Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Thursday, December 4, 2003

Application No. EP-2003-001

IN THE MATTER OF an application made by Bernard Chaus Inc. 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*.

Patricia M. Close
Patricia M. Close
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL: PATRICIA M. CLOSE, Presiding Member
ZDENEK KVARDA, Member
ELLEN FRY, Member

STATEMENT OF REASONS

BACKGROUND

Between June 1 and November 18, 1998, Bernard Chaus Inc. (Chaus) imported seven shipments of clothing.

On June 18, 2002, the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) made a re-determination of the value for duty declared for the above shipments, resulting in an assessment of a further $212,130 in duty and $90,622 in GST, for a total of $302,752.

On July 15, 2002, Chaus , through its agent (Ernst & Young LLP), wrote to the Commissioner with a view to appealing the new assessment. On the same day, an officer of the Canada Customs and Revenue Agency (CCRA) provided the Commissioner with the agent's proof of authority. The letter and authorization were filed within the 90-day time limit specified in section 60 of the *Customs Act*,[1] but the actual request for a further re-determination (in Form B-2) was not made until September 15, 2002, two days after the prescribed time limit.

On September 23, 2002, the Commissioner refused the application "as it [had] exceeded the 90-day time limit."

On November 18, 2002, Chaus, through its agent (Gowling Lafleur Henderson LLP), applied to the Commissioner under section 60.1 of the *Act* for an extension of time to make a request for a further re-determination.

On February 13, 2003, the Commissioner refused the application "as it [had] been determined that the application was not made as soon as circumstances permitted".

On May 12, 2003, Chaus applied to the Canadian International Trade Tribunal (the Tribunal) under section 60.2 of the *Act* for an extension of time to make a request for a further re-determination, by filing a copy of the above application under section 60.1 and the Commissioner's notice of refusal.

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

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On May 22, 2003, the Tribunal invited the Commissioner to comment on Chaus's application under section 60.2 of the *Act*. The Commissioner filed his response on June 23, 2003.

On June 24, 2003, the Tribunal invited Chaus to respond to the Commissioner's comments. On July 14, 2003, Chaus filed its comments.

On July 16, 2003, the Tribunal invited submissions on whether and how it had authority to impose or dispose of the requirement under subsection 60(1) of the *Act*, that an applicant must pay all outstanding duties and interest or provide security satisfactory to the Minister of National Revenue before making a request for a further re-determination. On July 23, 2003, the Commissioner filed his submission, and Chaus filed its submission on July 25, 2003.

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 above provision contains four tests, each of which an applicant must meet in order to succeed in an application to the Tribunal for an extension of time to make a request for a further re-determination by the Commissioner.

First, paragraph 60.2(4)(*a*) of the *Act* requires that the application to the CCRA under section 60.1 for a re-determination or further re-determination of a tariff classification must have been made within one year of the time allowed to make a request under section 60. In this case, the application under section 60.1 of the *Act* was made on November 21, 2002, well before the September 13, 2003, deadline.

Second, subparagraph 60.2(4)(*b*)(i) of the *Act* requires the applicant to demonstrate that, within the 90-day period prescribed in section 60, the applicant was unable to act in response to the CCRA's

determination or re-determination, or give a mandate to someone else to act in the applicant's name. Alternatively, the applicant could prove that the applicant had a *bona fide* intention to make a request for re-determination within the 90-day prescribed period. The Tribunal accepts Mr. Chaus's July 15, 2002, letter and authorization as evidence of his *bona fide* intention.

Third, subparagraph 60.2(4)(*b*)(ii) of the *Act* requires the applicant to demonstrate that it would be just and equitable to grant the application. The Tribunal finds that Chaus has met this burden. As stated above, the request for re-determination was made only two days outside the prescribed time limit. As a result of missing that deadline, Chaus stands to lose well over $100,000, with no chance of demonstrating that the assessment was too high, since the CCRA's re-determination doubled the value for duty of the imported goods. This is a harsh consequence for a minor, technical breach of the *Act*, and it calls for relief. Moreover, it is apparent that time was *not* of the essence as far as the Commissioner was concerned. The CCRA took from late 1998 until mid-2002 to re-determine the value for duty of the imported goods, a period of well over three years; yet, it contends that it would be unfair to it and other importers if Chaus were allowed to make its request a mere two days late. In the Tribunal's view, the Commissioner has failed to demonstrate that it would be unfair.

Fourth, subparagraph 60.2(4)(*b*)(iii) of the *Act* requires the applicant to demonstrate that the application was made as soon as circumstances permitted. The wording of this requirement presents somewhat of an initial interpretative difficulty, due to its ambiguity: It is unclear whether "application" means an application to the CCRA under section 60.1 or an application to the Tribunal under section 60.2. Elsewhere in section 60.2, i.e. in paragraph 60.2(4)(*a*), Parliament made explicit reference to an "application under subsection 60.1(1)" when referring to an application to the Commissioner. Therefore, at first blush, there is an *a contrario* presumption against the use of "application" in section 60.2 to refer to an application to the CCRA unless it is accompanied by the phrase "under subsection 60.1(1)".

However, such an interpretative approach, in the context of the subject matter of section 60.2 of the *Act*, would lead to inconsistency and should, therefore, not be followed.[2] Subsection 60.2(1) compels the applicant to make an application to the Tribunal within 90 days of the Commissioner's refusal to extend the time to make a request for a re-determination or further re-determination. Ninety days is a comparatively short period of time. The Tribunal believes that there would be no benefit in further constricting that period by compelling the applicant to make an application as soon as circumstances permitted *within* the 90 days. By way of contrast, subsection 60(1) allows the full 90-day period, imposing no such further restriction.

