Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2019-019

Tenneco Automotive Operating Company Inc.

v.

President of the Canada Border Services Agency

Order and reasons issued
Thursday, March 12, 2020

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal filed by Tenneco Automotive Operating Company Inc. on August 12, 2019, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a motion by the President of the Canada Border Services Agency for an order dismissing the appeal for lack of jurisdiction.

BETWEEN

TENNECO AUTOMOTIVE OPERATING COMPANY INC. **Appellant**

AND

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

ORDER

The motion is denied. The Canadian International Trade Tribunal has jurisdiction to hear the appeal.

Cheryl Beckett

Cheryl Beckett
Presiding Member

STATEMENT OF REASONS

SUMMARY

[1] Importers have four years to ask the Canada Border Services Agency (CBSA) for a refund of customs duties under subsection 74(1) of the *Customs Act*.[1] On September 5, 2018, Tenneco Automotive Operating Company Inc. (Tenneco) asked the CBSA for a refund pertaining to a series of transactions covering a four-month period of September 2014 to December 2014. Tenneco did so via a "blanket" request covering all of the transactions for the period in issue.[2] Blanket requests are used where individual requests would be unnecessarily bureaucratic and duplicative.

[2] In the real world of international trade, the Tribunal is always concerned about practicalities and efficiency, and eschews unnecessary bureaucratic formalities. The Tribunal understands that the CBSA recognized this goal as well, when it put into place an administrative procedure for "blanket" requests.

[3] However, the Tribunal finds that the CBSA's policy and practice (and consequently its specific actions in these particular circumstances) are fundamentally flawed in one key area, i.e. in regard to the date on which it considers a blanket request to have been filed. According to the CBSA, a blanket request requires approval by the CBSA but a blanket request is only considered as having been filed on the day of that approval *instead of* on the date when the request is actually filed. In the Tribunal's view, the intention to file a request for each of the transactions covered by a blanket request is formed, at the latest, on the date that the blanket request is filed by the importer with the CBSA. Importers should not be penalized for the time that it takes for CBSA officials to "approve" a blanket request.

[4] Indeed, approval of the blanket request mechanism rarely, if ever, occurs on the same day as the filing of the request itself. As such, in the period between the filing of a request and its approval, time will understandably pass as the application is processed. The CBSA can take unlimited time to grant the approval because it is not constrained by any legislative deadlines. The result of the CBSA's policy can therefore create, either unwittingly or by design, a Kafkaesque bureaucratic scenario; at its most absurd, it incentivizes CBSA officials to withhold approval of the procedure of a blanket refund request until after all of the deadlines for filing individual requests have passed.

[5] Unfortunately, in Tenneco's case, that scenario played out. Whether unwittingly or by design is of no importance—by the time the CBSA finally approved Tenneco's blanket request application (295 days after the filing date), all of the transactions pertaining to the request had gone beyond the four-year refund request period. After being confronted by this absurd situation, the CBSA's position has been to deny any remedy to Tenneco by relying upon its own administrative process and policy that purports to permit the CBSA to determine whether Tenneco met the filing deadline or not. Described more succinctly, the CBSA's approach favoured a questionable bureaucratic approval process over access to justice and effectively annulled the object and scheme of the legislation, which

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1 R.S.C., 1985, c. 1 (2nd Supp.) [*Customs Act*].

2 *Preparation and Presentation of Blanket B2 Adjustment Requests*, (26 January 2017) (online: https://www.cbsa-asfc.gc.ca/publications/dm-md/d17/d17-2-4-eng.html) [Memorandum D17-2-4]. The CBSA's administrative practice/policy of allowing "blanket" refund requests for a series of transactions to be grouped together in an addendum to one B2 form, instead of individual requests having to be made for each and every one of a series of similar transactions. According to the policy, blanket requests must be *applied for and authorized* by the CBSA.

was to allow importers to request refunds within a four-year window. The Tribunal cannot accept that an internal CBSA mechanism, which is designed to ease an administrative burden for all the correct intentions, has become a tool to improperly deny an importer its right to make a refund request.

