



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## ORDER AND REASONS

Application No. EP-2020-001

Friul Intagli Industries S.p.A.

*Order and reasons issued  
Friday, January 29, 2021*

**TABLE OF CONTENTS**

ORDER ..... i

STATEMENT OF REASONS ..... 1

    OVERVIEW ..... 1

    BACKGROUND ..... 1

        The CBSA section 60.1 decision..... 5

POSITIONS OF THE PARTIES ..... 6

    Friul..... 6

    CBSA ..... 7

ANALYSIS ..... 8

DECISION ..... 14

IN THE MATTER OF an application made by Friul Intagli Industries S.p.A. pursuant to subsection 60.2(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), for an order extending the time to file requests for further re-determination pursuant to section 60 of the *Customs Act*.

### ORDER

Having considered the application made by Friul Intagli Industries S.p.A. (Friul), the Canadian International Trade Tribunal finds that the requirements and conditions set out in section 60.2 of the *Customs Act* have been met.

The Tribunal hereby grants the application for an extension of time and gives Friul 30 days from the date of this order to file requests for further re-determination, pursuant to section 60 of the *Customs Act*, with respect to the re-determinations listed in the application.

Susan D. Beaubien

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Susan D. Beaubien  
Presiding Member

## STATEMENT OF REASONS

### OVERVIEW

[1] Friul Intagli Industries S.p.A. (Friul) asks for an extension of time to challenge tariff classifications that have been applied to certain goods, for the purposes of the *Customs Act*.<sup>1</sup>

[2] The President of the Canada Border Services Agency (CBSA) rejected an application brought by Friul pursuant to section 60.1 of the *Act*. Friul now invokes section 60.2 and brings this application to the Tribunal seeking an extension of time.

### BACKGROUND

[3] Friul is an Italian corporation. It manufactures and exports unassembled furniture and furniture components<sup>2</sup> to many countries of the world on four continents. Friul's products have been exported to Canada since at least 2015.<sup>3</sup>

[4] In November 2017, the CBSA undertook a Trade Compliance Verification Review (TCV Review) with respect to certain tariff classifications declared upon importation of Friul's products.<sup>4</sup> Friul retained the services of Ashron Freight Services (Ashron) to assist Friul in complying with the CBSA's review process.

[5] At the outset of the TCV Review, Ashron provided the CBSA with copies of invoices and B3 Customs Coding Forms relevant to the scope of the review.<sup>5</sup>

[6] Over the course of the TCV Review, an employee of the CBSA communicated directly with one individual (Marzia) working in Friul's Export Department and with Ashron.<sup>6</sup> Friul asserts that it cooperated with the CBSA throughout, despite alleged language barriers and some misunderstanding concerning the nature and scope of the requests being made by the CBSA.<sup>7</sup>

[7] The TCV Review focused on two transaction entries. Friul provided the CBSA with additional information and documents as required for the TCV Review.<sup>8</sup> Upon completion of the review, the CBSA found that Friul had used incorrect tariff classifications for some of the goods that had been imported.<sup>9</sup> The CBSA issued a Tariff Classification Report (TCR) on March 2, 2018.<sup>10</sup> It issued a Detailed Adjustment Statement (DAS) dated May 29, 2018, for each of the two transactions that were reviewed.<sup>11</sup>

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<sup>1</sup> R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

<sup>2</sup> Exhibit EP-2020-001-01, p. 2, 100-134; Exhibit EP-2020-001-04A, p. 2.

<sup>3</sup> Exhibit EP-2020-001-01, p. 2; Exhibit EP-2020-001-04A, p. 18.

<sup>4</sup> Exhibit EP-2020-001-01, p. 4; Exhibit EP-2020-001-04A, p. 2-3, 18.

<sup>5</sup> Exhibit EP-2020-001-01, p. 20, 158.

<sup>6</sup> *Ibid.*, p. 4, 20.

<sup>7</sup> *Ibid.*, p. 5, 12, 20, 23.

<sup>8</sup> *Ibid.*, p. 4, 20, 151, 158.

<sup>9</sup> Exhibit EP-2020-001-04A, p. 2-3; Exhibit EP-2020-001-01, p. 4, 20.

<sup>10</sup> Exhibit EP-2020-001-04A, p. 2-3, 18-27.

<sup>11</sup> Exhibit EP-2020-001-01, p. 20, 41; Exhibit EP-2020-001-04A, p. 85-86.