A more logical context for the notion of diligence denoted by the phrase "as soon as circumstances permitted" would be the 12-month period to make an application to the CCRA under subsection 60.1(6) of the *Act*. It appears that the intention of Parliament was not to deprive diligent applicants of their "day in court" simply because they were unable to meet the 90-day deadline under subsection 60(1). On the other hand, Parliament did not want the clock to run forever and, therefore, set an outside limit of 12 months from the 90-day deadline as the maximum possible period to make an application for an extension of time to make a request for a further re-determination. Determining whether or not an applicant has acted with sufficient diligence within the 12-month "window" is a task that involves the exercise of considerable discretion. Furthermore, the power granted to the Tribunal under section 60.2 allows it to reverse or concur with a decision made by the CCRA under section 60.1. The exact same wording of "as soon as circumstances permitted" is found under subparagraph 60.1(6)(*b*)(iii). In the Tribunal's view, it would appear logical that Parliament intended the Tribunal to consider the same time period in its decision as that

2. See Francis Bennion, *Statutory Interpretation*, 3d ed. (London: Butterworths, 1997) at 970, to the effect that an *a contrario* presumption should not be applied where it would lead to inconsistency or injustice.

of the CCRA in its decision. Therefore, the Tribunal interprets "application", in subparagraph 60.2(4)(*b*)(iii), as meaning an application under subsection 60.1(1), i.e. the application made to the CCRA.

The Tribunal is satisfied that Chaus made its application under subsection 60.1(1) of the *Act* as soon as circumstances permitted. A total period of 92 days elapsed between the Commissioner's notice of re-determination and Chaus's application under subsection 60.1(1). During that period, Chaus, that had long ago ceased Canadian operations, sought professional advice from Ernst & Young LLP; through that firm, it notified the Commissioner of the grounds for its request for a further re-determination, although it held off filing the B-2 form until two months later. Meanwhile, it carefully reconsidered the strategy proposed by Ernst & Young LLP for dealing with the re-determination and sought a second opinion from its U.S. customs attorneys and specialized Canadian counsel.[3] This comparative flurry of activity can hardly be characterized as dilatory conduct.

The Commissioner contends that "as soon as circumstances permitted" means unusual or exceptional circumstances beyond Chaus's control[4] and relies on case law interpreting a similarly worded provision of the *Income Tax Act*[5] as support for that contention. The Tribunal views such a test as being too strict and notes in passing that the *Income Tax Act* does not apply to the present application and, in any event, the test under the *Income Tax Act* has been less narrowly applied in more recent cases.[6] The Tribunal finds that the proper test is that an applicant must have made its application as early as, under the particular circumstances, it could reasonably be expected to get the application ready and present it to the CCRA.[7]

Therefore, the Tribunal finds that Chaus has met all four statutory tests and that its application should be granted.

In granting an application under subsection 60.2(3) of the *Act*, the Tribunal may impose any terms that it considers just, or order that the request for a further re-determination be deemed to be valid. The Tribunal solicited submissions from the parties as to whether it had authority to impose, or waive, the requirement under subsection 60(1) that all amounts owing as duties and interest on the imported goods be paid or satisfactory security be given to the Minister of National Revenue before a request for a further re-determination could be made. In their submissions, Chaus contended that the Tribunal lacked authority to force compliance with subsection 60(1),[8] and the Commissioner submitted that the Tribunal lacked authority to waive the application of the subsection.[9]

The Tribunal is of the view that its powers under subsection 60.2(3) of the *Act* must be exercised consistently with the legislative scheme of sections 60 to 60.2, which includes a requirement for the payment of all outstanding duties and interest or giving of satisfactory security before a request for a further re-determination may be made. Chaus admits that, when it made its request for a further re-determination in September 2002, it could not meet this statutory requirement.[10] Therefore, the Tribunal declines to issue an

3. Affidavit of Mr. Barton Heminover, Appellant's Brief, 14 July 2003.
4. The CCRA's Position Paper, 23 June 2003 at para. 21.
5. *Wright v. M.N.R.*, [1983] C.T.C. 2493; 83 D.T.C. 447; *Savary Beach Lands Ltd. v. M.N.R.*, (1972) C.T.C. 2608; 72 D.T.C. 1497; *Marvin Shore v. M.N.R.*, [1974] C.T.C. 2193; 74 D.T.C. 1132; *Kidd v. M.N.R.*, (1983) C.T.C. 2747; 83 D.T.C. 639.
6. *The Queen v. A.C. Pennington*, [1987] 1 C.T.C. 235 (F.C.A.) [*Pennington*]; *Meer v. R.*,[2001] 3 C.T.C. 2537; *Seater v. R.*, [1997] 1 C.T.C. 2204.
7. *Pennington* at 237.
8. Applicant's submission, 25 July 2003.
9. Respondent's submission, 23 July 2003.
10. Applicant's Brief, 14 July 2003 at para. 41.

order that the request was deemed to be a valid request. Chaus now asks instead that the Tribunal allow a reasonable amount of time in order for it to arrange the above payment or security.[11] In the Tribunal's opinion, compliance with subsection 60(1) is a matter for the Commissioner, not the Tribunal, to enforce. Instead, the Tribunal prefers, to simply grant the application for an extension of time for the reasons cited above and allows until January 31, 2004, for Chaus to make its request for a further re-determination under section 60.

Patricia M. Close
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Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

11. Applicant's submission, 25 July 2003.