[6] The CBSA ought simply to have accepted that the blanket refund request was received on the date that the application was received at its offices and the same is therefore applicable for all of the transactions referenced in the blanket request. The intention to seek a refund for amounts paid in error on all of those transactions clearly manifested itself on the date that the blanket request application was made. Any other date is incongruent with subsection 74(3) of the *Customs Act*, which provides the prescribed time when written notice of a claim must be filed. All of the transactions filed on the date in that manner were deserving of examination, irrespective of the date on which the CBSA began or completed its examination of the request for "approval". While it is true that subsection 74(3) does provide that an application must be made in the prescribed manner and form containing the necessary information, there is no legislative justification for an additional approval which effectively reduces the prescribed time given to the person making the claim.

[7] The Tribunal cautions the CBSA against imposing any additional limit on the statutory right of importers to file a refund request within four years of the date of the importation of the goods. The CBSA's blanket request mechanism should be applauded as a means to facilitate access to justice and eliminate red tape; however, it should not be allowed to become a source of bureaucratic nightmares for importers or potential justification for CBSA officials to arbitrarily dictate whether claims will be approved or denied by their decision to issue an "approval" to file an application.

[8] As such, the Tribunal finds that Tenneco's blanket request and each transaction to which it pertains were filed on the date that the blanket request application was received by the CBSA. Decisions on each of its individual transactions should then have been taken on their merits, rather than on an artificial finding of untimeliness. By acting as it did in regard to various transactions in issue in this matter, the CBSA refused to make decisions in regard to tariff classification and consequently a refund of duties that Tenneco purports to have paid in error. The CBSA improperly refused to act in this matter; those refusals are negative decisions that the Tribunal can examine.

[9] The appeal is properly before the Tribunal. The motion is denied.

BACKGROUND

[10] On September 5, 2018, Tenneco filed a blanket B2 adjustment request, i.e. a single "cover" B2 adjustment form with a spreadsheet detailing a series of transactions subject to the general appeal, along with the request for the CBSA to grant this filing format (blanket authorization request). The refund requests were denied by the CBSA as untimely, i.e. they were treated as being related to goods that were imported more than four years before the filing of the adjustment or refund request. The CBSA refused to issue a section 59 decision (to grant or refuse the refund by changing or maintaining the tariff classification as originally declared) and consequently refused to make the next decision (a section 60 decision) as to these goods, a decision which would have been appealable to the Tribunal. Nevertheless, Tenneco filed an appeal to the Tribunal on August 12, 2019, contesting this outcome.

[11] Accordingly, the CBSA brought a motion to the Tribunal on October 7, 2019, stating the following:

> The President did not render a decision pursuant to section 60 of the *Customs Act*. Section 67(1) clearly states that only decisions "made under section 60 or 61" may be appealed to the Tribunal. Consequently, since a section 60 decision was not, and could not be rendered by the President, Tenneco's appeal falls outside of the Tribunal's jurisdiction.
>
> [Footnotes omitted]

[12] After receipt of the above motion, the Tribunal directed parties to file supplementary submissions on jurisdiction and to address its previous decision in *Worldpac I*.[3]

[13] The issue raised by the motion and considered by the Tribunal is whether the filing of the application, the B2 form and related worksheets was a refund request in the prescribed form and manner as required by the *Customs Act* and, thus, whether the decision of the CBSA to refuse to decide on the refund request is appealable to the Tribunal.

CHRONOLOGY OF EVENTS

[14] A list of events important to understanding the appeal, as set out in the appellant's brief, is set out below:

- September 5, 2018 (Day 1) – Tenneco filed the following:

  a. an *application* to make a blanket adjustment request;

  b. a *blanket adjustment request* in the prescribed form B2 but covering multiple import transactions from September to December 31, 2014 – the B2 form is structured to cover only two transactions at a time; this would be akin to a "cover" letter for information in attachments thereto.

  c. a *spreadsheet* with details of the transactions covered by the adjustment request, including multiple import transactions (181 transactions from September to December 2014).

