Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-027

Ever Green Ecological Services Inc.

v.

President of the Canada Border Services Agency

Decision issued
Friday, September 18, 2015

Reasons issued
Friday, October 2, 2015

Canada

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IN THE MATTER OF an appeal heard on May 7 and 8, 2015, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF various requests for re-determination, dated August 11, 2014, made under the *Customs Act*, as submitted to the President of the Canada Border Services Agency.

BETWEEN

EVER GREEN ECOLOGICAL SERVICES INC. **Appellant**

AND

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

DECISION

The appeal is allowed. Amounts paid by Ever Green Ecological Services Inc., in order to pursue this appeal, are to be refunded by the Canada Border Services Agency.

Jason W. Downey
Jason W. Downey
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	May 7 and 8, 2015
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber Courtney Fitzpatrick Rebecca Marshall-Pritchard
Student-at-law:	Rohan Mathai
Acting Senior Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representative**
Ever Green Ecological Services Inc.	Peter E. Kirby
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Orlagh O'Kelly Amy Smeltzer

WITNESS:

Glenn Smith
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STATEMENT OF REASONS

BACKGROUND AND DISCUSSION

1. This is an appeal filed by Ever Green Ecological Services Inc. (Ever Green) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*.[1]

2. Between March 22 and December 17, 2012, Ever Green imported 12 used garbage and recycling trucks (the goods in issue) from the United States.[2] The goods are of U.S. origin.[3]

3. As was the case in *Bri-Chem Supply Ltd. v. President of the Canada Border Services Agency*,[4] which was heard at the same time as the present appeal on May 7 and 8, 2015,[5] and *Southern Pacific Resource Corp. v. President of the Canada Border Services Agency*[6], this appeal concerns exclusively the taxpayer's ability to make corrections to erroneous customs declarations.

4. All three appeals were filed with the Tribunal as a result of the refusal by the President of the Canada Border Services Agency (CBSA) to apply the Tribunal's decision in *Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency*.[7]

5. Ever Green is appealing the CBSA's claim that it owes duties on the goods in issue. The Tribunal finds that Ever Green owes none.

6. At the time of importation, Ever Green classified the goods in issue under tariff item No. 8705.90.90 of the schedule to the *Customs Tariff*[8] as other special purpose motor vehicles (box No. 27 on customs forms), declared them to be of U.S. origin (box No. 12, specifically, the goods originated in "UAZ", meaning "United States, Arizona") and indicated code 2 for tariff treatment (box No. 14, code 2 corresponds to Most-Favoured-Nation [MFN] tariff treatment). The applicable rate of duty was zero.

7. As was the case in *Bri-Chem* and *Southern Pacific*, the goods in issue would have entered Canada duty-free no matter where they originated in the world[9] and irrespective of the tariff treatment code that Ever Green had entered on its form, because the goods in issue were also duty-free under *all other* preferential tariff treatments, whether under a free trade agreement or not. In other words, the goods in issue were duty-free "across the board".

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2014-027-12C (protected), tab A6, Vol. 2.
3. The CBSA did not contest the validity of the certificates of origin. *Transcript of Public Hearing*, Vol. 2, 8 May 2015, at 210, 214.
4. (18 September 2015), AP-2014-017 (CITT) [*Bri-Chem*].
5. The record remained open until May 22, 2015, in order to allow the filing of certain revised exhibits as directed by the Tribunal at the hearing. Exhibit AP-2014-027-30, Vol. 1D.
6. (18 September 2015), AP-2014-028 (CITT) [*Southern Pacific*]. The hearing in that matter took place on June 2, 2015.
7. (21 December 2012), AP-2010-002 (CITT) [*Frito-Lay*].
8. S.C. 1997, c. 36.
9. The only exception is if the goods originated in the People's Republic of Korea, which is the only country that is subject to the General Tariff.

8. On December 10, 2013, the CBSA sent Ever Green a trade compliance verification notification letter informing it that the CBSA would be conducting an audit of the tariff classification for the period covering the dates of the importations of the goods in issue.[10]

9. On March 3, 2014, the CBSA informed Ever Green that there were no issues regarding the tariff classification of the goods that it had verified.

10. However, on March 17, 2014, the CBSA amended its position by issuing an interim report informing Ever Green that the correct classification of the goods in issue was tariff item No. 8704.22.00 (other motor vehicles for the transport of goods with a gross vehicle weight exceeding five tonnes but not exceeding 20 tonnes) instead of tariff item No. 8705.90.90.[11]

11. Unlike goods imported under tariff item No. 8705.90.90 (duty-free "across the board"), goods imported under tariff item No. 8704.22.00 are dutiable at 6.1 percent *ad valorem* under MFN tariff treatment, but are duty-free under the United States Tariff (UST/NAFTA). The goods in issue were always of U.S. origin.

12. On April 16, 2014, to reflect its newfound understanding of what the goods actually were in terms of tariff classification, Ever Green filed corrections pursuant to subsection 32.2(2) of the *Act*, changing the tariff classification of the goods in issue to tariff item No. 8704.22.00 and indicating code 10 (for "UST") in box No. 14 (used for tariff treatment).[12]

13. The CBSA issued a final report on April 29, 2014, confirming the contents of the interim report.[13]

14. On May 1, 2014, the CBSA issued 12 detailed adjustment statements giving notice that it accepted Ever Green's corrections to tariff *classification* but that it rejected its tariff *treatment.*[14]

15. On May 30, 2014, Ever Green requested a further re-determination of those decisions.[15]

16. On August 11, 2014, the CBSA issued a B2 reject notification denying Ever Green's request.[16] The CBSA claimed that it had not issued re-determinations of origin under subsection 59(2) of the *Act* and that, therefore, the CBSA had no legislative authority to consider a request for further re-determination under section 60. This position by the CBSA of course purposefully ignores subsection 32.2(3). This matter was otherwise settled by the Tribunal in *Frito-Lay*.[17]

17. On November 12, 2014, Ever Green filed this appeal with the Tribunal.

18. For the same reasons given in *Bri-Chem*, the Tribunal finds that it has jurisdiction to decide this appeal and that Ever Green made revenue-neutral changes in tariff classification where the previously claimed duty-free status now required a code 10 (for "UST") in order to be maintained. The goods in issue were always duty-free admissible importations originating in the United States and eligible, from the

10. Exhibit AP-2014-027-12C (protected), tab A8, Vol. 2.
11. *Ibid.*,tab A12.
12. *Ibid.*, tab A14.
13. *Ibid.*, Tab A16.
14. *Ibid.*, tab A18.
15. *Ibid.*, tab A20.
16. *Ibid.* tab A22.
17. *Frito-Lay* at para. 49.

beginning, for UST/NAFTA tariff treatment. As examined in *Frito-Lay*; this never placed Ever Green in a refund situation, as synthesized by the CBSA; section 74 of the *Act* is not applicable.

19. For the same reasons given in *Bri-Chem*, the Tribunal also finds that the CBSA's actions in this matter constitute an abuse of process.

DECISION

20. The appeal is allowed. Amounts paid by Ever Green, in order to pursue this appeal, are to be refunded by the CBSA.

Jason W. Downey
Jason W. Downey
Presiding Member