least September 13, 2013, which is 61 days after the deadline set out in subsection 60(1).
37. Exhibit EP-2014-001-01, tab 1 at para. 3, Vol. 1.
38. Exhibit EP-2014-001-01, tab 1, Vol. 1.
39. See Halsbury's Laws of Canada – Commercial Law III (Agency), Section IV.5.
40. *Mr. Grandison*; *Agripack*.

evidence to be insufficient to establish the claims of the affiant.[41] In this regard, the affidavit provided by DI is deficient, as it does not provide precise details regarding the actions taken by DI with respect to the request for re-determination, such as the date on which instructions were given, the person or company to whom the instructions were given, the scope of the instructions and the follow-up steps taken. Furthermore, DI has not provided other evidence to corroborate the statements contained in the affidavit.

34. Having regard to the fact that it was within DI's control to effect a timely filing of its request for re-determination and that the failure to do so was largely attributable to its failure to exercise due diligence in respect of the actions (or inaction) of its broker, the denial of DI's application for an extension of time to cure its filing omission would not be unjust. Moreover, it would be equitable *vis-à-vis* those parties that exercise the required level of care to ensure adherence to legislated filing deadlines. Having found that the "just and equitable" criterion was not met, the Tribunal does not consider it necessary to address the fourth statutory condition in subparagraph 60.2(4)(*b*)(iii) of the *Act*.

DECISION

35. The application is denied.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Jason W. Downey
Jason W. Downey
Member

Ann Penner
Ann Penner
Member

41. *Washagamis First Nation v. Ledoux*, 2006 FC 1300 (CanLII) at para. 37; *Chekroun v. Canada (Citizenship and Immigration)*, 2013 FC 738 (CanLII) at para. 84; *Ontario (Public Infrastructure Renewal) (Re)*, 2008 CanLII 14881 (ON IPC) at para. 42.