- November 14, 2018 (Day 70) – The CBSA responded, asking for more information on certain goods covered by the appeal.
- January 2, 2019 (Day 119) – Tenneco responded, citing the *Worldpac I* decision as additional information.
- January 18, 2019 (Day 135) – The CBSA responded, asking for product literature, part numbers and a description of certain goods imported in 2015.
- January 16, 2019, received January 24, 2019 (Day 141) – The CBSA responded, denying the blanket adjustment request, stating as follows:

  > This is further to the blanket authorization application received on behalf of your client Tenneco Automotive Operating Company Inc. on September 6, 2018.
  >
  > After review, it has been determined that your B2 blanket adjustments cannot be accepted as submitted, due to the following:

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[3] Exhibit AP-2019-019-05.

> *Information provided to substantiate your claim was provided after the four-year time limit. Section 74 of the Act provides for a four-year period for the submission of refund claims.*
>
> *The filing of a blanket B2 authorization application does not constitute filing an adjustment request under section 32.2 or 74 of the Customs Act. It in no way removes or extends* the time limits to file a required adjustment under section 32.2 CA or the application of penalties under the Administrative Monetary Penalty System, nor does it extend the one year under paragraph 74 (1)(c.1) or *the four [sic] time limits to file a refund under section 74.*
>
> [Italics added for emphasis]

- February 7, 2019 (Day 155) – Tenneco responded, seeking clarification for the denial.
- February 7, 2019 (Day 155) – The CBSA responded the same day, referring to the four-year time limit and limiting the adjustment request spreadsheet to goods imported from March 2015 onwards.
- June 27, 2019 (Day 295) – The CBSA responded and accepted the application for blanket adjustments for goods imported from July 2015 to December 2015.

POSITIONS OF THE PARTIES

[15] The CBSA maintains that the Tribunal has no jurisdiction to hear this appeal. Its position is that an importer cannot file a B2 form with its blanket refund application and protect the time limits to file refund requests. The CBSA also cites subsection 74(5) of the *Customs Act*, which specifically exempts decisions where complete or accurate documentation was not provided from being deemed to be section 59 decisions. The CBSA reiterates that there is no section 60 decision from which to appeal to the Tribunal. The CBSA submits that the *Worldpac I* decision of the Tribunal, where it found that it had no jurisdiction to deal with a similar appeal, is applicable to the circumstances of the present appeal.

[16] Tenneco submits that the Tribunal has jurisdiction to hear the appeal pursuant to guidance from the Federal Court of Appeal contained in *C.B. Powell Limited*.[4] Tenneco distinguished *Worldpac I* by clarifying that, unlike the appellant in that case, Tenneco is not contending that "the filing of a blanket authorization letter [*sic*] suspends the obligation to file a refund request within the four-year time limit." Instead, Tenneco argued that "there is no legislative requirement to provide additional or specific information requested by the CBSA within the four-year time limit" and that the CBSA improperly conflated the blanket refund authorization process with the issues of time limits for filing refunds requests and provision of complete or accurate information. Essentially, what is contested by Tenneco is the CBSA's decision that the refund requests were not made in a timely manner as it contends that the untimeliness is solely because of the time the CBSA took to approve the blanket refund request.

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4 *C.B. Powell Limited v. President of the Canada Border Services Agency* 2011 FCA 137.

ANALYSIS

Provisions related to the refund of customs duties

[17] The relevant statutory provisions are set out in the Appendix to these reasons. The initial provision to be noted is section 74 of the *Customs Act*, which provides as follows:

> **(3)** No refund shall be granted under subsection (1) in respect of a claim unless
>
> > **(a)** the person making the claim affords an officer reasonable opportunity to examine the goods in respect of which the claim is made or otherwise verify the reason for the claim; and
> >
> > **(b)** an application for the refund, including such evidence in support of the application as may be prescribed, 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)(a), (b), (c), (c.11), (d), (e), (f) or (g), *four years after the goods were accounted for* under subsection 32(1), (3) or (5), . . .
>
> [Italics added for emphasis]

[18] Subsection 2(1) of the *Customs Act* sets out that "prescribed" means the following:

> **(a)** in respect of a form or the manner of filing a form, authorized by the Minister,
>
> **(b)** in respect of the information to be provided on or with a form, specified by the Minister, and
>
> **(c)** in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation.

[19] As will be discussed below, no regulation, authorization, specification or other instrument prescribing a manner, form or information regarding the making or processing of section 74 refund claims was identified by the CBSA. The CBSA entirely relied on its Memorandum D17-2-4. This is discussed immediately below.

