Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2019-038

9029654 Canada Inc. dba Sofina Foods Inc.

v.

President of the Canada Border Services Agency

Order and reasons issued Monday, February 8, 2021

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal filed by 9029654 Canada Inc. dba Sofina Foods Inc. on December 5, 2019, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a request, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*, filed on March 31, 2020, by the President of the Canada Border Services Agency for an order dismissing the appeal for lack of jurisdiction.

BETWEEN

9029654 CANADA INC. DBA SOFINA FOODS INC. **Appellant**

AND

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

ORDER

The request is granted. The Canadian International Trade Tribunal does not have jurisdiction to hear this appeal. The appeal is therefore dismissed.

Georges Bujold

Georges Bujold
Presiding Member

STATEMENT OF REASONS

BACKGROUND

[1] The dispute between the parties which underlies this appeal concerns the unauthorized use of a certificate for duty relief issued pursuant to a federal program administered under provisions of the *Customs Tariff*.[1] In a request for a decision filed pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,[2] the President of the Canada Border Services Agency (CBSA) claims that this matter is outside the scope of the Tribunal's jurisdiction under section 67 of the *Customs Act*[3] and that, therefore, this appeal should be dismissed. The relevant background facts are as follows.

[2] On July 12, 2013, Janes Family Foods Ltd., a company which was subsequently purchased by and amalgamated with the appellant, 9209654 Canada Inc. dba as Sofina Foods Inc. (Sofina), imported frozen chicken into Canada duty-free using a duties relief license.[4] That license did not belong to the importer and was used erroneously.

[3] By way of a letter dated February 26, 2018, the CBSA informed Sofina of the error.[5] This letter also notified Sofina that, as a result, it was required to adjust the importation transaction and pay all applicable duties and taxes owed, including interest, by March 26, 2018. Sofina did not make the necessary adjustment by March 26, 2018, nor did it pay the duties, taxes and interest as required.

[4] On July 10, 2019, more than four years after the original importation, the CBSA issued Detailed Adjustment Statement No. 00001-04166247 (Original DAS), seemingly as a redetermination under paragraph 59(1)(a) of the *Act*. By virtue of the Original DAS, the CBSA assessed Sofina additional duties and interest for the importation transaction at issue. However, the Original DAS mistakenly stated that it constituted a redetermination pursuant to section 59.

[5] On August 13, 2019, Sofina paid the assessment under the Original DAS. On August 15, 2019, more than six years after the date of the importation of the goods, the CBSA issued Detailed Adjustment Statement No. 00005-01095383-9 (Revised DAS), stating that it was a B32 corrector adjustment made to the Original DAS to update the authority under which the original document was issued, i.e from subsection 59(1) of the *Act* to subsection 118(1) of the *Customs Tariff*. The Revised DAS expressly states that it represents an assessment under the *Customs Tariff* and serves to cancel the "initial decision" (i.e. the Original DAS). It further informs Sofina that no monies are due or payable as a result of the correction since the amounts owing for the relevant transaction had already been paid. Therefore, the Revised DAS indicates that it constitutes a "non-revenue type" of adjustment.

[6] On September 9, 2019, within 90 days of the date of the Original DAS, Sofina requested a further re-determination of the Original DAS by the CBSA in accordance with subsection 60(1) of the *Act*. On September 11, 2019, Sofina also filed an application for judicial review before the Federal Court seeking to have the Revised DAS set aside.

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1 S.C. 1997, c. 36.
2 SOR/91-499 [*CITT Rules*].
3 R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
4 It is not disputed that Sofina has accepted responsibility for goods imported by Janes Family Foods Ltd.
5 The letter was addressed to Janes Family Foods Ltd., but there is no evidence that it was not received by Sofina, nor does the latter claim that it was not.

