IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 7139/2019

In the matter between:

MAT CHEM CC **APPELLANT**

and

THE COMMISSIONER OF THE SOUTH AFRICAN

REVENUE SERVICE **RESPONDENT**

Coram: Mnguni J

Heard: 10 July 2020

Delivered: 20 November 2020

ORDER

The following order is granted:

Mat Chem's appeal against the commissioner's determination in terms of section 47(9) of the Act is dismissed with costs.

JUDGMENT

Delivered: 20 November 2020

Mnguni J

[1] This is an appeal under s 47(9)*(e)* of the Customs and Excise Act 91 of 1964 (the Act) against a determination by the Commissioner of the South African Revenue Service (SARS) made in terms of s 47(9)*(a)*(i)*(bb)* of the Act. The determination, contained in a letter dated 5 November 2018 and confirmed by the Internal Administrative Appeal Committee (the IAAC) on 14 March 2019, stated that the Commissioner had determined that the goods imported by the appellant (Mat Chem) under rebate of duty under Schedule 3 to the Act, had been disposed of in a manner inconsistent with s 75(5) of the Act.

[2] Mat Chem is a registered rebate user at SARS for the importation of a product called palm stearin (the goods) in terms of Schedule 3, Part 1 of the Act, rebate item 303.01, tariff heading 1511.90, under rebate code 02.06, and described as 'Palm stearin, refined but not chemically modified, for blending with paraffin wax, of which the palm stearin content is 20 per cent or more by mass'. A full rebate from customs duty is applicable to the importation of the goods. Section 19, read with rule 75.01 to the Act,[1] requires that the premises (the rebate store) where the goods will be used and stored, be licenced or registered for the storage of such dutiable imported goods and/or for the manufacture of such dutiable goods from such imported material. Mat Chem's rebate store was situated at 30 Monte Carlo Road, Mahogany Ridge, Pinetown and was on 3 June 2013 registered under reference number DBN 2015.13.03.13. Ms Mary-Lou Lottreaux (Ms Lottreaux) is the sole member of Mat Chem and the deponent to its founding affidavit.

[3] On 9 December 2016 Mat Chem and Equisale 140 CC (Equisale) concluded a written sale of business agreement in terms of which Mat Chem sold to Equisale its business as a going concern for R6,2 million plus the value of the stock. The sale included all movable assets, stock of raw materials, work in progress and unfinished products, consumables, stock in transit, intellectual property, goodwill and the trading name. However, the sale specifically excluded the rebate store as well as the

[1] GN R1874, *GG* 16860, 8 December 1995.

liabilities defined to be the debtors' book of Mat Chem, various bank accounts and a guarantee issued by Nedbank in favour of the Customs and Excise department for the rebate store.

[4] The sale agreement recorded the date of transfer as 17 January 2017. The rebate store remained under the ownership of Mat Chem. Mat Chem allowed Equisale to continue to use the rebate store and its rebate code for clearing the goods under full rebate of duty, for the benefit of Equisale, until such time that Equisale was registered as a rebate user and had also registered the rebate store in its name. The business was only transferred into Equisale's name on 20 February 2017. Equisale continued to utilise the rebate store after the transfer until December 2017 when Mat Chem advised it of its intention to close the rebate store. During that period, Mat Chem assisted Equisale in the management of the business.

[5] Fast forward, by letter dated 11 June 2018, Mat Chem wrote to SARS and requested SARS to cancel its rebate store registration, indicating that it had sold its business and therefore no longer required the rebate store. Mat Chem also indicated that it wanted the facility cancelled so that it could cancel its guarantee with Nedbank, which was held as security for the rebate store.

[6] As part of the administrative process preceding the official cancellation of the rebate store, SARS referred the matter to its customs audit team to conduct an audit on Mat Chem and its rebate store to ensure that all was in order before SARS could release the security. By letter dated 22 June 2018 (the engagement letter) SARS notified Mat Chem of its intention to conduct an audit on its rebate store for the period from 1 June 2016 to 20 June 2018 (the period under review) for the purposes of verifying compliance with the Act and other legislation administered by SARS. SARS attached a list of randomly selected Mat Chem transactions from SARS for the period under review and requested supporting documentation for those transactions. On receipt of the requested information, the customs audit team evaluated the documentation. On the same date, the customs audit team visited the rebate store to conduct an inspection and then requested further documentation, which included, inter alia, the rebate book and clearance documents for the period under review.

[7] Upon perusal and evaluation of the rebate book, the customs audit team discovered a handwritten entry made on 31 January 2017 stating that: 'business sold, stock taken and stock transferred'. At that time, the customs audit team did not have information, contained in the documents in its possession, as to whom the business was sold to. The customs audit team contacted the rebate store and spoke to Mr Ismail Mohamed Laher (Mr Laher) who informed the customs audit team that he was a member of Equisale and that his entity had purchased Mat Chem's business in December 2016.