Refund of customs duties for multiple import transactions

[20] The CBSA's Memorandum D17-2-4 contains a description of the process of filing blanket section 74 refund requests (excluding section 60 appeals).[5]

[21] In brief, the process outlined by these CBSA guidelines entails the following steps to request a refund in a simplified format where the request is regarding more than 25 transactions in a 12-month period, i.e. a blanket request:

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[5] References to section 60 are to an importer's appeal to the President of the CBSA, i.e. the administrative review mechanism that is provided for prior to the appeal to the Tribunal under section 67 of the *Customs Act*: Memorandum D17-2-4 at paras. 7, 16.

a. an application to file the request in a blanket format must be submitted by the importer along with an electronic workbook containing data on all the relevant transactions. (Note that a sample format for both of these documents is set out in an Appendix to D17-2-4.)
b. the application must be approved by CBSA in writing. (Note that there are no timelines for this approval. In contrast, the filing of an individual B2 request does not require approval.)
c. once authorization is received, partially completed B2 form(s) can be filed along with supporting electronic workbooks and printouts of same. (Note that each B2 covers up to a year's worth of transactions.)

There are no prescribing instruments cited in Memorandum D17-2-4 in support of how this process complies with section 74 of the *Customs Act*. In contrast, the Tribunal notes that the CBSA has expressly prescribed a particular B2 format and a specific process for filing appeals which format and process is *limited to blanket appeals under section 60 of the Customs Act*; this prescription does not include blanket refund requests under section 74 of the *Customs Act*. The prescription for section 60 appeals is reproduced in an appendix to Memorandum D11-6-7.[6]

[22] The CBSA claims that Memorandum D17-2-4 is the prescribing instrument for the form, manner and information of section 74 blanket refund requests. However, the Tribunal is not convinced of this, especially given the discrepancy described above, i.e. that the evidence shows an explicit prescribing instrument for section 60 appeals whereas none was identified for section 74 refunds.

[23] It is to be noted that the Tribunal has stated on several occasions that a D-Memorandum such as D17-2-4 is a statement of CBSA's administrative policy and is not binding on the Tribunal.[7] Further, such an administrative policy is not binding on the CBSA itself, and where the CBSA exclusively follows such a policy, this constitutes an unreasonable fettering of its discretion.[8] Courts have stated that:

> Certain types of guidelines that are not regulations may in many instances be extremely helpful and unobjectionable, i.e., guidelines published to aid in the preparation of income tax returns. Non-regulation guidelines become objectionable, however, if they have the effect of predetermining the matters in issue….[9]

[24] Finally, even if Memorandum D17-2-4 were a prescribing instrument, it does not follow that its provisions could alter the time period to file a refund request contained in section 74 of the

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6 *Prescription of Form, Manner and Information to Make a Request for Re-Determination, Further Re-Determination or Review Under Section 60 of the Customs Act*, Memorandum D11-6-7, "Request under Section 60 of the Customs Act for a Re-determination, a further Re-determination or a Review by the President of the Canada Border Services Agency", (1 April 2017) at Appendix G (online: https://www.cbsa-asfc.gc.ca/publications/dm-md/d11/d11-6-7-eng.html).

7 *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (12 January 2018), AP-2017-003 (CITT) at para. 33; *R. S. Abrams v. President of the Canada Border Services Agency* (20 January 2017), AP-2016-004 (CITT) at para. 25; *La Sagesse de l'Eau v. President of the Canada Border Services Agency* (13 November 2012), AP-2011-040 and AP-2011-041 (CITT) at para. 56.

8 *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at para. 24.

9 *Dale Corporation* v. *Nova Scotia (Rent Review Commission)*, 1983 CanLII 3137 (NS CA).

Customs Act. It is settled law that a prescribing instrument, such as a regulation or prescription, cannot deviate from the statutory provisions by which it purports to be authorized.[10]

[25] In any event, Tenneco does not dispute that the B2 form is prescribed for the purposes of refund requests under section 74 and that the blanket refund request process is otherwise as set out in the CBSA's guidelines. It is only the timing and effect of the CBSA's *approval* of such requests that are at issue.