[8] Consequently, additional customs duties and goods and services tax (GST) were levied with respect to the reviewed transactions. Those duties and taxes were duly paid by Friul.<sup>12</sup>

[9] The outcome of the TCV Review required Friul to review all its shipments to Canada which preceded the TCV Review. In order to comply, Friul had to review and correct all transactions that had occurred over the preceding four years and been affected by the tariff classifications covered by the TCV Review. Friul was directed to make these corrections within 90 days of the TCR, i.e. by June 4, 2018.<sup>13</sup>

[10] Now in issue were 79 additional transactions with supporting invoices and other documents.<sup>14</sup> This caused Friul to amend tariff classifications for at least some of its previous imports, to the extent that it agreed with the CBSA's revised tariff classifications pursuant to the TCV Review.<sup>15</sup>

[11] In doing so, Friul reviewed, revised and produced corrected invoices for the years 2015, 2016 and 2017 which underpinned the B3 Customs Coding Forms reflecting those transactions. According to Friul, this exercise required an item by item review of hundreds of invoice lines.<sup>16</sup> In conducting this work, Friul claims that it followed the CBSA's guidance concerning tariff classification.<sup>17</sup>

[12] Friul had not completed this work by June 4, 2018. As such, the CBSA issued a Notice of Penalty Assessment.<sup>18</sup> This document identified all the transactions requiring corrections pursuant to the TCV Review.<sup>19</sup>

[13] Friul submitted revised invoices to the CBSA on July 27, 2018.<sup>20</sup>

[14] The CBSA objected to the format of the revised invoices, asserting that Friul should have submitted the corrected information using a form prescribed by the CBSA.<sup>21</sup> It also took issue with the fact that some of the tariff classifications had not been corrected. Friul asserts that the uncorrected tariff classifications pertained to those transactions which were disputed by Friul and not yet resolved by way of discussions with the CBSA.<sup>22</sup>

[15] The CBSA agent dealing with the file was about to leave on vacation. He advised Friul that the alleged deficiencies in Friul's response would need to be discussed with his manager.<sup>23</sup> Friul interpreted this correspondence as communicating that further discussions would resume once the agent returned from vacation, and that requests for re-determination would be filed, to the extent that a settlement could not be reached with respect to the disputed tariff classifications.<sup>24</sup>

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<sup>12</sup> Exhibit EP-2020-001-01, p. 20, 183.

<sup>13</sup> Exhibit EP-2020-001-04A, p. 2-3, 18-19.

<sup>14</sup> Exhibit EP-2020-001-01, p. 21, 41.

<sup>15</sup> *Ibid.*, p. 4-5.

<sup>16</sup> *Ibid.*, p. 4, 185-187.

<sup>17</sup> *Ibid.*, p. 4-5, 21.

<sup>18</sup> Exhibit EP-2020-001-01, p. 66-71, 24, 41; Exhibit EP-2020-001-04A, p. 3, 28-45.

<sup>19</sup> Exhibit EP-2020-001-01, p. 66-71; Exhibit EP-2020-001-04A, p. 28-45.

<sup>20</sup> Exhibit EP-2020-001-01, p. 4-5, 21, 73-98; Exhibit EP-2020-001-04A, p. 3.

<sup>21</sup> Exhibit EP-2020-001-04A, p. 3, 58-59; Exhibit EP-2020-001-01, p. 5, 21.

<sup>22</sup> Exhibit EP-2020-001-01, p. 4-5.

<sup>23</sup> Exhibit EP-2020-001-04A, p. 58-59.

<sup>24</sup> Exhibit EP-2020-001-01, p. 5, 21-22.

[16] Instead, the CBSA proceeded to issue an assessment against all transactions of goods imported by Friul dating back to 2015, apparently without giving consideration to the revised invoices submitted by Friul on July 27, 2018. The CBSA's assessment action was communicated by a letter dated August 13, 2018 (hereinafter referred to as the August 13 Letter), addressed to the attention of Marzia, and transmitted to Friul via Priority Post.<sup>25</sup> The letter was also transmitted via email to Marzia at Friul and to Ashron.<sup>26</sup>

[17] However, the particulars of the assessment were set forth in a separate DAS dated September 6, 2018.<sup>27</sup> Friul asserts that the DAS never reached the requisite individual (Marzia) at Friul, ostensibly due to the closure of Friul's business premises for the summer vacation period<sup>28</sup> or misdirection of mail.<sup>29</sup> As such, Friul asserts that it never saw or received the DAS until months later (March 2019).<sup>30</sup> It admits having received the August 13 Letter.<sup>31</sup>

[18] The issuance of the DAS triggered a 90-day period to request a re-determination of the tariff classifications imposed by the CBSA. The CBSA decision gave rise not only to additional (back) customs duties and GST payable, but also to interest and penalties.<sup>32</sup> The DAS showed a total amount payable of \$665,253.51.<sup>33</sup>

[19] During October 2018, a trade lawyer claiming that he was "in the process of being retained" by Friul contacted the CBSA to inquire about a "large DAS" payable, including the possibility of a partial payment arrangement, on a without prejudice basis.<sup>34</sup> It is unknown whether that counsel was actually retained by Friul.

[20] In any event, the same CBSA agent who had dealt with the file throughout, replied by stating the following:

I am endeavoring to confirm this information, this area is outside my routine job, but I believe an importer must either pay all duties and interest and/or post security. This security can take many forms; the only example I have heard of are paying private insurance companies for performance bonds. It is acceptable to have combinations of security and payment forms.<sup>35</sup>

[21] Friul did not take the further procedural steps to initiate, as of right, a re-determination of the tariff classifications in advance of the December 8, 2018, deadline.

