Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2014-021

Worldpac Canada

v.

President of the Canada Border Services Agency

Order and reasons issued Thursday, February 18, 2016

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1
- BACKGROUND 1
- PROCEDURAL HISTORY 2
- POSITIONS OF PARTIES 3
  - CBSA 3
  - Worldpac 4
- LEGISLATION 4
- ANALYSIS 5
- DECISION 6

IN THE MATTER OF a preliminary issue of jurisdiction in an appeal filed by Worldpac Canada on September 3, 2014, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

BETWEEN

WORLDPAC CANADA **Appellant**

AND

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

ORDER

The Canadian International Trade Tribunal hereby concludes that it does not have jurisdiction to hear the appeal. Consequently, the appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

STATEMENT OF REASONS

BACKGROUND

1. This is a decision on the preliminary issue of the jurisdiction of the Canadian International Trade Tribunal to hear the appeal filed by Worldpac Canada (Worldpac) on September 3, 2014, pursuant to subsection 67(1) of the *Customs Act*.[1]

2. At the outset, the Tribunal makes two observations.

3. Firstly, the Tribunal wishes to address a specific administrative practice used by the Canada Border Services Agency (CBSA) in regard to what is known as "blanket authorizations". This mechanism involves a specific process by which an importer can apply to the CBSA for an authorization to file several adjustment or refund requests at once.

4. Instead of filing a large number of individual requests (often identical or in regard to the same subject matter), in certain circumstances, the CBSA allows importers to file a single request,[2] under a blanket authorization, covering importations over a given period of time. This is meant to save time and effort for both the importer and the CBSA, which only has to deal with a single request as opposed to a larger number dealing with the same goods. According to its internal policies, however, the CBSA will only grant a blanket authorization, pursuant to an importer's request, if it believes that, by doing so, it will be mutually beneficial to the CBSA and the importer—this makes sense. It is designed to facilitate matters for all.

5. The obvious implication here is that an importer can only file several adjustment requests under the authority of a single application if an authorization is granted by the CBSA. This authorization then becomes the understanding that the CBSA will process a multitude of importations as one request, under one umbrella, because, for example, the goods are all similar, deal with the same subject matter and, more generally, to which the same arguments would apply (e.g. a request for a change in tariff treatment).

6. The process of blanket authorizations is not stipulated in the *Act* but comes from an administrative practice. It simply allows the CBSA to streamline formal processes in order to help importers. Importantly, it must be remembered that the process in no way alters imperative prescriptions of the *Act*, including the four-year time limit for filing refund or adjustment requests under subparagraph 74(3)(b)(i) of the *Act*. At all times, both parties are bound by the requirements of the *Act*, notwithstanding this administrative streamlining.

7. Secondly, the Tribunal also wishes to note the general disorganization of the present case from its inception. For some time, it was quite difficult for the Tribunal to determine, with any given degree of precision, which goods were actually the subject of the appeal. The submissions filed by Worldpac were incoherent, and it was difficult to understand precisely what was being appealed. Only after a series of interventions, teleconferences and a preliminary hearing did the relevant subject matter actually become ascertainable. In that context, it is worthwhile going through a detailed timeline of these events in order to circumscribe the debate.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. The concept of a "single request" is used for illustrative purposes in this case. It is possible for more than one request to be filed under this "blanket" process, depending on the importation dates and the goods involved. As illustrated in the present case, 25 requests were submitted, covering hundreds of individual importations.

PROCEDURAL HISTORY

8. On September 11, 2011, Worldpac submitted two blanket authorization requests to the CBSA.

9. On February 28, 2012, the CBSA issued two blanket authorization letters to Worldpac allowing it to submit blanket refund claims in connection with a change in tariff classification and claims of benefits under Chapter 99 of the *Customs Tariff*,[3] covering a four-year period beginning March 1, 2008.[4] The blanket authorization letters from the CBSA explicitly stated that the blanket refund requests were to be presented in the format discussed between the parties and that the authorizations may be cancelled if mutual administrative benefits were not realized.[5] The letters also informed that the filing of a blanket authorization request in no way removed or adjusted the time limits to file refund requests under the *Act*.

