Nº : A-17-22

online ID:1

FEDERAL COURT OF APPEAL
COUR D'APPEL FÉDÉRALE
FILED / DÉPOSÉE
January 17, 2022
Karina Andone
MONTRÉAL, QC | 1

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

-and-

PIER 1 IMPORTS (US), INC.

Respondent

NOTICE OF APPLICATION

Article 28(1)e) and following of the *Federal Courts Act*

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 17 , 2022

Delivered by : _____
(Registry Officer)

Address of local office:

Montréal Office
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TO :

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APPLICATION

This is an application for judicial review in respect of:

- An Order and Reasons issued on December 16th, 2021 by the Canadian International Trade Tribunal, as well as a Decision and Reasons issued on September 2nd, 2021;

The applicant makes application for: an Order quashing the December 16th, 2021 Order and Reasons, the September 2, 2021 Decision and Reasons and remitting the matter back to the Canadian International Trade Tribunal for reconsideration.

The grounds for the application are:

Background

1. The Respondent, Pier 1 Imports (US), Inc. (**Pier 1**), was a retailer of decorative home furnishings and accessories, which operated stores in both the United States of America (US) and in Canada.[1]

2. Pier 1 imported its goods from various manufacturers across the world to warehouses located in the US. The goods destined to the Canadian retailers were imported in Canada by land/trucks later on to the various Canadian Stores.

3. As there was no sale for export to Canada for the goods imported into Canada, it became necessary to use one of the calculation methods provided in the *Customs Act*[2] (**CA**) under s. 51-53.

4. Between 2004 and 2015, Pier 1 declared the goods it imported into Canada using a flexible application of the Computed Value Method

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1 On February 17, 2020, Pier 1 and its subsidiaries commenced Chapter 11 of the *Bankruptcy Code* proceedings in the U.S. Bankruptcy Court for the Eastern District of Virginia.

2 (R.S.C., 1985, c. 1 (2nd Supp.)).

(**CVM**), detailed in s. 52 of the CA as permitted by s. 53 of the CA (the **FCVM**).

5. On July 10, 2017, the Canada Border Services Agency (**CBSA**) concluded a verification of Pier 1's valuation method[3] and it was determined that the applicable method moving forward would be the Deductive Value Method (**DVM**) provided in s. 51 of the CA.

6. Unsatisfied with this decision, Pier 1 filed a Judicial Review application before the Federal Court, which was dismissed on September 28, 2018 and by the Federal Court of Appeal in October 18, 2019.

The September 2, 2021 Decision and Reasons

7. In an effort to simplify the hearing of this matter, the parties filed an agreed statement of facts. It is now apparent that the Canadian International Trade Tribunal (**CITT**) has ignored some of the relevant elements of this agreement between the parties or failed to explain its reasoning in accordance with the principles enunciated in the *Vavilov*[4] decision.

8. On September 2nd, 2021, the CITT allowed Pier 1's appeal with regard to the proper method to calculate the Value for Duty (**VFD**) of the goods it imports to Canada.

9. The CITT found that the CVM, detailed in s. 52 of the CA and applied flexibly as permitted by s. 53 of the CA, was the applicable method. The CITT therefore allowed Pier 1's appeal even though the CITT found it was unable to calculate the FCVM.

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[3] The verification also purported to review the valuation method declared by Pier 1 on a series of importations of goods into Canada that took place between March 1, 2014 and February 28, 2015.

[4] *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65.

10. Indeed, the CITT came to the surprising conclusion that the FCVM was the method which required "fewest deviations" from the strict application of the prior methods. In fact, the record showed that the application of the FCVM requires multiple deviations which are readily apparent from the agreed statement of facts:

    a. Pier 1 does not know the cost of the materials employed in the production of the goods subject to this litigation as it imports the goods from offshore manufacturers. As such, Pier 1 does not meet this requirement found in s. 52(2)(a)(i) of the CA;

    b. Pier 1 does not know the production costs of the goods it imports from offshore manufacturers. As such, Pier 1 does not meet this requirement found in s. 52(2)(a)(ii) of the CA;

    c. Pier 1 was unable to provide an amount for profit and general expenses, which was similar to the amounts incurred by American producers who actually sell goods for export to Canada "of the same class or kind". As such, Pier 1 does not meet this requirement found in s. 52(2)(b) CA and s. 6(3)(a) of the *Valuation for duty regulations*;[5]

    d. Indeed, the CITT found that the six comparators identified by the respondent, six American businesses who sell goods for export to Canada, "did not provide an accurate depiction of Pier 1's likely profit".[6]

11. As such, in order to apply the FCVM, the CITT deviated on all of the requirements of the CVM as defined by Parliament in s. 52 of the CA.

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5 DORS/86-792.
6 Para. [48] of the September 2, 2021 Decision and Reasons in AP-2019-047.

12. Conversely, a flexible application of the DVM (FDVM) required only one deviation, because it took Pier 1 sometimes more than the 90 day time-limit provided in s. 51(2)b) of the CA to sell their goods to their clients.