[7] On September 16, 2019, the CBSA informed Sofina, by email, that its request under section 60 of the *Act* was rejected on the basis that the Original DAS was corrected and replaced by the Revised DAS. According to this email, this meant that Sofina no longer had a valid notice under subsection 59(2). As a result, the CBSA indicated that there was longer a decision under section 59 which could be addressed under section 60.[6]

[8] Sofina filed its notice of appeal with the Tribunal on December 5, 2019, submitting that the CBSA's email dated September 16, 2019, was a "non-decision" from which an appeal lies with the Tribunal pursuant to section 67 of the *Act*. The notice of appeal indicates that the subject matter of the appeal is the tariff classification of imported goods. However, it describes the questions at issue as follows: "The validity and correctness of the Section 59(1) determination (OOOOHl0416624-7 dated 2019/07/10) and the subsequent denial of the CBSA Recourse to issue a determination with respect to this 59(1) determination, as well as the validity and correctness of CBSA issuance of a B32 Corrector adjustment made to transaction number 00001-00416624-7."

[9] The CBSA's request, dated March 31, 2020, asking the Tribunal to dismiss the appeal for want of jurisdiction, followed the filing of Sofina's brief on February 3, 2020.

POSITIONS OF THE PARTIES

[10] The CBSA submits that the Tribunal has no jurisdiction to hear this appeal. Its position is that the Tribunal's jurisdiction is limited to matters concerning the origin, tariff classification and value for duty of the imported goods. The CBSA reiterates that there was no section 60 decision from which Sofina could appeal to the Tribunal. In the CBSA's view, it did not, and could not render any decision under sections 58 to 60 of the *Act* on the facts of this case, since the subject matter of the Original DAS concerned the unauthorized use of a certificate under a duty refund program that has nothing to do with the duty calculation under the *Act*.

[11] As such, the CBSA argues that this is not a situation where it improperly refused to act or exercise its jurisdiction under the provisions of the *Act*. The CBSA adds that its intent, when it issued the Original DAS, was to make a duty assessment under section 118 of the *Customs Tariff*. It also argues that it may validly amend a decision to correct an error in expressing its manifest intention. The CBSA further submits that the Federal Court, not the Tribunal, has jurisdiction to set aside decisions made under section 118 of the *Customs Tariff*.

[12] Sofina submits that the Tribunal has jurisdiction to hear the appeal pursuant to guidance from various precedents, including the Federal Court of Appeal's decision in *C.B. Powell II (FCA)*.[7] Sofina argues that the Original DAS is incorrect and that there is agreement of the parties on that issue. According to Sofina, errors in decisions issued pursuant to subsection 59(1) of the *Act* can only be corrected or otherwise dealt with in the manner provided under the *Act*'s recourse mechanism. Sofina maintains that it is therefore entitled to a decision under section 60 and to a refund of the duties paid, given that they were paid in compliance with an invalid decision. In short, Sofina disputes the CBSA's authority and ability to issue the Revised DAS and to cancel the Original DAS

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6 In this regard, it warrants noting that, pursuant to subsection 60(1) of the *Act*, only 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."

7 *C.B. Powell Limited v. President of the Canada Border Services Agency*, 2011 FCA 137 [*C.B. Powell II (FCA)*].

through a B32 corrector adjustment. It also claims that the ultimate assessment of duties was time-barred. However, Sofina does not dispute that the duties relief license was used erroneously.

THE TRIBUNAL'S JURISDICTION TO HEAR THIS APPEAL

[13] The issue raised by the CBSA and considered by the Tribunal is whether the Tribunal can hear this appeal, which stems from the CBSA's rejection of Sofina's request for a re-determination or further re-determination under section 60 of the *Act*. The heart of the matter is whether such a "non-decision" is appealable to the Tribunal in the circumstances described above. The relevant statutory provisions are set out in the Appendix to these reasons.

[14] The scheme of the *Act* provides that a dispute from a decision of the CBSA regarding origin, tariff classification, value for duty, or marking of imported goods would normally be heard by the Tribunal. Subsection 67(1) 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.

