


IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 32157/07

In the matter between:

ASHWOOD TRADING (PTY) LTD

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED. ✓	
DATE: 20/6/2008	 Applicant SIGNATURE

and

THE MINISTER OF FINANCE NO

First Respondent

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE

Second Respondent

J U D G M E N T

TSOKA, J:

[1] *Rebus indicatis standum est (stare decisis)*: Decided cases should be adhered to. This is a salutary legal principle that has been followed by our Courts for many years. In terms of this principle once a higher Court has ruled on an issue, the ruling becomes binding on lower Courts. Such ruling should be adhered to. The reasoning is not hard to follow. This results in certainty

and predictability. Courts and the public are able to readily predict the outcome of an issue, should a similar issue arise for resolution.

[2] The issue in this matter is whether or not the second respondent has correctly determined the appropriate tariff heading under which certain aluminium goods imported by the applicant were classified for custom duty purposes.

[3] It is common cause that the containers in issue in the present matter are similar to the containers that were in issue in the matter of *Commissioner, South African Revenue Services v The Baking Tin (Pty) Ltd* 2007 (6) SA 545 (SCA). Although the applicant recognises the *Stare Decisis* as stated in paragraph [1] above, it contends that its containers ought to be classified under the tariff heading TH 7612.90.90 of Schedule 1 to Customs and Excise Act 91 of 1964 ("the Act"). It contends further that the Supreme Court of Appeal in *The Baking Tin* case, was not called upon to determine whether the containers in that case ought to have been classified under tariff heading TH 761290.90. This being the case, the applicant contends that the *Stare Decisis* is, in the present case, not applicable. This Court, the contention goes, is not bound to follow the decision in *The Baking Tin* case.

[4] To determine which tariff heading is more appropriate to applicant's containers, it is essential to briefly set out the facts in this matter.

[5] On 2 December 2004 certain of applicant's aluminium foil containers were detained in terms of section 88(1) (a) of the Act. The local tariff committee of the second respondent made a determination that the containers ought to have been entered under tariff heading TH 7612.90.90. However, on 20 July 2006 the second respondent advised the applicants that in its circular minutes reference number 3/76.15 dated 19 July 2007, applicant's containers were to be classified under TH 7615.19.20. As a result of this classification, the second respondent's determination was that the containers were "*Table, Kitchen or other household articles and parts thereof of aluminium; pot scourers and scouring or polishing pads, gloves and the like, of aluminium; sanitary ware and parts thereof, of aluminium: other: Hollowware for table or kitchen use (excluding buckets)*".

[6] Being dissatisfied with this determination, the applicant, in terms of section 47(9) (e) of the Act, lodged the present appeal.

[7] The first respondent is the Minister of Finance in his official capacity as the head of the Department of Finance. The first respondent abides the judgment of this Court.

[8] The applicant describes its containers as "*only suitable for the transportation, storage and reheating food items which are precooked. Although certain of the foods for which the containers are used, do not require reheating. The items in question can properly be described as packaging containers for the commercial storage, handling and conveyance of food*

stuffs. They are designed to maintain and preserve the contents of the food until consumption ... they are suitable for one use only and must be discarded after the product has been reheated and/or consumed".

[9] It is in this context that the applicant contends that the classification tariff of its containers should be TH 7612.90, which falls under "Other", the subheading of TH7612. TH7612 is for "Aluminium casks, drums, cans, boxes and similar containers (including rigid or collapsible tubular containers), for any material (excluding compressed or liquefied gas) of a capacity not exceeding 300 litres, whether or not lined or heat insulated, but not fitted with a mechanical or thermal equipment".

[10] The principles applicable in determining whether the articles fall under a particular classification are expressed by the Court in *The Baking Tin* case (at 547B) in the following terms:

"[5] The principles applicable in determining whether articles fall under a particular classification are by now well-settled. In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* Nicholas AJA said:

'The process of classification

Classification as between headings is a three-stage process: first, interpretation – the ascertainment of the meaning of the words used in the headings (and relevant section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.'

The Court also had regard, as one must, to the General Rules for the Interpretation of the Harmonized System (the Brussels Notes), Rule 1 of which states that for legal purposes, classification shall be determined according to the terms of the

headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.'

[6] The explanatory notes are not, however, peremptory injunctions. In *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* Trolip JA said that 'they are not worded with linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. See also *Lewis Stores (Pty) Ltd v Minister of Finance and Another*.' [Footnotes omitted.]

[11] The second respondent, in its circular minutes 3/76.15 dated 19 July 2007 concedes that heading 76.12 "has potential merit in terms of the heading text, excepting that the containers in question are more than simply for the storage and transport of goods". However the second respondent preferred heading 76.15 as "... in terms of the heading texts and the small point exclusion, heading 76.15 would seem to warrant preferential consideration over heading 76.12". Moreover, "the aluminium foil container complies with the ordinary meaning of 'kitchenware', being 'bakeware' ... The term 'kitchenware' is not ordinarily limited to household articles, but includes equipment for use in the 'kitchens' of hotels, restaurants, boarding houses, hospitals, canteens, barracks etc (see Explanatory Note (A) to heading 73.23, first paragraph".