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<sup>25</sup> Exhibit EP-2020-001-04A, p. 3, 60-61; Exhibit EP-2020-001-01, p. 5.

<sup>26</sup> Exhibit EP-2020-001-04A, p. 3, 60.

<sup>27</sup> Exhibit EP-2020-001-01, p. 29-34; Exhibit EP-2020-001-04A, p. 3-4.

<sup>28</sup> Exhibit EP-2020-001-01, p. 5, 22-23, 26; Exhibit EP-2020-001-07.

<sup>29</sup> Exhibit EP-2020-001-01, p. 5, 23.

<sup>30</sup> Exhibit EP-2020-001-01, p. 189, 191; Exhibit EP-2020-001-07, p. 3.

<sup>31</sup> Exhibit EP-2020-001-07, p. 3.

<sup>32</sup> Exhibit EP-2020-001-04A, p. 28.

<sup>33</sup> *Ibid.*, p. 68.

<sup>34</sup> *Ibid.*, p. 4, 69-70.

<sup>35</sup> *Ibid.*, p. 69.

[22] A notice of arrears was issued on November 28, 2018,<sup>36</sup> and a lien action was commenced against Friul by the Canada Revenue Agency on January 9, 2019.<sup>37</sup>

[23] Friul later posted a bond dated February 14, 2019, in the amount of \$703,677.78 as security for the amount due prescribed by the DAS, together with penalties.<sup>38</sup>

[24] On March 4, 2019, Friul's new and current counsel contacted the CBSA to obtain a copy of the DAS issued on September 6, 2018.<sup>39</sup> This document was provided by the CBSA on March 11, 2019.<sup>40</sup>

[25] During this timeframe, there appeared to be some procedural changes being generally introduced by the CBSA with respect to the requirements for the receipt and processing of re-determination requests, including extension of time requests. The record indicates that there was some communication between Friul's counsel and the CBSA concerning these issues, with the file being characterized by the latter as seemingly complex and the CBSA suggesting a telephone discussion "before [Friul's counsel] get too deep in".<sup>41</sup>

[26] On March 17, 2019, Friul's counsel advised the CBSA that an appeal was being prepared. A copy of the security bond was provided to the CBSA, together with a request that the CBSA review the bond and confirm that it satisfied the criteria for security. This confirmation was provided the following day.<sup>42</sup>

[27] During June and July 2019, Friul's counsel corresponded with the CBSA seeking copies of documents that had been either misplaced or not received, and seeking clarification with respect to transaction entries on the DAS that appeared to be duplicative or to have no relationship with Friul's transactions.<sup>43</sup>

[28] Friul's counsel submitted a signed form titled "Agreement to Receive and Submit Information to the Recourse Directorate of the Canada Border Services (CBSA) by Email" on August 30, 2019.<sup>44</sup> This form had been provided to counsel by the CBSA in March 2019.<sup>45</sup>

[29] A statutory declaration dated October 7, 2019, was obtained from the shipping and logistics manager of Cargo Compass Spa, an Italian distribution logistics company responsible for the loading and shipment of Friul's shipments to Canada. The statutory declaration provided, in chart form, a listing of Friul's exports to Canada by invoice number which was cross-referenced to the cargo container number and the B3 Customs Coding Form. In addition, information concerning the nature of the goods and the logistics of their importation and delivery in Canada was also provided.<sup>46</sup>

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<sup>36</sup> Exhibit EP-2020-001-01, p. 56; Exhibit EP-2020-001-04A, p. 4.

<sup>37</sup> Exhibit EP-2020-001-01, p. 55; Exhibit EP-2020-001-04A, p. 4.

<sup>38</sup> Exhibit EP-2020-001-01, p. 36-38; Exhibit EP-2020-001-04A, p. 82-84.

<sup>39</sup> Exhibit EP-2020-001-04A, p. 4, 71-72.

<sup>40</sup> Exhibit EP-2020-001-04A, p. 4, 73; Exhibit EP-2020-001-01, p. 5, 28.

<sup>41</sup> Exhibit EP-2020-001-01, p. 168-173; Exhibit EP-2020-001-04A, p. 76.

<sup>42</sup> Exhibit EP-2020-001-04A, p. 78-80.

<sup>43</sup> Exhibit EP-2020-001-01, p. 191-194.

<sup>44</sup> Exhibit EP-2020-001-04A, p. 5, 74-75, 81.

<sup>45</sup> *Ibid.*, p. 4-5, 74.

<sup>46</sup> Exhibit EP-2020-001-01, p. 136-148.