[8] Subsequently thereto, the customs audit team scheduled a meeting with Mr Laher for 3 July 2018. At that meeting, Mr Laher confirmed that Equisale was not registered as a rebate user and rebate store owner. He advised the customs audit team that Equisale's application for registration with SARS was unsuccessful because Mat Chem was still registered as the rebate user and the rebate store owner for the same business. Following the meeting with Mr Laher, SARS requested additional documents relating to stock sold during the time in relation to the period prior to January 2017. The requested documents were received by 21 August 2018. On reviewing the documents, the customs audit team found that Mat Chem sold its business and stock as foreshadowed in paras 3 and 4 above. Neither Mr Laher nor Equisale was a registered registrant under the Act.

[9] By letter dated 10 September 2018 (the first letter of intent) SARS communicated the customs audit team's findings to Mat Chem by recording, inter alia, that Mat Chem had allowed the unlawful transfer of rebate import goods to a non-registrant person/company, resulting in goods being used and disposed of or dealt with, contrary to the provisions of the Act. SARS advised Mat Chem that the whole consignment in respect of which such goods formed part of, was liable for forfeiture. The first letter of intent also recorded that Mat Chem had failed to keep and/or maintain stock and production records in a manner required by the Act to enable Mat Chem to properly account for such goods at the time of inspection by SARS. As a result, SARS demanded payment from Mat Chem as follows: in respect of customs duty, an amount of R155 474 plus VAT of R21 766.36, and in lieu of forfeiture of stock (in terms of s 88(2)*(a)*(i)) an amount of R1 554 740. The first letter

of intent invited Mat Chem to make representations on the findings and SARS's intention to raise a debt.

[10] On 18 September 2018 Ms Lottreaux attended a meeting with the customs audit team and made oral representations. On 8 October 2018 SARS withdrew the first letter of intent, and on the same day SARS issued a second letter of intent in which it recorded that in addition to the amount payable and listed in the first letter of intent, Mat Chem was also liable for both interest on VAT and penalty on VAT. On 5 November 2018 SARS issued a letter of its final audit findings to Mat Chem, which also served as a letter of demand confirming the findings of the customs audit team as contained in SARS's second letter of intent.

[11] Aggrieved by this, Mat Chem on 28 November 2018 filed an internal administrative appeal in terms of s 77A-H of the Act, using the prescribed DA51 form. The main ground of appeal, as recorded in its notice, was stated as 'an unintended contravention of the Customs and Excise Act during sale of business'. By notice dated 14 March 2019, the IAAC confirmed SARS's finding. The IAAC reasoned that 'on review of Mat Chem's mitigation, no exceptional grounds have been found, thus rendering the said mitigation insufficient to set aside the decision taken by the customs audit team'. The decision to demand forfeiture, a penalty and interest was therefore confirmed.

[12] It was against this background that Mat Chem on 1 April 2019 launched this appeal, contending that the IAAC's decision demonstrated a fundamentally flawed approached to the application of s 93 (2) of the Act, by elevating the test of 'on good cause shown mitigate or remit any penalty under this Act on such conditions as the commissioner may determine' required by s 93(2), and by requiring an additional burden of showing exceptional circumstances.

Issues for determination

[13] Two issues arise for determination. The first is whether SARS acted properly in its determination that Mat Chem was liable to pay a penalty equivalent to the full value, for duty purposes, of goods dealt with in contravention of the Act, and which were liable to forfeiture but were not readily available. The second is whether SARS

exercised its discretion properly or at all in determining that Mat Chem did not show sufficient cause to mitigate or remit the penalty in terms of s 93(2) of the Act.

Legal Framework

[14] In order to have regard to the contentions raised on behalf of Mat Chem, it is necessary to set out the provisions of the Act relevant to this appeal. Section 75(1) of the Act permits the entry of imported goods under Schedule 3 without the payment of duty, on condition that the goods are used for or disposed of the purposes and in the manner as specified in the item of that schedule. In order to benefit from the rebate, s 75(2) provides that:

'(2) A rebate of duty in respect of any goods described in Schedule No. 3 shall be allowed -

(a) only in respect of goods entered for use in the production or manufacture of goods in the industry and for the purpose specified in the item of the said Schedule in which those goods are specified. . .'.

Rule 75.01 to the Act[2] requires the importer to be registered with SARS as a rebate user and the rebate store where the goods will be used and stored is also required to be registered with SARS.