[15] In this case, there is no decision of the CBSA made under section 60 or 61 of the *Act*. The Tribunal has to decide whether, despite the absence of such a decision, it has jurisdiction over this appeal in view of the applicable statutory framework and relevant facts. If the Tribunal determines that it has jurisdiction and proceeds to make a decision under section 67, the Tribunal's decision can then be appealed to the Federal Court of Appeal on any question of law.[8] It should be noted that the Tribunal can no longer expect parties to take jurisdictional disputes to the Federal Court, as the Federal Court of Appeal has determined that, absent exceptional circumstances, the Federal Court does not have the jurisdiction to rule on such issues.[9]

[16] The Federal Court, in *Pier 1 Imports (U.S.)*,[10] 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.[11]

[17] The Federal Court of Appeal is also clear that the CBSA's "non-decisions" or refusals to exercise jurisdiction under the *Act* may constitute "decisions" that could be appealed to the Tribunal. The Court stated as follows: "The 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."[12] This is not to say, however, that the Tribunal has

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8 Section 68 of the *Act*.

9 *The Queen v. Fritz Marketing*, 2009 FCA 62 [*Fritz Marketing*] at paras. 31 *et seq.*; see also *President of the Canada Border Services Agency v. C.B. Powell Limited*, 2010 FCA 61 [*C.B. Powell I (FCA)*] at para. 4.

10 *Pier I Imports (U.S.) v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 963 [*Pier I Imports (U.S.)*].

11 *Pier I Imports (U.S.)* at para. 29.

12 *C.B. Powell I (FCA)* at para. 35.

jurisdiction to hear any appeal concerning such "non-decisions", which are perhaps better characterized as "implied decisions" by the CBSA under section 60.[13]

[18] This issue was clarified by the Federal Court of Appeal and the Tribunal in subsequent cases. For example, in *C.B. Powell*,[14] the Tribunal noted that it cannot ascribe to the term "decision" a meaning that is inconsistent with the overall scheme of the statute and, in particular, with the jurisdiction statutorily conferred upon it by Parliament. The Tribunal also stated as follows:

> The Tribunal's authority under subsection 67(1) of the *Act* to hear an appeal is contingent on a prior "decision" having been made by the President of the CBSA pursuant to subsection 60(1).
>
> The Federal Court of Appeal, in *Moumdjian v. Canada (Security Intelligence Review Committee)*, indicated that ". . . the term 'decision or order' has no fixed or precise meaning but, rather, depends on the statutory context . . . ." In this regard, the Tribunal agrees with the CBSA that the only decisions that the President of the CBSA is authorized to make pursuant to subsection 60(1) of the *Act* are *re-determinations and further re-determinations of the tariff classification, origin and value for duty of goods* that were the subject of a decision pursuant to subsection 59(2).[15]
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> [Emphasis added, footnotes omitted]

[19] The Federal Court of Appeal upheld the Tribunal's interpretation in that case. In particular, it confirmed that only a "re-determination" or "further re-determination" by the President of the CBSA, under subsection 60(1), of one of the three components in the duty calculation (origin, tariff classification and value for duty) could qualify as a "decision" from which an appeal lies with the Tribunal. The Court added that there will be situations where the Tribunal will find that implied decisions were made in regard to one or more of these components. In the words of the Court, "[t]hat, of course, will be for the Tribunal to determine on a case-by-case basis. In developing its own jurisprudence in this area, the Tribunal will need to consider the purposes of Part III of the Act and this administrative regime."[16]

[20] Thus, there *may* be situations where the Tribunal will find that implied decisions were made by the CBSA that could give rise to an appeal before the Tribunal pursuant to subsection 67(1) of the *Act*. These situations are to be determined on a case-by-case basis.[17]

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13 In this regard, in *C.B. Powell II (FCA)* at paras. 31-34, the Federal Court of Appeal approved the Tribunal's interpretation that subsection 67(1) of the *Act* embraces the possibility of appeals from *implied decisions* by the CBSA.

14 *C.B. Powell v. President of the Canada Border Services Agency* (11 August 2010), AP-2010-007 and AP-2010-008 (CITT) [*C.B. Powell*].

15 *C.B. Powell* at paras. 28-29. The Tribunal notes that, while not mentioned in *C.B. Powell*, in addition to tariff classification, origin and value for duty, the marking of imported goods may be the subject of a decision by a customs officer pursuant to subsection 59(2) of the *Act*, and by the President of the CBSA pursuant to subsection 60(1).