THE TRIBUNAL'S JURISDICTION TO HEAR THIS APPEAL

[26] A dispute from a decision of the CBSA regarding tariff classification would normally be heard by the Tribunal. Subsection 67(1) of the *Customs Act* states as follows:

> 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 Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

[27] The Tribunal has to decide whether it has jurisdiction over this appeal given the above statutory framework. That decision can then be appealed to the Federal Court of Appeal. It should be noted that the Tribunal can no longer expect parties to take jurisdictional disputes to the Federal Court, as the Federal Court has determined that it does not have the jurisdiction to rule on such issues.[11]

[28] The Federal Court, in *Pier 1 Imports (U.S.), Inc.*, has recently stated the following:

> Generally speaking, adjudicative bodies such as the CITT (and the CBSA President exercising the powers under section 60 of the Act) may consider any legal question that is necessary to determine the issue that falls under their jurisdiction.[12]

[29] The Federal Court of Appeal is also clear that CBSA "non-decisions" or refusals to exercise jurisdiction under the *Customs Act* were "decisions" that could be appealed to the Tribunal by stating that "[t]he court below appropriately cited *Mueller*, *supra*, for the proposition that so-called 'non-decisions' or refusals to exercise jurisdiction under this statutory regime were 'decisions' that could be appealed to the CITT".[13]

[30] The Federal Court of Appeal has approved of the Tribunal's statement that implied that decisions could be made at the same time as express decisions and that the former could be the subject of the Tribunal's jurisdiction in the normal course of deciding the latter.[14] The determination

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10 See for e.g. *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489 at paras. 28, 33; *Re Attorney-General of Canada and Paulsen*, 38 D.L.R. (3d) 225 at 232 (FCA).

11 *The Queen v. Fritz Marketing*, 2009 FCA 62 [*Fritz Marketing*] at paras. 31 *et seq.*

12 2018 FC 963 at para. 29.

13 *President of the Canada Border Services Agency v. C.B. Powell Limited*, 2010 FCA 61 [*C.B. Powell I*] at para. 35.

14 *C.B. Powel Limited v. President of the Canada Border Services Agency*, 2011 FCA 137 [*C.B. Powell II*] at para. 31-33.

of whether such a situation is present in a given appeal was described by the Court as a "factual" one.[15]

[31] In this case, there was an implied decision, i.e. a decision by the CBSA to reject the tariff classification claimed by Tenneco in its refund request. The decision on this threshold issue resulted in a CBSA (non-)decision that the refund request was not filed on a timely basis, which resulted in no refund of duties. The CBSA's refusal to issue a ruling on a refund request based on tariff classification was a *de facto* denial that Tenneco's claimed tariff classification was correct.

[32] The Tribunal is of the view that, much like the CBSA, it *must* decide a threshold question such as timeliness in making its decision on tariff classification; this is inherent in its statutory mandate.[16] The date of importation is a threshold legal question in order to eventually decide the *proper tariff classification* of the subject good; indeed, the timeliness of a refund request or an appeal is a question which has to be (implicitly) decided each and every time a refund request or appeal is made.

[33] Fundamentally, Tenneco was seeking reimbursement of duties to take advantage of the Tribunal's decision in *Worldpac I*.[17] Tenneco should have been afforded the opportunity to make its case rather than being barred from doing so for a reason that does not even rise to the level of favouring form over substance—the CBSA's process has created a fiction whereby it unabashedly controls when a request is to be considered as filed by withholding its approval rather than simply accepting its actual date of postmarked delivery. The question as to why the CBSA delayed providing its approval does not matter. Regardless of whether such delay was simply due to administrative burden and workload, the fact remains that such factors still do not take precedence over a person's right to make a refund request as set out in the statutory framework. Importantly, all of the transactions for which Tenneco is seeking a refund via its blanket request could have been the subject of individual requests for each and every transaction, and would have been timely had they been filed in that format on the same day as the blanket refund request was filed. Tenneco chose the blanket request route precisely so as to avoid unnecessary duplication and burden. Instead, because of the CBSA's policy, Tenneco has unwittingly been caught up in defending its rights to access to justice and opposing the present motion.