[15] In terms of s 75(5)*(a)*(i):

'In addition to any liability for duty incurred by any person under any other provision of this Act, the person who enters any goods for use by him under rebate of duty or any person on whose behalf any goods are so entered, shall . . . be liable for the duty on all goods so entered which have not been used or which have been disposed of otherwise than in accordance with the provisions of [s 75] and of the item under which they were so entered, as if such rebate of duty did not apply to such goods and such person shall pay such duty on demand by the Commissioner. . .'.

It therefore follows that when a registrant imports goods identified in Schedule 3, payment of duty at that time is suspended until the goods are stored, manufactured and disposed of in terms of that schedule.

[16] Rule 75.11 permits a registrant to transfer goods to any other registrant

'who is registered under the same item or to the same or any other registrant who is registered under any other item in which the same goods are specified if the extent of the

[2] Rule 75.01 read with sections 19 and 59A of the Customs and Excise Act 91 of 1964.

rebate under such items at the time of such transfer is the same, provided such goods were acquired as a result of an unconditional sale and are owned by the first-mentioned registrant at the time of such transfer and an application on form DA 62 for such transfer is submitted to and approved by the Controller prior to such transfer.' [3]

Rule 75.14 specifies the manner in which the goods imported under rebate of duty must be recorded, which records must be kept in a format approved by the Controller and in a manner as the controller may decide.

[17] In terms of rule 75.15:

'Any registrant shall, if required to do so by the Controller, also keep a production record which shall show therein or thereon all receipts at factory ex rebate store, as well as the nature and quantities of the materials used and of the finished articles manufactured there from, in such a manner as the Controller may decide. A registrant shall also keep such samples of materials obtained under rebate of duty as the Controller may require and in such manner as he may decide.'

[18] Section 87 deals with goods which were irregularly dealt with and are therefore liable to forfeiture. Sub-section (1) thereof provides that

'Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacture of any goods shall be liable to forfeiture wheresoever and in possession of whomsoever found. . .'.

[19] Section 88(2)*(a)*(i) provides that

'If any goods liable to forfeiture under this Act cannot readily be found, the Commissioner may, notwithstanding anything to the contrary in this Act contained, demand from any person who imported, exported, manufactured, warehoused, removed or otherwise dealt with such goods contrary to the provisions of this Act or committed any offence under this Act rendering such goods liable to forfeiture, payment of an amount equal to the value for duty purposes or the export value of such goods plus any unpaid duty thereon, as the case may be.'

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[3] Section 1 of the Act defines Controller as 'in relation to any area or any matter, means the officer designated by the Commissioner to be the Controller of Customs and Excise in respect of that area or matter and includes an officer acting under the control or direction of any officer so designated by the Commissioner'.

Section 93(2) provides that the 'Commissioner may, on good cause shown mitigate or remit any penalty incurred under this Act on such conditions as the Commissioner may determine.'

[20] Having enumerated the provisions of the Act relevant to this appeal, it now remains to apply them to the facts of the present case.

As to the first issue

[21] It is common cause that Mat Chem disposed of the goods imported under rebate of duty contained in Schedule 3 in the manner inconsistent with s 75(5) of the Act and that SARS determined the amount to be forfeited to be 100 percent of the value of the goods contained in annexure K to the founding affidavit. Consequently, the Commissioner exercised his discretion and demanded from Mat Chem, in terms of s 88(2)*(a)*(i) payment of an amount equal to the value of the goods for duty purposes. Counsel for Mat Chem contended that forfeiture or payment of the value equivalent is a penalty or a penal provision linked to the obligation to pay duty in terms of s 87(1).

[22] I am not persuaded by this argument. The flaw seems to lie in a complete misunderstanding of the fact that forfeiture, either in terms of s 87 or s 88(2) is a specific item of debt which the Commissioner has a statutory authority to impose in the circumstances of this case. As correctly pointed out by counsel for SARS, forfeiture is simply imposed to account for the duty that would have been collected or properly accounted for but for the failure of Mat Chem to comply with the provisions of the Act. Importantly, s 87(1) of the Act contains a proviso 'that forfeiture shall not affect liability to any other penalty' incurred under the Act.

[23] As I see it, the distinction between the goods themselves or a monetary amount determined by the Commissioner, does not alter the jurisdictional facts of s 87(1) or s 88(2)*(a)*(i) of the Act. It is not disputed that the Commissioner correctly determined the value of the amount payable to the Commissioner, in lieu of the goods. It is of no consequence that Mat Chem was bona fide in dealing with the goods, as once the jurisdictional facts are met, as in the present case, s 88(2)*(a)*(1) follows as a matter of cause.