[12] The applicant in its contention, urges the Court to have regard to the primary purpose of the containers. In rejecting this argument, the Court in *The Baking Tin* case (at par 12 p 548G) expressed itself as follows –

"[12] The second difficulty with the reasoning of the High Court is that it is well-established that the intention of the manufacturer or importer of goods is not a determinant of the appropriate

classification for the purpose of the Act. Thus the purpose for which they are manufactured is not a criterion to be taken into account in classification. In *Commissioner, South African Revenue Services v Komatsu Southern Africa (Pty) Ltd* this Court said:

'It is clear from the authorities that the decisive criterion for the customs classification of goods is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance. This is an internationally recognised principle of tariff classification. The subjective intention of the designer or what the importer does with the goods after importation are, generally, irrelevant considerations. But they need not be because they may in a given situation be relevant in determining the nature, characteristics and properties of the goods.'

[13] In my view the tariff classification heading of the containers, which, it is common cause, are similar to the containers in *The Baking Tin* case, has been settled. As the applicant contends otherwise, it must prove that the classification heading TH 7612.90.90 is more appropriate than TH 7615.19.20.

[14] The tariff heading the applicant contends for, namely TH 7612 relates to "aluminium casks, drums, cans and boxes and similar containers of capacity not exceeding 300 litres". TH 7612.90 is a general description of "Other" and TH 7612.90.90 is yet a further description of "Other".

[15] The applicable Explanatory Notes to the tariff heading TH 7612 state that the provisions of Explanatory Note to heading 7310 (which are in respect of the same containers save that 7310 applies to articles made of iron and steel) apply *mutatis mutandis* to this heading. The Explanatory Note states that casks and drums of aluminium are mainly used in the transport of milk,

beer and wine etc. Aluminium cans and boxes are often used for packaging foodstuffs. The heading also includes rigid tubular containers (eg for pharmaceutical products such as pills or tablets) and collapsible tubular containers for cream, toothpaste etc.

[16] Are applicant's containers, in the circumstances, better described as cans, boxes or similar containers, than as table, kitchen or household items?

[17] The answer is found in Explanatory Note 76.15. It states that this heading covers the same type of articles as described in the Explanatory Notes to heading 73.23 and 73.24 particularly the kitchen utensils, sanitary and toilet articles described therein. The heading also covers aluminium cooking or heating apparatus similar to that described in the Explanatory Note heading 74.18. However, the heading does not cover "(a) cans, boxes and similar containers of heading 76.12 ...".

[18] Counsel for the applicant argues that the Court should consider the classifications used in both Canada and Great Britain for classification of similar containers. In both Canada and Great Britain similar foil containers, such as applicants' containers, are classified under tariff heading TH 76.12.90. The Court is further urged to accept the expert opinion of Quibell William Hudson, in whose view the applicant's containers should be classified under TH 76.12.90.90.

[19] The Explanatory Notes and the classifications adopted by both Canada and Great Britain are helpful in the interpretation of the Act. They are not binding. As stated in *The Baking Tin* case, "... they consist mainly of discursive comment and illustrations". The expert opinion of Hudson is also of persuasive value. Like the Explanatory Notes, it is not obligatory.

[20] In the result I am unpersuaded that *The Baking Tin* case is not a binding authority that the applicant's containers should be classified under tariff heading TH 7615. I am of the view that the Court in *The Baking Tin* case, resolved the tariff classification heading of similar containers as applicant's containers despite that the TH 76.12.90.90 was not raised in that case. The decision in *The Baking Tin* case is binding. It must be followed.

[21] The respondent seeks an order for costs of two counsel. The applicant opposes this order.

[22] It is common cause that the issue raised in this matter is complex. It is further common cause that previously both parties engaged the services of senior counsel. The reason for the applicant in engaging the services of one counsel is as a result of the applicant's senior counsel becoming unavailable. There is therefore no reason why the costs awarded in this matter should not include the costs of engaging the services of two counsel.

[23] In the result the application is dismissed with costs, which costs include the costs of employing the services of two counsel.



M P TSOKA
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

P L CARSTENSEN

INSTRUCTED BY

HOWES INCORPORATED

**COUNSEL FOR FIRST AND
SECOND RESPONDENT**

**T R PETER
K.MOKOTEDI**

INSTRUCTED BY

THE STATE ATTORNEY

DATE OF HEARING

29 MAY 2008

AND TO: **THE MINISTER OF FINANCE N O**
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Johannesburg

AND TO: **THE COMMISSIONER FOR SOUTH AFRICAN
REVENUE SERVICES**
Second Respondent
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(app.10.7.08)