



Ottawa, Monday, February 16, 2004

Application No. EP-2003-002

IN THE MATTER OF an application made by Agripack under section 60.2 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, for an extension of time to make a request for a further re-determination.

ORDER OF THE TRIBUNAL

The Canadian International Trade Tribunal grants the application for an extension of time to make a request for a further re-determination under section 60 of the *Customs Act*.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary



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TRIBUNAL: PIERRE GOSSELIN, Presiding Member
PATRICIA M. CLOSE, Member
RICHARD LAFONTAINE, Member

STATEMENT OF REASONS

BACKGROUND

On November 20, 2001, the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) issued a decision pursuant to subsection 59(1) of the *Customs Act*,¹ re-determining the tariff classification and value for duty of goods imported by Agripack. On February 22, 2002, Agripack filed a request for a re-determination of that decision, pursuant to subsection 60(1). The Commissioner informed the Canadian International Trade Tribunal (the Tribunal) that the application had been rejected because it had been made out of time. On April 22, 2002, Agripack paid the amounts owed as a result of the re-determination.

On December 23, 2002, Agripack filed an application for an extension of time to make a request for a re-determination with the Commissioner. On March 31, 2003, the Commissioner denied Agripack's request for an extension of time on the grounds that Agripack had not met all the requirements found in subsection 60.1(6) of the *Act* in order to be granted the extension. On May 22, 2003, Agripack made an application to the Tribunal for an extension of time to make a request for a further re-determination, pursuant to section 60.2. The application related to B2-1 adjustment numbers 00005009963349 and 00005009963189 issued on November 20, 2001.

POSITIONS OF THE PARTIES

In a submission to the Tribunal dated September 15, 2003, Agripack noted that the National Customs Ruling (NCR) that was essential to its understanding of the Commissioner's re-determination was improperly addressed, such that Agripack did not receive it until November 27, 2001. Agripack is of the view that it was only upon receipt of the NCR on November 27, 2001, that the time frame, as prescribed in subsection 60(1) of the *Act*, commenced. Further, without the timely receipt of this NCR, Agripack is of the view that it could not act or give a mandate to act in filing the application.

The Commissioner argued, in his submission dated August 8, 2003, that Agripack had not met the criterion that it was "unable to act or to give a mandate" since none of the actions presented by Agripack constituted circumstances beyond its control, nor did they interfere with its capacity to file a dispute notice

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

under section 60 of the *Act* or give a mandate to file such a dispute notice within the legislative time limit. The Commissioner found that Agripack was able to act, but had simply neglected to do so. The Commissioner argued that Agripack's letters to ministers and importer associations cannot be considered to be a *bona fide* intention to make an application and that the application was not actually made until December 23, 2002, 10 months after the Commissioner had issued his notice of re-determination pursuant to section 59 of the *Act*.

With respect to the requirement of section 60.2 of the *Act* that the application be made "as soon as circumstances permitted", the Commissioner referred to tax jurisprudence in arguing that it should be read to mean "exceptional circumstances that are beyond the client's control". The Commissioner argued that, absent the incapacitation of key employees or a natural disaster, the application should be rejected on this basis. The Commissioner argued that waiting for replies to correspondence did not meet that requirement, particularly where, as here, the correspondence was irrelevant to the application process. Moreover, the Commissioner argued that Agripack had a responsibility to explain what those circumstances were, which it failed to do in this application.

The Commissioner also argued that Agripack has not met the requirement of demonstrating that it would be "just and equitable" to grant the application. The Commissioner argued that the Tribunal must provide its view on whether granting the application would be fair overall. In this regard, the Commissioner noted that granting this application would have a negative impact not only on himself but also on other importers that go to great lengths to comply with the time limits stipulated in the *Act*. The Commissioner referred to Agripack's suggestion that this particular ruling will create significant financial hardship, but argued that a "clear connection must be made between the financial hardship and its impact on the filing process", which has not been established in this case.