10. On March 25, 2013, the CBSA issued a notice of cancellation in respect of one of the above blanket authorizations, identified as T0324002 (for tariff classification), on the basis that mutual benefits could not be realized.[6] It would later become apparent to the Tribunal that this cancellation occurred because of an apparent lack of general organization and diligence by Worldpac in supplying documents and responding to the CBSA's queries.

11. On March 26, 2013, Worldpac applied to the CBSA for another blanket authorization. On March 27, 2013, Worldpac appealed the notice of cancellation to the Tribunal in Appeal No. AP-2013-044, which it later withdrew on June 5, 2013.

12. On July 12, 2013, the CBSA issued a third blanket authorization to Worldpac in respect of importations that took place between March and December 2009. It appears that there were a number of delays between the date of Worldpac's application and the issuance of the blanket authorization by the CBSA. This period covered the appeal of the above notice of cancellation and a further period of inactivity on the part of the CBSA after that.

13. Worldpac filed a total of 25 blanket adjustment requests with the CBSA: 7 on September 19, 2013 (the September filings), and 18 on October 4, 2013 (the October filings).[7] These 25 requests were in respect of hundreds of importations that had occurred between January 1 and December 21, 2009.[8]

14. On March 4, 2014, the CBSA made decisions in respect of the September filings, informing Worldpac that those requests which were filed within the four-year time limit under the *Act* had been accepted and that those which were filed outside that time limit had been excluded from consideration.

15. On April 1, 2014, the CBSA made similar decisions in respect of the October filings. Those which were filed within the four-year time limit under the *Act* had been accepted and those which were outside that window had also been excluded from consideration.

16. Worldpac argued that the date of the two initial blanket adjustment requests in February 2012 was the relevant date of application to these filings and that, hence, any refund requests made four years prior to

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3. S.C. 1997, c. 36.
4. See Exhibit AP-2014-021-10A, tab C-3, Vol. 1, for copies of blanket authorizations T0343978 (for tariff code changes) and T0324002 (for tariff classification).
5. Exhibit AP-2014-021-10A, tab C-3, Vol. 1.
6. Exhibit AP-2014-021-34D, tab C, Vol. 1B.
7. Exhibit AP-2014-021-34D, tabs A, B, Vol. 1B.
8. Exhibit AP-2014-021-341A at paras. 5-7, Vol. 1A.

that date ought to be considered timely, even for importations filed under the third blanket authorization of 2013. In addition, Worldpac argued that the blanket requests made in 2012, covered under the initial two blanket authorization letters, should still be considered relevant (notwithstanding that one had been cancelled). Apparently, Worldpac still considered those initial authorizations and the related adjustment requests (from 2012, covering a period beginning in March 2008) to still be live issues. Its position was that these blanket authorizations somehow stopped the prescriptive passage of time in regard to computation under the *Act*.

17. On June 5 and 13, 2014, the CBSA issued reject notifications for transactions contained within the September and October filings that were outside the legislated four-year limit.[9]

18. Worldpac sought a further re-determination of the reject notifications under section 60 of the *Act*. The CBSA simply declined on the basis that there had been no re-determination under section 59 that would warrant a further re-determination under section 60.

19. The current appeal was filed with the Tribunal on September 3, 2014. After several delays caused by Worldpac, the Tribunal identified a need to hold three separate teleconferences in an effort to establish which importations were the subject of the appeal and to oblige Worldpac to organize its case and supply adequate documentation in support of its claims.

20. On May 12 and 14, 2015, the CBSA filed motions with the Tribunal, requesting that the appeal be dismissed on the basis that Worldpac had not complied with the Tribunal's repeated instructions to clarify the list of transactions under appeal.

21. Despite the Tribunal's best efforts, the matter still remained unresolved until a hearing was held on June 10, 2015, at which time the Tribunal, through extensive chronological work with Worldpac, was able to determine that the appeal related to two reject notifications issued by the CBSA on June 5 and 13, 2014. On July 6, 2015, with the intention of giving Worldpac a full opportunity to make its case, the Tribunal denied the CBSA's motion and ultimately allowed the appeal to proceed.

22. During the course of the preliminary hearing, it was noticed that there was a possible jurisdictional issue relating to the CBSA's treatment of the requests at issue according to sections 59 and 60 of the *Act*. As such, the parties were directed to file submissions on the issue of the Tribunal's jurisdiction, pursuant to section 67, by July 24, 2015, and submission replies by August 7, 2015.