13. The CITT concluded that the FDVM was not applicable based on irrelevant criteria:

    a. The fact that Pier 1 would have "to systematically overpay taxes on goods and duties and then to request refunds at some unknown time in the future";

    b. Pier 1 did not have a system in place that could track "sales and pricing data with the amounts paid in taxes and duties".[7]

14. S. 53 of the CA does not allow the CITT to consider those facts in its determination of the most appropriate method.

15. The CITT concluded it had an incomplete picture of the mark-up it needed for its calculation of the VFD under the FCVM because it was unable to determine the following expenses incurred by Pier 1: "buying, global logistics, inventory planning, product allocation, foreign exchange and related marketing expenses incurred prior goods being shipped to stores".

16. Therefore, on September 2, 2021, the CITT requested further submissions from the parties requesting the "amounts of general expenses and profits to be used in the mark-up percentage".

17. The CITT reserved its right "to amend its evaluation of the final mark-up percentage contained in the reasons of this decision".

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[7] Para. [38] of the September 2, 2021 Decision and Reasons in AP-2019-047.

The Interlocutory October 19th, 2021 decision to refuse additional expert evidence

18. On October 5, 2021, the CBSA requested leave from the CITT that both parties be allowed to file new comparators due to the fact that the CITT was faced with an incomplete record and was unable to complete its calculation of the VFD of the imported goods.

19. On October 19th, 2021, the CITT denied CBSA's request but nonetheless "reserved the option to accept additional expert evidence".

20. On November 1, 2021, the Respondent filed its submissions and pointed out to its own financial statements, more specifically its Home office segment, in order to respond to the September 2nd, 2021 request for additional submissions mentioned above (**Pier 1's additional representations**).

21. On November 15, 2021, the CBSA responded to Pier 1's additional representations, and reiterated that a proper determination under s. 52(2)b) and s. 53 of the CA requires the use of comparators.

The December 16, 2021 Order and Reasons

22. On December 16th, 2021, the CITT issued an order and accompanying reasons in which it accepted the submissions filed by the respondent.

23. The CITT accepted Pier 1's additional representations and amended the total mark-up provided in the September 2, 2021 decision.

24. On September 2nd, 2021 and on December 16th, 2021, the CITT fundamentally misapprehended the record it had before it about Pier 1's commercial reality:

a. Pier 1 sometimes sold its goods at the retail price on its price lists. The CITT disregarded the agreed statement of facts filed by the parties on this issue[8];

b. After the July 10, 2017 verification, Pier 1 did not modify its IT system in order to be able to apply the DVM;

c. Pier 1 does not sell goods for export to Canada; and

d. Therefore, it was impossible for the CITT to ascertain that Pier 1's numbers were "generally reflected in sales for export to Canada of goods of the same class or kind" as required under s. 52(2)b) and s. 53 of the CA.

25. Pier 1 has therefore not met its *onus* to prove that the FCVM was applicable.

26. Furthermore, the CITT's finding is inconsistent with s. 7 of the *Agreement on Implementation of article VII of the General Agreement on Tariffs and Trade 1994*.

27. Faced with an incomplete record, the CITT had only two reasonable options in order to calculate the Profit & General expense component of the VFD under a flexible application of the CVM. Indeed, the CITT could:

a. Dismiss the appeal filed by Pier 1; or

b. Request new expert evidence from both parties, based on accurate comparators, in accordance with section 52(2)b) of the CA.

28. In any event, the CITT's decision to allow the appeal in its September 2nd, 2021 decision was at best premature. The CITT could not allow Pier 1's appeal and thus decide with regard to the application of the FDVM or

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[8] Para. 41g) of the agreed statement of facts.

FCVM until it concluded that it had sufficient evidence to calculate the VFD and it became *functus officio*.

29. According to the principles enunciated by the Supreme Court of Canada in *Chandler*[9], a tribunal is *functus officio* only when it has "reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances".

30. Indeed, a decision is final when "it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain"[10].

31. The CITT became *functus officio* on December 16, 2021 when it determined the amounts of general expenses and profit to be used in the calculation of a final mark-up percentage.

32. The September 2nd, 2021 Decision and Reasons only became final on December 16th, 2021 when the CITT issued the Order and Reasons and both are a matter subject to Judicial Review by this Court as a whole.

This application will be supported by the following material:

1) Affidavit of William St-Roch;

2) Transcripts of the testimony heard on March 15, 17 and 18 in AP-2019-047;

3) Agreement on Implementation of article VII of the General Agreement on Tariffs and Trade 1994 and relevant commentary.

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9 *Chandler* v. *Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848, p. 861.

10 *Kurukkal v. Canada (Minister of Citizenship and Immigration),* 2009 FC 695, para. 26, confirmed by 2010 FCA 230.

The applicant requests that the Canadian International Trade Tribunal send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the tribunal, to the applicant and to the Registry:

Transcripts of the testimony heard on March 15, 17 and 18 in AP-2019-047.

MONTREAL, January 17, 2022

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