ANALYSIS

Section 60.2 of the *Act* reads as follows:

60.2 (1) A person who has made an application under section 60.1 may apply to the Canadian International Trade Tribunal to have the application granted after either

- (a) the Commissioner has refused the application; or
- (b) ninety days have elapsed after the application was made and the Commissioner has not notified the person of the Commissioner's decision.

If paragraph (a) applies, the application under this subsection must be made within ninety days after the application is refused.

(2) The application must be made by filing with the Commissioner and the Secretary of the Canadian International Trade Tribunal a copy of the application referred to in section 60.1 and, if notice has been given under subsection 60.1(4), a copy of the notice.

(3) The Canadian International Trade Tribunal may dispose of an application by dismissing or granting it and, in granting an application, it may impose any terms that it considers just or order that the request be deemed to be a valid request as of the date of the order.

(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.

The Tribunal will address each of the four conditions contained in this section, as they apply to the present case.

The first requirement is that the application to the Commissioner under section 60.1 of the *Act* be made within one year of the date for making a request under section 60. The Commissioner issued his decision pursuant to subsection 59(1) on November 20, 2001, such that the request under section 60 should have been made on February 18, 2002. As Agripack had one year from this date, that is, until February 18, 2003, to make its application for an extension of time and its application was made by December 23, 2002, this requirement is met.

The second requirement, at subparagraph 60.2(4)(b)(i) of the *Act*, is that Agripack must demonstrate that, within the prescribed period, it was unable to act in response to the Commissioner's re-determination or to give a mandate to someone else to act in its name. Alternatively, Agripack could prove that it had a *bona fide* intention to make a request for a further re-determination within the prescribed period. In this regard, the Tribunal notes that Agripack's request for a re-determination pursuant to subsection 60(1) of the *Act* was date-stamped February 22, 2002. The 90-day appeal period expired on February 18, 2002, such that the application was late by only four days. Moreover, while the application was date-stamped February 22, 2002, the application was signed on February 14, 2002, which is within the appeal period stipulated in section 60. Therefore, the Tribunal considers that Agripack had a *bona fide* intention to make the request for a re-determination within the prescribed period, and that this requirement was met.

The Tribunal is of the view that Agripack has also met the third requirement, at subparagraph 60.2(4)(b)(ii) of the *Act*, in that it has demonstrated that it would be just and equitable to grant the application. The Tribunal notes that the Commissioner's decision will have a significant impact on Agripack. The Tribunal does not agree with the Commissioner that others will be unfairly disadvantaged should the extension be granted. In the circumstances of this case, particularly given the delay in providing Agripack with the NCR that involved Agripack itself and that was relevant to understanding the Commissioner's re-determination in this matter, the Tribunal is not convinced that any disadvantage would be suffered by other importers should the application for an extension of time be granted.

With respect to the fourth requirement, at subparagraph 60.2(4)(b)(iii) of the *Act*, which is that Agripack demonstrate that its "application was made as soon as circumstances permitted", the Tribunal is of the view that it must consider the circumstances surrounding Agripack's *application to the Commissioner* pursuant to section 60.1.² The Tribunal notes the relative complexity of this matter and is of the view that it was not unreasonable for Agripack to have taken close to a year to finalize the application, including the payment of amounts owed to the Commissioner as a result of his re-determination and the necessary time to prepare its case. Therefore, the Tribunal is of the view that the application was made as soon as circumstances permitted and that this requirement was met.

For these reasons, the Tribunal finds that Agripack has met all four statutory requirements and that its application should succeed. Therefore, the Tribunal grants the application for an extension of time for the

2. See *Bernard Chaus Inc.* (4 December 2003), EP-2003-001 (CITT).

reasons cited above and allows Agripack until March 26, 2004, to make its request for a further re-determination under section 60 of the *Act*.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Richard Lafontaine
Richard Lafontaine
Member