[34] Allowing the CBSA to negate the right of an importer to appeal a refusal which carries such negative consequences would be contrary to the intent and scheme of the *Customs Act*. Accordingly, the Tribunal cannot agree that the CBSA's refusal to make a formal section 60 decision on this ground can be permitted to frustrate or prevent an adjudication of the merits.[18]

[35] It should be noted (as the Tribunal pointed out to parties in seeking supplementary submissions) that this appeal bears some similarities to the appeal decided in *Worldpac I*. In that case, the Tribunal ruled that it had no jurisdiction to hear the appeal as, amongst other reasons, the Tribunal was not convinced that the granting or subsequent cancellation of any of the blanket authorizations was unfair.

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15 Ibid.

16 *Landmark Trade Services v. President of the Canada Border Services Agency* (13 January 2020), AP-2019-002 (CITT) at para. 20.

17 (18 February 2016), AP-2016-039 [*Worlpdac I*].

18 *Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency* (21 December 2012), AP-2010-002 (CITT); *C.B. Powell I* at para. 35.

[36] However, in the present case, the CBSA's conduct was unconscionable. The CBSA's conduct in the circumstances of this appeal has improperly prevented the importer from having the chance to have its case adjudicated, thereby frustrating any hope of receiving refunds of customs duties to which it may have been otherwise entitled.

[37] The alleged untimeliness of Tenneco's initial refund requests to the CBSA is entirely due to the delay by the CBSA itself in approving the blanket refund request. The refund request was filed well before the four-year deadline. Tenneco received no response for more than two months. Most importantly, there was no decision to reject the blanket requests at issue for more than four months. The purported untimeliness was caused by the CBSA's policy that the approval date of an application for authorization of a blanket refund request becomes the filing date for the refund request itself instead of the actual filing date of the application. This administrative policy has no statutory or regulatory foundation and is purely arbitrary.

[38] In addition, the fact that Tenneco filed a B2 form along with the blanket request application is significant. The filing of the B2 at the time of the blanket request application is a fundamental difference between the facts recounted in *Worldpac I* and the present appeal.

[39] Memorandum D17-2-4, at paragraphs 15 and 16, states the following:

> Blanket B2 Authorization Applications must be approved by the CBSA before Form B2s can be submitted. Therefore, Form B2s submitted along with the Blanket B2 Authorization Application will not be accepted.
>
> The filing of a Blanket B2 Authorization Application does not constitute filing an adjustment request pursuant to section 32.2 or 74 of the Act. It in no way removes or extends the time limits to file a required adjustment pursuant to section 32.2 of the Act nor does it extend the one year (under 74 (1)) C.1) [*sic*]) or the four-year time limits to file a refund request pursuant to section 74 of the Act. Importers/agents should submit individual B2 adjustment requests for transactions that are approaching their legislative time limits.

[40] Regardless of the statements made in Memorandum D17-2-4, this administrative policy cannot have the effect of limiting an importer's time limits for making a refund request. The policy cannot presumptively ignore, or intentionally fail to acknowledge, a filing which is intended to be a refund request. This is especially true when the importer files the very form which is used to claim a refund, whether it is part of an application for authorization of blanket refunds (as in this case) or otherwise. It is disingenuous and unhelpful to admonish importers to only make such filings when they are not "approaching their legislative time limits" since this expression is undefined and there is no timeline for a CBSA response to the application.

[41] The current policy should be of concern to the CBSA as it could give rise to situations where the approval process takes so long that it makes the entire procedure futile. It gives rise to situations where the CBSA's own actions prevent it from approving refund requests even if it wanted to, i.e. if it would otherwise recognize them as substantively valid. This is an absurd result which puts the otherwise efficient blanket request process into disrepute.

[42] Consequently, if the CBSA approves of a blanket refund request, it must do so as of the date the application to make a blanket request was filed. It should be made clear that the CBSA retains the discretion to refuse a blanket refund request (and proceed with individual requests), but the date of

the requests remains the date of filing of the application to make the blanket request; contrary to the CBSA's policy, the filing of an application for blanket refund requests must preserve the time limits for filing of the individual requests.

[43] In its correspondence with the importer and as support for its motion, the CBSA also relies on subsection 74(5) of the *Customs Act*, which states as follows:

> . . . a denial of an application for a refund under paragraph (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 (4), is not to be treated for the purposes of this Act as if it were a re-determination under this Act . . . .