16 *C.B. Powell II (FCA)* at paras. 25-34.

17 In this respect, see also *Landmark Trade Services v. President of the Canada Border Services Agency* (13 January 2020), AP-2019-002 (CITT) at para. 19.

[21] In itself, the CBSA's refusal or failure to make a re-determination pursuant to section 60 of the *Act* does not necessarily amount to an implied decision made by the CBSA pursuant to section 60 for the purposes of an appeal to the Tribunal pursuant to subsection 67(1). This conclusion is supported by the Tribunal's analysis and decision in *C.B. Powell*.

[22] The issue to be determined in that appeal was whether the CBSA's refusal to make a re-determination of origin was a decision that could be appealed to the Tribunal. In *C.B. Powell*, the Tribunal found that there had been no actual re-determination made by a customs officer with respect to origin pursuant to subsection 59(2) of the *Act* and that, therefore, no request could be made to the CBSA for reconsideration of the origin of the goods in issue pursuant to section 60. The Tribunal determined that, rather than being a decision pursuant to section 60, the reject notification issued by the CBSA was ". . . an administrative notice [that] informed C.B. Powell that it did not meet the criteria established by the Act in order to file a request for further re-determination under [subsection] 60(1)".[18]

[23] Accordingly, for the Tribunal to have jurisdiction pursuant to subsection 67(1) of the *Act*, there must be a re-determination made by a customs officer with respect to the origin, tariff classification or value for duty of imported goods pursuant to subsection 59(2). In the absence of such a re-determination, the President of the CBSA has no authority to make a decision under section 60, and the Tribunal is without jurisdiction to hear an appeal pursuant to section 67.[19]

[24] In summary, the *Act* provides a multi-step mechanism to challenge customs duty assessments. However, it clearly limits the issues that can be addressed by the President of the CBSA and, subsequently, by the Tribunal within this statutory scheme to the origin, tariff classification, value for duty or marking of imported goods. This is confirmed by subsection 60(1), which provides as follows:

> 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.
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> [Emphasis added]

[25] In the absence of a prior decision by a customs officer concerning the origin, tariff classification, value for duty or marking of imported goods under sections 57.01 to 59 of the *Act*, there is nothing for the President of the CBSA to re-determine or further re-determine under subsection 60(4). For this reason, it cannot be said that the President made an implied decision on any of those matters, or refused to exercise its jurisdiction to re-determine or further re-determine the origin, tariff classification, value for duty or marking of imported goods under the *Act* in such circumstances. Where there is no underlying decision concerning these matters, either by a customs

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18 *C.B. Powell* at para. 41.

19 For completeness, it should be noted that even if the marking of imported goods was not mentioned by the Tribunal in *C.B. Powell*, this matter may also be the subject of a decision by a customs officer, the notice of which could be given to an importer pursuant to subsection 59(2) of the *Act*. As such, the Tribunal's reasoning implies that an actual marking determination by a customs officer is necessary for the President of the CBSA to be subsequently authorized to examine that issue and, potentially, for the Tribunal, to have jurisdiction over an eventual President's re-determination or further re-determination with respect to marking, pursuant to section 60.

officer or the President, it follows that the Tribunal, whose jurisdiction *ratione materiae* is limited to those issues contemplated by the *Act*, has no authority to intervene.

[26] Indeed, acceptance of an appeal under the purported authority of subsection 67(1) of the *Act*, when no decision concerning any of those matters has been made (either in actuality or by necessary implication) by the President of the CBSA, as the authority designated under subsections 60(1) and 61(1) to make such decisions, would result in the Tribunal exceeding its intended jurisdiction under the statutory scheme. Again, the *Act* does not permit the Tribunal to determine all questions of law that arise in any appeal before it. The Tribunal's jurisdiction is limited by statute.