[30] On October 21, 2019, Friul requested the re-determination of the tariff classifications set forth in the DAS dated September 6, 2018. This correspondence provided a summary of the grounds upon which Friul contended that the tariff classifications and the calculation of back duties and taxes payable were incorrect. Friul's objections primarily turned on the methodology used by the CBSA.<sup>47</sup> Friul also sought an extension of time pursuant to section 60.1 of the *Act* to request that re-determination.<sup>48</sup>

[31] The CBSA issued a preliminary decision on November 29, 2019, rejecting Friul's extension of time requests and requesting further information.<sup>49</sup> In reply, Friul's counsel provided extensive written representations on December 19, 2019.<sup>50</sup>

### **The CBSA section 60.1 decision**

[32] On January 8, 2020, the CBSA denied Friul's extension of time requests.<sup>51</sup>

[33] In its decision, the CBSA concluded that Friul had not fulfilled the criteria of section 60.1 of the *Act*. More particularly, the CBSA was not persuaded that Friul had been unable to act within the prescribed 90-day timeline to request a re-determination, as the reason advanced by Friul (i.e. summer shutdown) was not an exceptional circumstance beyond the control of Friul, of the nature described in the CBSA's policy/guidelines.<sup>52</sup>

[34] Although Friul had retained the assistance of experienced advisors who initiated correspondence with the CBSA during October 2018, the CBSA found that there was no evidence to demonstrate that any action was subsequently taken to actually initiate a re-determination appeal within the statutory timeframe. The CBSA concluded that Friul's representatives were either not mandated to act, or failed to act, since any intention to appeal was not actualized until after collection action was commenced by the Canada Revenue Agency.<sup>53</sup>

[35] The CBSA relied upon the same reasons to underpin its finding that it would not be just or equitable to grant the extension of time, noting that there was no "compelling rationale" to explain "lengthy delay" in the filing of the application for an extension. It also considered that granting an extension would be "unfair to the importing community at large," in the absence of a more compelling rationale for the delay, since other importers likewise deal with complex and voluminous transaction entries when submitting their appeals.<sup>54</sup>

[36] Finally, the CBSA found that Friul had not filed its application "as soon as circumstances permitted," given the period of apparent inactivity between October 2018 and February 2019 and the fact that the appeal was not actually filed until October 21, 2019, although Friul's counsel had

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<sup>47</sup> *Ibid.*, p. 9, 13, 21, 23, 42-44.

<sup>48</sup> *Ibid.*, p. 40.

<sup>49</sup> Exhibit EP-2020-001-04A, p. 85-88.

<sup>50</sup> Exhibit EP-2020-001-01, p. 150-156.

<sup>51</sup> *Ibid.*, p. 177-181.

<sup>52</sup> Memorandum D11-6-9 – "Applications to the President for an Extension of Time to File a Request under section 60 of the *Customs Act*"; Exhibit EP-2020-001-04A, p. 94-106; Exhibit EP-2020-001-01, p. 178.

<sup>53</sup> Exhibit EP-2020-001-01, p. 178-179.

<sup>54</sup> *Ibid.*, p. 179.



apparently advised, at the end of August 2019, that all the documents needed for the appeal had been assembled.<sup>55</sup>

[37] On April 7, 2020, Friul filed this application with the Tribunal, seeking an extension of time pursuant to section 60.2 of the *Act*.<sup>56</sup>

[38] The CBSA responded to the application by filing submissions on May 8, 2020.<sup>57</sup>

[39] Friul submitted a reply on May 22, 2020.<sup>58</sup> It also filed additional materials that were late by one day.<sup>59</sup> In view of the late filing and additional documents, the CBSA requested leave to file a sur-reply.<sup>60</sup>

[40] Friul objected to the CBSA's request to submit a sur-reply.<sup>61</sup> The CBSA contended that Friul was simply re-arguing its position and that all material post-dating Friul's May 22nd reply should be disregarded, if the CBSA was not permitted to file a sur-reply.<sup>62</sup>

[41] The Tribunal granted leave to the CBSA to file a sur-reply strictly confined to any new facts that may have arisen from Friul's late-filed materials on May 25, 2020.<sup>63</sup>

[42] The CBSA filed a sur-reply on June 8, 2020.<sup>64</sup>

## POSITIONS OF THE PARTIES

### Friul

[43] Friul provided an extensive description of the background and events leading up to the issuance of the DAS on September 6, 2018. It submits that all four criteria for the grant of an extension of time pursuant to section 60.2 have been met.

[44] Friul asserts that it not only intended to request re-determination, but that it acted on that intention before the prescribed 90-day period. It emphasizes that it cooperated fully with the CBSA throughout the TCV Review. Notwithstanding, the CBSA imposed an assessment without giving any consideration to the revised invoices and tariff classifications submitted by Friul. This led to the issuance by the CBSA of a DAS which was not received by Friul until many months later, after the 90-day period had expired.

[45] The missing DAS is said to have compromised Friul's ability to seek re-determination within the prescribed period, as Friul was unfamiliar with all the procedural requirements for an appeal and did not have the information set forth in the DAS.

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<sup>55</sup> *Ibid.*, p. 180-181.

<sup>56</sup> *Ibid.*, p. 1.

<sup>57</sup> Exhibit EP-2020-001-04A.

<sup>58</sup> Exhibit EP-2020-001-06A.

<sup>59</sup> Exhibit EP-2020-001-07.

<sup>60</sup> Exhibit EP-2020-001-08.

<sup>61</sup> Exhibit EP-2020-001-09.