23. On October 28, 2015, a hearing on the question of the Tribunal's jurisdiction was held in Ottawa, Ontario.

POSITIONS OF PARTIES

CBSA

24. The CBSA's position was that the Tribunal had no jurisdiction in the present case because there was no decision under section 60 of the *Act* and, therefore, no path forward to section 67, which would grant the Tribunal jurisdiction. In support of its position, the CBSA argued that only where it makes a decision on the basis of origin, tariff classification or value for duty, or makes an implied decision on the basis of any of those three grounds, is there a statutory basis for review pursuant to section 59, 60 or 67.[10] In support of this

9. Exhibit AP-2014-021-34D, tabs A, B, Vol. 1B.
10. Exhibit AP-2014-021-34A at para. 2, Vol. 1A.

position, the CBSA referred to the decision of the Federal Court of Appeal (the Court) in *C.B. Powell Limited v. Canada (Border Services Agency)*[11] where the Court upheld the Tribunal's conclusion that only a legally founded re-determination or further re-determination by the President of the CBSA under subsection 60(1) in respect of one of the three components in the duty calculation could qualify as a decision.[12]

25. Moreover, the CBSA argued that the scheme of the *Act* and, in particular, subparagraph 74(3)(b)(i) and subsection 74(5) establish that the denial of an application on the basis of an importer's failure to file complete documentation within the relevant timelines does not constitute a re-determination and does not engage any of the grounds for review outlined in the *Act*.

Worldpac

26. For its part, Worldpac argued that the Tribunal has the jurisdiction to hear the appeal, as the CBSA's refusal to make a decision pursuant to section 60 of the *Act* is such a decision. Worldpac also relied, in part, on *C.B. Powell* and *Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency*[13] for the proposition that a refusal to make a decision is, in and of itself, both legally and factually, a decision *per se*.[14]

27. Worldpac also argued that many of its refund requests were legally filed under the first two blanket authorizations issued by the CBSA and that, somehow, this had the effect of suspending the four-year time limit prescribed under subparagraph 74(3)(b)(i) of the *Act*. Alternatively, Worldpac argued that the CBSA was at fault for having considered its refund requests to have been filed outside the prescribed time limit because the CBSA had cancelled the first blanket authorization, forcing Worldpac to incur lengthy delays attempting to secure another one. Worldpac argued that it should not be penalized for those delays.

LEGISLATION

28. Paragraph 59(1)(b) of the *Act* provides that "[a]n officer . . . may . . . (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 . . . ."

29. Subsection 60(1) of the *Act* states that a request for re-determination may be made to the CBSA by 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.

30. Subsection 67(1) of the *Act* provides that a person aggrieved by a decision of the CBSA made pursuant to section 60 or 61 may appeal from the decision to the Tribunal.

31. Subparagraph 74(3)(b)(i) of the *Act* states that no refund shall be granted under subsection 74(1) in respect of a claim unless ". . . (b) an application for the refund . . . 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) . . . four years after the goods were accounted for under subsection 32(1), (3) or (5) . . . ."

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11. 2011 FCA 137 (CanLII) [*C.B. Powell*].
12. Exhibit AP-2014-021-34A at paras. 26, 30, Vol. 1A.
13. (21 December 2012), AP-2010-002 (CITT) [*Frito-Lay*].
14. Exhibit AP-2014-021-35 at 1, 3, Vol. 1C.

32. Subsection 74(5) of the *Act* states that a denial of an application for a refund under paragraph 74(5)(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 74(4), *is not to be treated for the purposes of the Act as if it were a re-determination of origin, tariff classification or value for duty*.

ANALYSIS

33. Worldpac argued that the effect of the initial blanket authorization letters from the CBSA on February 28, 2012, was to suspend the obligation to file its refund requests within the four-year time limit and that, accordingly, the 25 transactions determined to be the subject of this appeal (i.e. the September and October filings) should be covered by those initial blanket authorizations. The Tribunal finds these arguments to be problematic on a number of fronts.