[27] For example, the Tribunal has found in the past that its jurisdiction does not extend to the fairness of the retroactive application of an amendment,[20] to the proper calculation of interest on unpaid duties,[21] or to the adequacy of security provided to the Minister of National Revenue as a prerequisite for a re-determination under section 60 of the *Act*.[22] These are clearly matters of administration and enforcement that are outside the scope of the Tribunal's jurisdiction.

[28] Similarly, in this case, the subject matter of the appeal is not a question that is related in any way to the determination of the origin, tariff classification, value for duty or marking of the imported goods under the relevant provisions of the *Act*. In fact, at the time of the issuance of the Original DAS, it was no longer legally possible for a customs officer to make a decision concerning these matters. Specifically, the CBSA could no longer proceed with a re-determination of origin, tariff classification or value for duty and Sofina could no longer proceed with corrections on these issues, as the four-year time limit set out in sections 32.2 and 59 had passed. As in *C.B. Powell*, no request could therefore be made to the President of the CBSA for reconsideration of those issues pursuant to section 60. In short, on the facts of this case, Sofina does not meet the criteria established by the *Act* in order to file a request for further re-determination under section 60 and be entitled to a decision by the President pursuant to this provision.

[29] Nevertheless, Sofina relies on *Grodan*[23] to argue that the Tribunal's jurisdiction under the *Act* is not limited to the narrow substantive question of the correct origin, tariff classification or value for duty of imported goods. Based on that precedent, Sofina submits that the Tribunal's jurisdiction extends to determining both the correctness and validity of decisions issued by the CBSA under sections 59 and 60. Its position is that the Tribunal should declare that the Original DAS issued under subsection 59(1) was incorrect, as was admitted by the CBSA, and order that the duties collected on the basis of this decision be refunded.

[30] However, *Grodan* is distinguishable. In that case, the appellant's position was that the decision under section 60 of the *Act* that was the subject of the appeal was invalid because the underlying decisions under section 59 were themselves invalid (i.e. because the CBSA was time-barred from making them). The CBSA claimed that the Tribunal did not have jurisdiction to deal with the timing of the decisions made pursuant to paragraph 59(1)(b) because, pursuant to section 67, it would only have the authority to hear appeals of decisions made under section 60.

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20 See procedural order in *Gammon Trading Co. Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (21 April 2004), AP-2003-012 (CITT).

21 *Ibid.*

22 *Volpak Inc. v. President of the Canada Border Services Agency* (8 November 2010), AP-2010-031 (CITT).

23 *Grodan Inc. v. President of the Canada Border Services Agency* (1 June 2012), AP-2011-031 (CITT) [*Grodan*].

[31] The Tribunal rejected the CBSA's argument and essentially found that, pursuant to section 67 of the *Act*, it has the authority to address ancillary issues arising in disputes regarding the origin, tariff classification or value for duty of imported goods. In *Grodan*, this meant that it had jurisdiction to determine not only the correctness of the decision on the tariff classification of imported goods that had been made by the CBSA under section 60, but also its validity. Indeed, as the Tribunal noted, if a tariff classification decision made under section 60 is not correct on the merits, then it cannot stand. Likewise, if it is not valid on jurisdictional grounds, it should also not stand. Following this reasoning, the Tribunal went on to find that its jurisdiction under section 67 effectively enabled it to examine and, if necessary, revisit the validity of decisions under section 59, which underpin any decision on the relevant topics made under section 60 from which an appeal to the Tribunal is directly made.

[32] As can be seen, in *Grodan*, there was an underlying tariff classification issue which fell squarely within the ambit of the issues that may be addressed by the CBSA and the Tribunal under the *Act*. In this case, there are no such issues and, unlike the appellant in *Grodan*, Sofina is not seeking a remedy that can be obtained through the recourse mechanism set out in the *Act*, that is, the review of the CBSA's prior decisions concerning the origin, tariff classification, value for duty or marking of imported goods.

[33] Properly read, *Grodan* therefore does not stand for the proposition that the Tribunal has broad jurisdiction to rule on the validity of decisions labeled as being made under section 59 of the *Act*, regardless of the circumstances. In the Tribunal's opinion, in order for it to examine the validity of such decisions, the substantive question being litigated and the remedy sought by the importer must be one that can be addressed through the process set forth in the *Act*.