<sup>62</sup> Exhibit EP-2020-001-10.

<sup>63</sup> Exhibit EP-2020-001-11.

<sup>64</sup> Exhibit EP-2020-001-12A.

[46] Friul argues that it is just and equitable to grant the application because if there is no opportunity to challenge the CBSA's tariff classification, the government would be unjustly enriched by a windfall derived from the use of an incorrect tariff classification. It asserts that importers have the right to have imported goods correctly classified and that there is no offsetting equitable consideration that would justify insulating an incorrect tariff classification from reconsideration or correction.

[47] With respect to the question of timeliness, Friul asserts that it was being careful and diligent in preparing its materials to ensure that it submitted complete and accurate information to the CBSA. It stresses the number of transactions at issue and characterizes the case as being complex.

[48] According to Friul, this complexity meant that the process of locating, reviewing and organizing relevant information was time-consuming, especially since the DAS was searched for, but could not be found, as it had not been received.

[49] Moreover, Friul points out that it was working not only to prepare the application for an extension but also to prepare its case for re-determination on the merits, which necessitated extensive and careful research and preparation.

[50] Friul also contends that the CBSA's requirement for a security bond was a complicating factor as it took Friul time to locate a bonding company that could issue a bond in compliance with the CBSA's requirements. Once that had been done, the bond had to be approved for form and content by the CBSA.

[51] In early 2019, the CBSA was transitioning to a new online appeal procedure. Friul points to this event as a further factor that affected the timing of its application.

## **CBSA**

[52] The CBSA submits that the applicant for an extension of time (Friul) bears the burden of proof to show that it has met the statutory conditions for the granting of an extension of time. In this case, the CBSA argues that Friul has fallen short of demonstrating that it filed its request "as soon as circumstances permitted" and has not shown that it would be just and equitable for the extension to be granted, having regard to the circumstances.

[53] While conceding that every case must be decided on its own facts and that there is no bright-line test to define "as soon as circumstances permitted", the CBSA stresses that it took Friul 13 months from the date of the DAS to request the extension and that several gaps within that timeline remain either unexplained or unjustified. It submits that the record does not show that Friul was "moved by a sense of urgency and diligence".<sup>65</sup>

[54] Indeed, the CBSA contends that Friul was aware of the DAS and its content by at least mid-October 2018, when its former counsel and Ashron were communicating with the CBSA. At that time, the statutory timeframe permitted a request for re-determination to be filed as of right.

[55] The CBSA concedes that Friul was taking "active steps" to pursue requests for re-determination by October 2018 but says that Friul has not explained why the appeal was not actually filed on or before December 5, 2018, or why that deadline could not be met. It also points to

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<sup>65</sup> Exhibit EP-2020-001-04A, p. 8.

an apparent lack of activity by Friul until March 2019, which remained unexplained, despite the obtaining of a security bond in February which was only later submitted to the CBSA on October 24, 2019.

[56] The CBSA refers to correspondence in late August 2019 wherein Friul's counsel indicated that filing of the requests for an extension of time and re-determination were imminent, yet this filing was not effected until October 21, 2019.

[57] Moreover, the CBSA argues that Friul has not explained why documents that were needed to support the appeal were not available earlier, given that these documents would have been at hand in preparing Friul's response to the TCR. It also notes that photographs of the goods and an affiant from Cargo Compass Spa should also have been accessible to Friul at a much earlier stage. The CBSA's requirement for the posting of security is a rule of general application. As such, it is deemed to be public knowledge and thus should have been known to an experienced international trader such as Friul, especially one that is receiving professional advice.

[58] Given that Friul took 10 months to seek an extension of time following the expiry of the statutory deadline, the CBSA argues that granting an extension in such circumstances would be unjust and inequitable towards other importers who act in accordance with prescribed deadlines, particularly since Friul has not fully explained the delays.

[59] The CBSA concedes that the Tribunal must consider and weigh different factors, including the consequences to the applicant if the extension is not granted, potential unfairness to others if the extension is granted and the reasons for the delay. In doing so, the exercise of discretion is case-specific. However, in the circumstances of this case, the CBSA contends that the sheer length of the delay is unreasonable and outweighs other considerations, including Friul's contentions of complexity.

[60] By way of sur-reply, the CBSA pointed out that Friul's reply had unnecessarily complicated this proceeding by focusing on the extraneous issues of the CBSA's process for selection of samples during the TCV Review and the methodology for calculation of duties owing from the DAS. Otherwise, the CBSA submitted that the additional materials submitted by Friul simply highlighted discrepancies and underscored that Friul had not filed its application as soon as circumstances permitted.

## ANALYSIS

[61] Subsection 60.2(1) of the *Act* prescribes that a person who has applied to the President of the CBSA for an extension of time<sup>66</sup> and been refused may apply to the Tribunal to have the application granted. Any such application to the Tribunal must be made within 90 days after the President has refused the application. In this case, the President's refusal was issued on January 8, 2020. This application was submitted to the Tribunal on April 7, 2020, namely on the last permissible day. As such, the application is timely, albeit barely.