As to the second issue

[24] The main thrust of Mat Chem's contention is that, in upholding the determination on appeal for want of exceptional circumstances warranting mitigation or remission, the IAAC did not bring its mind to bear on the test to be applied, and thus proceeded on the wrong principle and did not exercise a judicial discretion. Mat Chem's counsel submitted that the IAAC demonstrated a fundamentally flawed approach to its application of s 93(2), and the requirements which will influence the exercise of the discretion. He submitted that the IAAC did not proceed from a correct formulation of the sections under consideration and the test to be applied to determine whether there are mitigating factors, instead it elevated the test from showing good cause to showing exceptional circumstances.

[25] Not so, argued counsel for SARS. She submitted that s 93(2) on which Mat Chem relies, only provides for the mitigation or remission of penalties, and not for forfeiture. She submitted that the forfeiture amount, which then becomes an item of debt in terms of the Act, may not be mitigated or remitted in terms of s 93(2). It was further submitted that s 93(2) is not applicable to determinations under 88(2) of the Act. The answer to this argument is to be found in *Tayob*[4] where Van der Westhuizen J said the following:

'What s 88(2) provides for is not taxation, but a penalty. In fact, the whole of chap 11 deals with penal provisions. In terms of s 93 the Commissioner may remit, mitigate, etc such penalties and so the Commissioner has certain discretionary powers'.

This was endorsed by the Constitutional Court in *First National Bank of SA*,[5] when it said that s 93 provides for the remission of penalties in the discretion of the Commissioner, and that it would include forfeiture.

[26] It is important to record that Mat Chem does not take issue with the determination. The gravamen of its complaint is the IAAC's refusal to mitigate or remit the forfeiture amount imposed against it under s 88(2)*(a)* of the Act on the grounds, firstly, that the transfer of the goods as part of the sale of the business was

[4] *Commissioner of Customs and Excise v Tayob and others* 2002 (6) SA 86 (T) at 95A-E.
[5] *First National Bank of SA LTD t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA LTD t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 18.

in good faith and was never done with the intention of depriving SARS of that which was due to it, and secondly, that Mat Chem has tendered and will pay the duty, VAT, penalties on VAT and interest, and has accounted fully to SARS in respect of VAT on each transaction.

[27] There is some substance in the criticism by Mat Chem's counsel for the use of the phrase 'no exceptional grounds have been shown' by the IAAC. That criticism notwithstanding, it is important to point out that the difficulty confronting Mat Chem is that it does not take issue with the determination itself. In the circumstances, I do not consider this criticism as having resulted in the IAAC having adjudicated the matter on the wrong principle or having failed to exercise its discretion judiciously. In light of the aforegoing, I am not persuaded that Mat Chem has shown that the IAAC erred in the adjudication of this matter consequent upon using the aforementioned phrase.

[28] Nonetheless, Mat Chem contends that it has certainly shown good cause for a mitigation or remission of the penalty, and has advanced the following reasons in support of this contention:

(a) The transfer of the goods as part of the sale of the business was in good faith and never done with the intention of depriving SARS of that which was due to it;

(b) Ms Lottreaux kept comprehensive records of the storage, extraction and use of the goods notwithstanding transfer to the purchaser. SARS's only criticism regarding the record keeping of Mat Chem is that the records were kept for the purchaser and not for Mat Chem;

(c) Mat Chem has tendered and will pay the duty, VAT, penalties on VAT and interest, and has accounted fully to SARS in respect of VAT on each transaction with the purchaser;

(d) The purchaser could not register a rebate store until Mat Chem's registration had been cancelled. But for this debacle, the position involving the purchaser would long since have been regularised;

(e) Mat Chem's conduct did not defeat the purpose of the relevant legislation since de facto control was kept over the goods in the rebate store and comprehensive records were maintained by Ms Lottreaux to satisfy SARS that the rebated goods were used for their intended manufacturing purpose;

(f) The forfeiture penalty, as well as the forfeiture of the deposited sum of R52 869, is out of proportion to the duties payable;

(g) Good faith may not be a factor in determining whether forfeiture applies, but it certainly is a mitigating factor when determining an appropriate penalty;

(h) The extent of the penalty imposed is disproportionate to the harm suffered by SARS; and

(i) SARS and its IAAC acted arbitrarily and failed to consider relevant considerations in imposing the sanction.

[29] It is common cause that the above mitigating factors were placed and considered by the IAAC. I have already found that it has not been shown that the IAAC had erred in the adjudication of the matter. After giving this matter a careful thought, I am not persuaded that on the facts before me, there is any justification to substitute the decision of the IAAF.

Costs

[30] With regard to the question of costs, the general rule is that the costs follow the result. I see no reason why I should order otherwise.

Order

[31] In the result, I make the following order:

Mat Chem's appeal against the commissioner's determination in terms of section 47(9) of the Act is dismissed with costs.

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Mnguni J

APPEARANCES:

Heard:	10 July 2020
Delivered:	20 November 2020

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