[34] The Tribunal is also unable to accept Sofina's argument that subsection 59(6) of the *Act* entails that the Original DAS could not be modified through other means than a re-determination or further re-determination by the President of the CBSA under sections 60 and 61. While subsection 59(6) provides that a decision made under section 59 ". . . is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61," in the context of Part III, it is clear that the "decision" to which this provision refers is a decision concerning the origin, tariff classification, value for duty or marking of imported goods by a customs officer.[24] These are the only matters that a customs officer is authorized to address in decisions made under section 59.

[35] Put another way, for the privative clause set out in subsection 59(6) to apply, the impugned decision must concern at least one of those matters. Otherwise, the President of the CBSA would have to rule on issues that are outside the scope of its limited review jurisdiction under the *Act*.[25] The

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24 Part III of the *Act* governs the "Calculation of Duty" and lays out the process to dispute the CBSA's "Determination, Re-determination and Further Re-determination of Origin, Tariff Classification and Value for Duty of Imported Goods."

25 As a matter of law, the President's duty on receipt of a request pursuant to section 60 of the *Act* is limited by subsection 60(4) to the following: (a) re-determine or further re-determine the origin, tariff classification or value for duty; (b) affirm, revise or reverse the advance ruling; or (c) re-determine or further re-determine the marking determination. None of these options is possible on the facts of this case. A contextual reading of subsection 59(6) therefore suggests that this provision only governs subsequent recourses to the extent that an actual re-determination or further re-determination of the origin, tariff classification or value for duty of imported goods, an advance ruling on any of these matters or, alternatively, a marking determination, has been made under section 59.

Tribunal finds that such a result would be inconsistent with the overall scheme of the statute and the purpose of this administrative regime.

[36] There is little doubt that an important purpose of Part III of the *Act* is to ensure that the calculation of the applicable customs duties is based on a correct determination of the origin, tariff classification and value for duty of imported goods. However, the *Act* does not provide a mechanism for importers to challenge any and all administrative or enforcement decisions made by the CBSA and its officers before the Tribunal. The *Act* only empowers the Tribunal to decide ". . . certain issues efficiently and once and for all."[26]

[37] In this regard, the Tribunal notes that in *Pier I Imports (U.S.)*, the Federal Court discussed the scheme of the *Act*, beginning with section 58, which provides for an initial determination of "the origin, tariff classification and value for duty of imported goods" by a customs officer. After correctly noting that each level of internal appeal includes a privative clause, including subsection 59(6), the Court stated the following:

> Thus, where a litigant seeks a remedy that could be obtained through the process set forth in the Act, or raises a question that can be addressed through that process, section 18.5 of the *Federal Courts Act* deprives our Court of jurisdiction to hear the matter.[27]

[38] To the extent that the question raised by a litigant is *not* an issue that can be addressed through the process set out in the *Act*, as is the case here, it follows that the Federal Court is *not* deprived of jurisdiction. The request for re-determination of the Original DAS made by Sofina did not include a request to re-determine the origin, tariff classification, value for duty, or marking of the imported goods. On the contrary, Sofina expressly acknowledged in this request that "[s]ections 32 and 59 only [deal] with matters of origin, tariff classification value for duty or marking determination" and that ". . . the issue in this appeal concerns the use of a duty relief license."[28]

[39] There is no language in the Original DAS that could reasonably be interpreted to cover any of the circumscribed issues or limited matters that Parliament has empowered the Tribunal to rule upon under the *Act*. In these circumstances, the Tribunal fails to see how section 67 could be interpreted to give it jurisdiction to rule on the validity of this decision which was, in any event, subsequently cancelled and replaced with a revised decision by the CBSA. By the same token, section 67 does not entrust the Tribunal with the power to rule on the CBSA's ability to correct a decision that manifestly referred to section 59 as its enabling authority by mistake.