[62] In order for the Tribunal to grant an application for an extension, the criteria of subsection 60.2(4) of the *Act* must be satisfied. Subsection 60.2(4) provides as follows:

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<sup>66</sup> Pursuant to section 60.1 of the *Act*.

- (4) No application may be granted under this section unless
- (a) the application under subsection 60.1(1) was made within one year after the expiry of the time set out in section 60; and
  - (b) the person making the application demonstrates that
    - (i) within the time set out in section 60, the person was unable to act or to give a mandate to act in the person's name or the person had a bona fide intention to make a request,
    - (ii) it would be just and equitable to grant the application, and
    - (iii) the application was made as soon as circumstances permitted.

[63] The requirements listed in subsection 60.2(4) of the *Act* are cumulative. Each condition must be satisfied and the burden of proof falls on the applicant. The Tribunal's decision to grant or refuse an application under section 60.2 is determined *de novo*.<sup>67</sup>

[64] It is undisputed that the conditions of paragraph 60.2(4)(a) of the *Act* are met. The prescribed date to request re-determination pursuant to section 60 was December 8, 2018, namely 90 days after issuance of the DAS. Accordingly, any application pursuant to section 60.2 had to be filed on or before December 8, 2019.

[65] Friul submitted its requests for an extension of time pursuant to section 60.1 of the *Act* on October 21, 2019. Accordingly, the application under section 60.2 was filed in advance of December 8, 2019, deadline.

[66] Turning to subparagraph 60.2(4)(b)(i) of the *Act*, there is no evidence that Friul was either unable to act itself or to give a mandate to another person to act on its behalf. The CBSA concedes<sup>68</sup> that the communications to the CBSA effected on Friul's behalf during October 2018 reflected a *bona fide* intention by Friul to contest the revised tariff classification arising from the TCV Review process, and which culminated in issuance of the DAS.

[67] The Tribunal agrees that the correspondence between Friul and CBSA during October 2018 demonstrates that Friul had turned its mind to pursuing the remedy of an appeal. The issue is whether that intention fuelled subsequent action that was sufficient to satisfy the requirements of subparagraphs 60.2(4)(b)(ii) and (iii) of the *Act*.

[68] As such, the Tribunal is left to decide whether Friul's application was made as soon as circumstances permitted and if it would be just and equitable to grant the application.

[69] The parties cited several cases in support of their respective arguments on these issues. However, some of this jurisprudence pertains to applications for extension of time made pursuant to subsection 67.1(4) of the *Act*.<sup>69</sup> In addition to the factors prescribed by subsection 60.2(4), the criteria

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<sup>67</sup> *Dealers Ingredients Inc.* (29 August 2014), EP-2014-001 (CITT) [*Dealers*], paras. 21-22.

<sup>68</sup> Exhibit EP-2020-001-04A, p. 9.

<sup>69</sup> And its statutory predecessors.

of subsection 67.1(4) require the *further* consideration of whether there are “reasonable grounds for the appeal”.

[70] As such, when considering jurisprudence referable to subsection 67.1(4) of the *Act* in the context of the arguments that have been made herein, the Tribunal is mindful that an additional consideration, i.e. reasonable grounds for appeal, may have been a factor underpinning the outcome of those cited cases.

[71] In *Latoplast*, the Tribunal noted that a decision to grant an extension of time is a discretionary, fact-driven decision. It stated as follows:

18. There is no bright-line test for what constitutes “as soon as circumstances permitted”. Rather, the Tribunal must make a fact-specific determination on a case-by-case basis. The only hard deadline for an application for extension of time is that it must be made within one year after the expiry of the time set out in section 67 of the *Act*, as noted above.

19. As the Tribunal has expressed in the context of an application under section 60.2 of the *Act*, while statutory deadlines are not to be taken lightly, the *Act* “expressly gives the Tribunal permission to alter and extend statutory deadlines for certain requests”. This allows the Tribunal to be an accessible administrative forum for dispute resolution, provided that the conditions in the *Act* are met.<sup>70</sup>

[Footnotes omitted]

[72] The Tribunal has also noted that an applicant seeking an extension of time is expected to act with a sense of urgency.<sup>71</sup>

[73] In determining whether granting an extension would be just and equitable, the Tribunal will weigh relevant factors, including the length of the delay, the consequences to the applicant if the extension is not granted, the potential unfairness to other importers and the reasons for the delay. No single factor is conclusive, and the factors need not be given equal weight.<sup>72</sup>

[74] In the present case, Friul has submitted voluminous material in support of its application for an extension. The entire record on this application runs to hundreds of pages. Friul contends that it took considerable time for its counsel to assemble this material and that this circumstance accounts, at least in part, for the time that Friul has taken to formally file its application for an extension.

[75] The CBSA stresses that it took Friul 320 days to file its application.<sup>73</sup> It refers to previous cases where the delay was very brief (i.e. a few days)<sup>74</sup> and where a much shorter filing delay (e.g. 60 days) was characterized as being undue, notwithstanding the potential for harsh consequences being visited upon the applicant.<sup>75</sup> In the CBSA’s view, the time taken by Friul

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<sup>70</sup> *Latoplast Ltd.* (25 July 2019), EP-2019-001 (CITT).