[44] In effect, this purports to imply that the CBSA's decision cannot be appealed because Tenneco's refund requests were somehow procedurally deficient and cannot be dealt with through a substantive re-determination. This argument is untenable.

[45] Even if there was some fundamental deficiency in the refund requests at issue (none was argued by the CBSA), the evidence indicates that the blanket B2 form and the accompanying spreadsheet *for later transactions*, i.e. goods imported after December 2014, were eventually approved and processed by the CBSA as proper refund requests, without requiring any significant modification. There were no claimed procedural issues with these filings, which were substantially similar to the filings at issue. These other similar refund requests were accepted as to the form, manner of filing, and information provided. Therefore, the evidence shows that the only issue with regard to the goods at issue imported from September to December 2014 was the time limit, i.e. an evaluation of the date of importation against the date of filing for the refund request application and the date of the CBSA's approval of the blanket request application. The time limit for refund requests is a substantive issue, not a procedural one; as well, the time limit to file a refund request cannot impliedly be the subject matter of subsection 74(5) of the *Customs Act*—the time limit is expressly covered in subsection 74(3).

CONCLUSION

[46] Tenneco's refund requests for goods imported from September 2014 to December 2014 were filed within the statutory time limits. The CBSA should have issued a decision regarding these requests. This negative (non-)decision is a matter which can be appealed to the Tribunal as an implied or threshold decision concerning the tariff classification of the goods at issue.

DECISION

[47] The motion is denied. The Tribunal has jurisdiction to hear the present appeal.

Cheryl Beckett

Cheryl Beckett
Presiding Member

APPENDIX

Customs Act

59 (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may

> **(a)** in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods at any time within

. . .

> **(ii)** four years after the date of the determination, if the Minister considers it advisable to make the redetermination;

. . .

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. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.

. . .

(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,

> **(a)** re-determine or further re-determine the origin, tariff classification or value for duty;

. . .

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 Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

. . .

74 (1) Subject to this section, section 75 and any regulations made under section 81, a person who paid duties on any imported goods may, in accordance with subsection (3), apply for a refund of all or part of those duties, and the Minister may grant to that person a refund of all or part of those duties, if

. . .

> **(e)** the duties were paid or overpaid as a result of an error in the determination under subsection 58(2) of origin (other than in the circumstances described in paragraph (c.1) or (c.11)), tariff

> classification or value for duty in respect of the goods and the determination has not been the subject of a decision under any of sections 59 to 61;

(1.1) The granting of a refund under paragraph (1)(c.1), (c.11), (e) or (f) or, if the refund is based on tariff classification, value for duty or origin, under paragraph (1)(g) is to be treated for the purposes of this Act, other than section 66, as if it were a re-determination made under paragraph 59(1)(a).

(2) No refund shall be granted under any of paragraphs (1)(a) to (c) and (d) in respect of a claim unless written notice of the claim and the reason for it is given to an officer within the prescribed time.

(3) No refund shall be granted under subsection (1) in respect of a claim unless

> **(a)** the person making the claim affords an officer reasonable opportunity to examine the goods in respect of which the claim is made or otherwise verify the reason for the claim; and
>
> **(b)** an application for the refund, including such evidence in support of the application as may be prescribed, 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)(a), (b), (c), (c.11), (d), (e), (f) or (g), four years after the goods were accounted for under subsection 32(1), (3) or (5), and
> >
> > **(ii)** in the case of an application for a refund under paragraph (1)(c.1), one year after the goods were accounted for under subsection 32(1), (3) or (5) or such a longer period as may be prescribed.

(4) A denial of an application for a refund of duties paid on goods is to be treated for the purposes of this Act as if it were a re-determination under paragraph 59(1)(a) if

. . .

> **(b)** the application is for a refund under paragraph (1)(e), (f) or (g) and the application is denied because the origin, tariff classification or value for duty of the goods as claimed in the application is incorrect.

(5) For greater certainty, a denial of an application for a refund under paragraph (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 (4), is not to be treated for the purposes of this Act as if it were a re-determination under this Act of origin, tariff classification or value for duty.