[40] The Tribunal is cognizant that in *Fritz Marketing*, the Federal Court of Appeal discussed the Federal Court's apparent lack of jurisdiction to review decisions made under the *Act*. In that case, the importer alleged that detailed adjustment statements issued by the CBSA were invalid because they were based on evidence obtained in a manner contrary to the *Canadian Charter of Rights and Freedoms* (*Charter*). Speaking for the Court, Sharlow J. held that the privative clauses included in the *Act* ". . . [deprive] the Federal Court of the jurisdiction to set aside a Detailed Adjustment

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26 *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257 at para. 42.
27 *Pier I Imports (U.S.)* at para. 24.
28 Exhibit AP-2019-038-03 at 18.

Statement for any reason."[29] She noted that there was no reason why the CITT could not consider the importer's *Charter* argument and exclude evidence if necessary.

[41] In that case, there was an underlying value-for-duty issue that was properly brought before the Tribunal and over which it had the authority to decide under the *Act*. Therefore, the decisions of the CBSA in issue concerned an element of the formula to calculate the applicable import duties under the *Act*, and there was no question that the remedy sought by the appellant could be obtained through the process set forth in the *Act*. In such circumstances, since the *Act* provides for an adequate statutory remedy, there was indeed no reason for the Federal Court to intervene to set aside a detailed adjustment statement issued by the CBSA.

[42] Sharlow J.'s comment about the Federal Court being completely deprived of jurisdiction to set aside a detailed adjustment statement was made with these considerations in mind. In the Tribunal's opinion, it would be an error to interpret this statement to mean that the Federal Court's jurisdiction is ousted by subsection 59(6) of the *Act* in a situation, such as in this case, where the challenged decision of the CBSA concerns an issue that is clearly not governed by the *Act*.

[43] At any rate, the Tribunal further notes that the Federal Court of Appeal clarified in a subsequent decision, namely, *C.B. Powell I (FCA)*, that, in exceptional circumstances, recourse to the courts may be necessary before parties must exhaust their rights and remedies under the administrative process set out in Part III of the *Act*:

> The Act contains an administrative process of adjudications and appeals that must be followed to completion, unless exceptional circumstances exist. In this administrative process, Parliament has assigned decision-making authority to various administrative officials and an administrative tribunal, the CITT, not to the courts. Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called "jurisdictional" issues.[30]

[44] Again, the decision-making authority assigned to the various CBSA officials and the Tribunal by virtue of the *Act* does not include decisions concerning the improper use of a duties relief license and the resulting assessment of duties pursuant to the *Customs Tariff*. To conclude that the administrative process contemplated by the *Act* must be followed to completion in this situation would be inconsistent with the applicable provisions and, crucially, with the decision-making authority assigned to the Tribunal in this statutory scheme. Therefore, the facts of this case give rise to extraordinary circumstances that prevent the Tribunal from hearing this appeal.

[45] In summary, while there may be situations where the CBSA has made implied decisions that are subject to an appeal before the Tribunal, this is not the case in this matter. Before concluding that such an implied decision was made, the Tribunal must take into account the purposes of the *Act* and the nature of this administrative regime. The statutory scheme clearly limits the Tribunal's jurisdiction to matters of origin, tariff classification and value for duty (including, where relevant, ancillary issues, such as timeliness, necessary to decide whether any of the decisions previously

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29 *Fritz Marketing* at para. 33.

30 *C.B. Powell I (FCA)* at para. 4.

made by the CBSA on these matters was validly made).[31] However, in this case, there was no decision by the CBSA which is connected to the Tribunal's jurisdiction to decide matters of origin, tariff classification, value for duty or marking of imported goods. In reality, the entire matter which forms the basis of Sofina's appeal has nothing to do with these four issues.

[46] As argued by the CBSA, the present case does not involve a dispute as to the origin, tariff classification or value for duty of imported goods, but involves an assessment of duties following the improper use of a duties relief license. As a result, the President of the CBSA did not refuse to exercise jurisdiction or issue a "non-decision". Rather, the President did not have the jurisdiction to issue a decision under section 60 of the *Act* since the provision was inapplicable to the facts of the case, which concern a determination under section 118 of the *Customs Tariff*. The CBSA's purported section 59 decision was issued in error as it did not address issues that may be re-determined by customs officers under this provision, nor could it address them at the time of its issuance.