<sup>71</sup> *B. Erickson Manufacturing Limited* (3 April 2017), EP-2016-001 (CITT), para. 34

<sup>72</sup> *Full Bore Marketing Inc.* (22 August 2018), EP-2018-001 (CITT) [*Full Bore*], para. 13; *Dealers*, para. 26.

<sup>73</sup> Filed with the President of the CBSA pursuant to section 60.1 of the *Act*.

<sup>74</sup> *Fritz Marketing Inc. v. President of the Canada Border Services Agency* (2 November 2006), AP-2005-029 (CITT) [*Fritz Marketing*], *Conair Consumer Products ULC* (20 July 2018), EP-2018-002 (CITT) [*Conair*], *Full Bore*.

<sup>75</sup> *Dealers*, para. 27.

demonstrates that the application was not filed “as soon as circumstances permitted” and that Friul failed to act with the requisite sense of urgency.

[76] Friul asserts that the appeal process was delayed because Friul did not receive the DAS until March 2019. The CBSA challenges Friul’s contention that the DAS was not timely received. Pointing to the correspondence of October 2018, the CBSA contends that the statements made on Friul’s behalf indicate that the DAS was available and in hand on that date.

[77] Unlike the August 13 Letter, which was transmitted by way of email *and* Priority Post, the record does not demonstrate how the DAS was sent to Friul. Presumably, the DAS was sent by regular mail. It was addressed to Friul, at its corporate address, with no specification or cover letter indicating that the document was to receive the attention of any specific person or department within the company. Accordingly, it is quite possible that the document was misplaced or misdirected and did not reach the individual (Marzia) within Friul having carriage of the matter.

[78] The August 13 Letter, contained sufficient information to alert Friul that it faced significant liability for retroactively calculated customs duties. The Tribunal concludes that this information caused Friul to attempt to retain Canadian counsel during the autumn of 2018. In turn, this led to the correspondence with the CBSA in October 2018.

[79] The Tribunal finds that the October 2018 correspondence reflected Friul’s awareness of that potential liability, consistent with the content of the August 13 Letter, especially in the hands of counsel.<sup>76</sup> However, it does not go so far as to show that Friul had the detailed breakdown set forth in the DAS.

[80] The October 2018 correspondence also reveals that Friul was inquiring about the availability of a payment plan, while reserving its right to appeal. It is unclear whether this inquiry could be characterized as an overture to settlement discussions which, as a general principle, should be encouraged.

[81] The CBSA replied that, subject to confirmation, a request for re-determination would only be considered if the duties were fully prepaid, together with interest. In the alternative, security for the amount payable would have to be posted, in a form satisfactory to the CBSA. Summary information on the posting of security was provided.<sup>77</sup> The record is silent concerning any further confirmation or discussions between the parties on this issue. As such, it is unclear whether Friul was expecting further dialogue or information from the CBSA before taking next steps.

[82] The CBSA instituted enforcement action in January 2019. Friul obtained a security bond by February 2019 and its new counsel contacted the CBSA shortly thereafter to request confirmation that the bond was satisfactory.

[83] Subparagraph 60.2(4)(b)(iii) of the *Act* requires that the application be made “as soon as circumstances permitted”. The provision is broadly worded. Circumstances can vary widely from case to case. The Tribunal has noted that the cases cited by the CBSA involved nominal delays of a

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<sup>76</sup> Friul admits that this letter was received shortly after Friul reopened following the summer vacation period (see Exhibit EP-2020-001-07, p. 3).

<sup>77</sup> Exhibit EP-2020-001-01, p. 162-164; Exhibit EP-2020-001-04A, p. 69-72.

few days caused by docketing or other errors by the applicant or its counsel.<sup>78</sup> That is not the case here.

[84] Notwithstanding the voluminous record submitted, including an affidavit from Friul's distribution logistics company, no affidavit was tendered from Friul itself to describe or explain what transpired during the relevant timeframe. This omission is rather troubling. Such an affidavit would have been far more helpful and persuasive in resolving this application than the somewhat prolix materials and submissions tendered by Friul and reviewed by the Tribunal.

[85] However, the record does show that Friul took steps to initiate the appeal process by corresponding with the CBSA within the statutory 90-day period when re-determination could be requested as of right. Although the application for an extension of time was not filed until many months later, the record demonstrates ongoing, albeit periodic, correspondence between Friul and the CBSA, as Friul's counsel ostensibly deliberated and prepared the application. The CBSA was thus on notice that Friul intended to appeal, which was underscored by the posting of a security bond. In addition, some of the correspondence sent by the CBSA was conditional upon or suggestive of further information to come.