34. The *Act* prescribes certain time limits during which refund requests must be filed.[15] A blanket authorization—which constitutes an administrative solution/mechanism—devised by the CBSA can by no means modify the imperatives set out in the *Act*.

35. Subparagraph 74(3)(b)(i) of the *Act* is prescriptive and does not provide for extensions of time. Furthermore, discussions and attempts to find mutually beneficial grounds between the parties, either informally or through the blanket authorization process, do not suspend the effect of time and the operation of the legislative scheme; parties must always be mindful that the *Act* operates notwithstanding their interactions.

36. The Tribunal also accepts the CBSA's position that, in this case, it validly did not issue re-determinations under section 59 of the *Act* and that, hence, no further re-determinations were legally available under section 60 with respect to the goods in issue.

37. The Tribunal also finds that the present case does not generate a situation in which Worldpac was the victim of an officially induced error or that the granting or subsequent cancellation of any of these blanket authorizations was unfair.

38. As indicated above, the time limits are clearly set out in the legislative scheme and the *Act* does not provide any way to extend or modify them. The blanket authorization letters themselves made particularly clear that they ". . . in no way remove or extend the time limits to file a required adjustment under section 32.2 CA or the application of penalties under the Administrative Monetary Penalties System, nor [do they] extend the one year under paragraph 74(1)(c.1) or the four-year time limits to file a refund under section 74." Furthermore, the blanket authorizations themselves have neither the effect nor the ability to extend the four- year time limit stipulated under the *Act.*

39. Arguably, Worldpac could have filed individual refund requests for each transaction. This would have been time-consuming and administratively complex but would have enabled Worldpac to ensure compliance with the time limits set out in the *Act*. Instead, it chose to dedicate its time and effort negotiating a third blanket authorization request with the CBSA, a process which took several months. As it did so, time was fleeting for those importations on the fringe of that four-year time limit.

40. The Tribunal did give particular attention to Worldpac's argument that the CBSA was behaving inappropriately under some outlying scheme of "non-decisions" in an attempt to intentionally deny the

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15. Subparagraph 74(3)(b)(i) of the *Act.*

Tribunal jurisdiction. That issue was of specific concern in *Frito-Lay* and *C.B. Powell*, which were previously decided by the Tribunal and the Court respectively.

41. The Tribunal finds this case to be uniquely distinguishable from *C.B. Powell* and *Frito Lay*. In those cases, the issue was whether the refusal of the CBSA to process applications were decisions that could be appealed to the Tribunal. However, in the present matter, the CBSA had no legal authority whatsoever to issue a decision under section 60 of the *Act* and validly proceeded accordingly; that distinction is of prime importance and effectively dispositive of this matter.

42. Subsection 74(5) of the *Act* allows for a refund to be denied on the basis of incomplete or inaccurate documentation or any ground other than those specified in subsection 74(4). As in *Volpak Inc. v. President of the Canada Border Services Agency*,[16] the CBSA in the present case did not have jurisdiction to make a decision pursuant to section 60. The CBSA officer responsible for processing Worldpac's requests for refunds accepted those that were within the scope of the four-year time limit and did not accept those that were beyond that limit. A decision was made with regard to those requests that met the statutorily prescribed four-year deadline. There is no discretion legally available to the CBSA officers to accept requests that are filed beyond that time limit. Furthermore, there was no evidence of an apparent error in determining the parameters of the applicable four-year time limit or which transactions fell within or without that period.

43. On that basis, there were therefore no actionable decisions by the CBSA on the transactions that fell outside of the legislative time frame. Moreover, there is no evidence, beyond mere speculation on Worldpac's part, that this represents a veiled attempt by the CBSA to negate the Tribunal's jurisdiction.

44. The wording of subparagraph 74(3)(b)(i) and subsection 74(5) of the *Act* is clear. The CBSA's decision not to process parts of Worldpac's refund requests because they were filed outside the prescribed time limit is sound and cannot be treated as a re-determination under section 59. In such a case, if there is no re-determination under section 59, there can be no further re-determination under section 60 and, thus, there is no basis for an appeal to the Tribunal under subsection 67(1). Accordingly, the Tribunal finds that it does not have jurisdiction in this case.

DECISION

45. The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

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16. (8 November 2010), AP-2010-031 (CITT).