[47] It is clear that the CBSA intended to make a decision pursuant to section 118 of the *Customs Tariff*, but mistakenly referred to sections 32.2, 59, and 60 of the *Act* in the Original DAS. While this is an issue that is ultimately for the Federal Court to decide, the Tribunal accepts the CBSA's argument that administrative decision makers are allowed to correct "accidental slips and omissions" that do not reflect the manifest intention of the decision maker.[32] This was done in the Revised DAS. In any event, where the CBSA makes such an omission or error in specifying the appropriate legislative provisions under which a decision is made, this does not bring the situation in the present appeal within the ambit of the Tribunal's jurisdiction. What matters is the substance of the decision that was made.

[48] The Tribunal does not have jurisdiction to hear this appeal as, under the circumstances, there was not (nor could there be any) decision made by the CBSA under section 60 of the *Act*.

[49] In the final analysis, the Tribunal possesses no jurisdiction to review the CBSA's decision to issue assessments under section 118 of the *Customs Tariff*, whether they are time-barred or not.

[50] For these reasons, this is not a case where the CBSA made an implied decision that can be examined by the Tribunal in an appeal pursuant to section 67 of the *Act*. Unlike the situation in *Tenneco*,[33] it cannot be said that the CBSA refused to make decisions in regard to the origin, tariff classification, value for duty or marking of imported goods or improperly refused to act on a timely basis, such that its inaction could be deemed by the Tribunal to constitute a negative decision that it could examine in an appeal pursuant to section 67. Simply put, there is no underlying dispute regarding origin, tariff classification, value for duty or marking, which could give the Tribunal's jurisdiction to hear this appeal, i.e. make the statutory scheme set out at sections 59, 60 and 67

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31 Subsection 67(3) of the *Act* provides that, in appeals under subsection 67(1), the Tribunal ". . . may make such order, finding or declaration as the nature of the matter may require . . . ." Further, section 16 of the *Canadian International Trade Tribunal Act* provides that the duties and functions of the Tribunal are, *inter alia*, to ". . . hear, determine and deal with all appeals that, pursuant to any other Act of Parliament [e.g. *Customs Act*] or regulations thereunder, may be made to the Tribunal, and *all matters related thereto* . . ." [emphasis added]. Read together, these provisions establish that the only order, finding or declaration that the Tribunal may make in appeals pursuant to section 67 must concern matters related to the tariff classification, value for duty, origin or marking of imported goods.

32 See Exhibit AP-2019-038-11 at 2 and authorities therein referred to.

33 *Tenneco Automotive Operating Company Inc. v. President of the Canada Border Services Agency* (12 March 2020), AP-2019-019 (CITT).

applicable. A dispute as to this particular negative decision is not a matter which can be appealed to the Tribunal.

DECISION

[51] The CBSA's request pursuant to rule 23.1 of the *CITT Rules* is granted. The Tribunal does not have jurisdiction to hear this matter and the appeal is therefore dismissed.

Georges Bujold

Georges Bujold
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;

. . .

(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.

. . .

(6) A re-determination or further re-determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61.

. . .

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.

Customs Tariff

118 (1) If relief from, or remission of, duties is granted under this Act, other than under section 92, or if remission of duties is granted under section 23 of the *Financial Administration Act* and a condition to which the relief or remission is subject is not complied with, the person who did not comply with the condition shall, within 90 days or such other period as may be prescribed after the day of the failure to comply,

(a) report the failure to comply to an officer at a customs office; and

(b) pay to Her Majesty in right of Canada an amount equal to the amount of the duties in respect of which the relief or remission was granted, unless that person can provide evidence satisfactory to the Minister of Public Safety and Emergency Preparedness that

(i) at the time of the failure to comply with the condition, a refund or drawback would otherwise have been granted if duties had been paid, or

(ii) the goods in respect of which the relief or remission was granted qualify in some other manner for relief or remission under this Act or the *Financial Administration Act*.