[86] Part of the delay can also be attributable to steps needed to comply with the CBSA's own procedural requirements, including the requirement to fully prepay the amount in issue.<sup>79</sup> The Tribunal makes no finding on the merits of such a requirement, other than to observe that the burden imposed on a prospective appellant increases, somewhat proportionately, with the amount of money in dispute. A prospective appellant must either expend some of its cash flow or pay for a security bond, as an upfront requirement. The Tribunal considers that the process for securing a bond for a significant sum of money, having a form and content satisfactory to the CBSA, would entail complexities which create delay, all the more so for a foreign corporation having no place of business in Canada. As such, this becomes a relevant consideration for the purposes of subparagraph 60.2(4)(b)(iii) of the *Act*.

[87] Having regard to the foregoing, the cases cited by the parties in argument appear to be distinguishable, on their facts. The described circumstances of the cited cases did not pertain to a situation where the applicant for an extension of time had signalled an intention to appeal, by way of correspondence within the prescribed time for seeking re-determination, followed by the posting of security for a substantial sum of money, in high six figures.

[88] Moreover, Friul's counsel appeared to be preparing the application for an extension of time and the substantive appeal together, as opposed to sequentially, having regard to the material that was actually submitted to the Tribunal.

[89] The Tribunal accepts that complexity is a factor that may be taken into account in assessing the timeliness of filing an application for an extension.<sup>80</sup> The transactions at issue do involve some complexity, although the Tribunal finds that Friul's characterizations in this regard to be somewhat over-stated.

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<sup>78</sup> See, for example, *Conair, Full Bore, Fritz Marketing*.

<sup>79</sup> See, for example, Exhibit EP-2020-001-01, p. 163, 170.

<sup>80</sup> *Agripack* (16 February 2004), EP-2003-002 (CITT).

[90] Although Friul did not proceed with optimal alacrity, the record does show an ongoing intention to proceed with the appeal. Steps were continuously taken to that effect. Having incurred the expense of a security bond, Friul used most of the time permitted under the statute to perfect its application for an extension and appeared to be working to meet the statutory deadline, and not to abridge the time available. However, the Tribunal cannot arbitrarily prescribe a certain threshold (number of days) by which an application must be filed. This would be tantamount to rewriting the time limit that is prescribed by the statute for bringing the application.

[91] In view of the foregoing, the Tribunal finds, on application of the test of a balance of probabilities, that Friul has demonstrated, albeit narrowly, that it has met the requirement of subparagraph 60.4(2)(b)(iii) of the *Act*.

[92] Friul contends that it would be just and equitable for its application to be granted. It relies upon *Fritz Marketing*, quoting the Tribunal's finding that if an extension was not granted, "Fritz Marketing would lose the opportunity to present its case, and the Tribunal believes that it would not be equitable for it to lose that opportunity because of a minor defect in filing dates."<sup>81</sup>

[93] However, the CBSA did not contest the extension request in that case, which was an application made under section 67.1 of the *Act*. The merits of the appeal appeared to be an overriding consideration. The Tribunal's reasons primarily deal with the merits of Fritz Marketing's appeal, which was opposed by the CBSA. Accordingly, *Fritz Marketing* is of little assistance in deciding the present application.

[94] The Tribunal notes that the CBSA apparently decided to re-assess all importations of Friul's goods, based on an extrapolation of a limited number of transactions that were reviewed and without consideration of the materials submitted by Friul, because a specific form had not been used. The Tribunal considers that this process gives rise to at least an arguable issue with respect to procedural fairness and natural justice. Moreover, this is underscored by the allegations that the CBSA has adopted or applied incorrect methodology in determining the tariff classification of Friul's imports and the relevant amount of duty that is payable. In making these observations, the Tribunal makes no finding on the substantive merits. However, the Tribunal finds that these factors bear significant weight on the question of whether it is just and equitable to grant this application.

[95] The CBSA contends that allowing Friul's application for an extension would be unfair to other importers who act with more dispatch in seeking re-determination of tariff classifications. However, if unchallenged, the CBSA's determination in this matter will serve as a precedent which may affect or disadvantage other importers of similar goods, premised on methodology which may or may not be correct.

[96] The Tribunal is also mindful of the considerable amount of money that is at stake. If Friul is not permitted to complete the re-determination process that was set in motion during October 2018, it will have to pay a disputed sum running to hundreds of thousands of dollars without having been heard. In the Tribunal's view, this factor tips the balance in favour of finding that it would be just and equitable to grant the application. Indeed, in the Tribunal's overall assessment of the factors prescribed by paragraph 60.2(4)(b) of the *Act*, it is the predominant one, having regard to the circumstances of this particular case.

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<sup>81</sup> *Fritz Marketing*, para. 9.



**DECISION**

[97] Subsection 60.2(3) of the *Act* permits the Tribunal to grant an extension of time on any terms that it considers just. In view of the time taken by Friul to prepare its materials in support of its requests for re-determination, the Tribunal expects that Friul should now be in a position to proceed expeditiously.

[98] For the foregoing reasons, the Tribunal grants the application for an extension of time and gives Friul 30 days from the date of this order to file requests for further re-determination, pursuant to section 60 of the *Act*, with respect to the re-determinations listed in the application.

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member