

IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

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CASE NO 59626/2009

IN THE MATTER BETWEEN:

SAFICON INDUSTRIAL HOLDINGS (PTY) LTD

APPLICANT

AND

COMMISSIONER FOR THE SOUTH AFRICAN  
REVENUE SERVICES

RESPONDENT

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JUDGMENT

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TOLMAY, J:

This is an appeal in terms of the provisions of sec 47(9)(10) of the Customs and Excise Act, 91 of 1964 ("the Act") against a tariff determination made by the Commissioner for the South African Revenue Services ("the Commissioner"). In terms of sec 47(9)(i)(a) of the Act. The applicant disputes the correctness of this classification by the Commissioner.

The truck, which is the subject of this application is a truck used in the shipping industry for handling empty cargo containers, and is known as an Empty Container Handler. The Commissioner, on 2 July 2008 determined that the truck must, for duty purposes, be classified under tariff heading 8427.20.50 of Part 1 of Schedule No 1 to the Act, as a fork lift truck with a mass exceeding 10 000kg. Under this definition the truck attracts a general rate of customs duty of 15%.

The applicant contends that the most appropriate tariff heading for the classification of the truck is tariff heading 8427.20.90 of Part 1 of Schedule No 1 to the Act. Under this heading the truck will be classified as a works truck fitted with lifting or handling equipment. If the truck is classified as such the goods will be free of duty. In the papers it was initially also contended that alternatively to 8427.20.90 the truck should be classified under tariff heading 8426.12, but during argument counsel on behalf of applicant submitted that 8427.20.90 is the correct tariff heading.

It must thus be determined whether the truck can be classified as a fork-lift truck or a works truck fitted with lifting or handling equipment.

In **International Business Machines (SA) (Pty) Ltd v Commissioner of Customs and Excise 19, 1985(4) SA 852(A)** the process of tariff classification was stated to be the following:

*“classification as between headings is a three-stage process: first, interpretation – the ascertainment of the meaning of the words used in the headings (and relative 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”.*

In this matter the characteristics and functioning of the truck is of no importance and the dispute turns exclusively on whether the truck is a “fork-lift truck” or “a works truck fitted with lifting or handling equipment”.

The legal principles applicable to tariff classification are embodied in, Part 1 of Schedule No 1 to the Act which includes the General Rules of Interpretation, the Section Notes, the Chapter Notes, and the tariff headings, sub-headings and the rate of duty payable in terms of the various headings.

The Customs Co-operation Council in Brussels compiles and issues a list of goods generally dealt with in international trade. These goods are grouped in sections and chapters, which are given titles indicating the broad class of goods each covers. The specific types of goods within the particular class are itemised by a description of the goods within each chapter. Under each tariff heading there are sub-headings, which describe the species of the goods in greater detail. Each tariff heading and sub heading is given a specific numerical code. This list is known as the Harmonized System.

Section 47(8) provides that the interpretation of any tariff heading or tariff subheading of Part 1 of Schedule No 1 "*shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonized System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time ...*"

The principles applicable to the interpretation of the Harmonized System were dealt with in the matter of **Secretary for Customs and Excise v Thomas Barlow & Sons Limited 1970(2) SA 660 (A)** per Trollip JA at 675 H – 676 B: where it was stated as follows:

*"It is of importance, however, to determine at the outset the correct approach to adopt in interpreting the provisions of the Schedule and in applying the explanations in the Brussels Notes*

*Note VIII to Schedule 1 sets out the "Rules for the Interpretation of this Schedule". Para 1 says:*

*'The titles of section, chapters and sub-chapters are provided for ease of reference only, for legal purposes, classification (as between headings) 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 indicate, according to paras. (2) to (5) below.'*

*That, I think, renders the relevant headings and sections and chapter notes not only the first but the paramount consideration in determining which classification, as between headings, should apply in any particular case. Indeed, right at the beginning of the Brussels Notes, with reference to a similarly worded paragraph in the Nomenclature, that is made abundantly clear. It is there said:*

*'In the second provision, the expression 'provided such headings or Notes do not otherwise require' (that is the corresponding wording of the Nomenclature) is necessary to make it quite clear that the terms of the headings and any relative section or chapter notes are paramount, i.e. they are the first consideration in determining classification.'*"

After stating that the relevant tariff headings, Section Notes and Chapter Notes are the first and paramount consideration, Trollip JA discussed the weight to be attached to the Explanatory Notes, at 676 B – 676 F it is stated as follows:

*"It can be gathered from all the foregoing that the primary task in classifying particular goods is to ascertain the meaning of the relevant headings and section and chapter notes, but, in performing that task, one should also use the Brussels Notes for guidance especially in difficult and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them. They are manifestly not designed for the latter purpose, for they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. And, in any event, it is hardly likely that the Brussels Council*

*intended that its Explanatory Notes should override or contradict its own Nomenclature. Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes. If an irreconcilable conflict between the two should arise, which in my view is not the case here, then possibly the meaning of the headings and notes should prevail, because, although sec 47 (8) (a) of the Act says that the interpretation of the Schedule 'shall be subject to the Brussels Notes, the latter themselves say in effect that the headings and notes are paramount, that is, they must prevail. But it is not necessary to express a firm or final view on that aspect.'*

In order to determine the appropriate classification it is necessary to consider the tariff headings and explanatory notes.

Tariff heading 84.27 reads as follows: "fork-lift trucks; other works trucks fitted with lifting or handling equipment.

Sub-heading 8427.20.50 reads as follows: "other fork-lift trucks of a mass exceeding 10 000kg".

Sub-heading 8427.20.90 reads: "other".

The Explanatory Notes state the following: "*with the exception of straddle carriers and works trucks fitted with a crane of heading 84.26, this heading covers works trucks fitted with lifting or handling equipment.*

*Works trucks of this description include for example:*

**"(A) FORK-LIFT AND OTHER ELEVATING OR STACKING TRUCKS**

*(1) Mechanically propelled fork-lift trucks, which are sometimes of large size, carry the load on an elevating carriage sliding on a vertical mast. This lifting mechanism is normally situated in front of the driver's seat; it is designed to support the load during movement and to lift it for stacking or to place it in a vehicle*

*This group also includes side-loading trucks, which are designed to handle long loads (girders, planks, pipes, containers, etc) and are usually equipped with a platform to support the load during transport over short distances.*

*The lifting device of the above trucks is normally powered by the motive power unit of the vehicle, and is usually designed to be fitted with various special attachments (forks, jibs, buckets, grabs, etc) according to the type of load to be handled.*

*(2) Other stacking machines, usually mounted on a truck are equipped with a platform or fork which can be raised and lowered in a vertical support, by hand or power-operated winch or rack systems. They are used for stacking sacks, crates, casks, etc.*

*Some stacking machines which work on the same principle as elevators are classified in heading 84.28*

*(my underlining)*

**(B) OTHER WORKS TRUCKS FITTED WITH LIFTING OR  
HANDLING EQUIPMENT**

*This group includes:*

- (1) *Trucks with mechanically elevating platforms for the maintenance of electronic cables, public lighting systems etc, (See the introduction to Explanatory Note to heading 84.26 regarding elevating platforms of this type mounted on lorries.)*
- (2) *Other trucks fitted with lifting or handling equipment including those specialised for use in particular industries (e.g. in the textile or ceramic industries, in dairies, etc.)"*

The crux of the applicant's argument is that according to the so called "golden rule" of interpretation the ordinary grammatical meaning of a fork-lift truck should be determined in order to determine the correct tariff heading. See **Coopers & Lybrand and Others v Bryant 1995(3) SA 761 (AD)** on p 767 D-F. In the **Collins English Dictionary – Complete and Unabridged** a fork-lift truck is defined to mean: "*a vehicle having two power operated horizontal prongs that can be raised and lowered for loading, transporting and unloading goods especially goods that are stacked on wooden pallets*". The argument went further to say that as the truck in question does not have "forks" but rather a "spreader beam". It cannot be classified as a fork-lift truck.

The respondent contended that this approach constitutes an oversimplification of the legal issues to be decided and could only be valid if the imperative provisions of sec 47(8)(a) of the Act and the principles applicable to



classification as set out in **Secretary for Customs and Excise v Thomas Barlow & Sons Limited 1979(2) SA 660 (A)** are disregarded.

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It was furthermore argued by applicant that the explanatory notes should be disregarded as it contradicts the heading and sub-heading, if the explanatory notes are however taken into consideration the truck will fall under (B)(2) as the truck in question is used specifically within the shipping industry.

It was argued by the respondent that on a proper reading of tariff heading 84.27, and a correct application of the principles of tariff classification the machine is a *species* of the lifting, elevating and stacking equipment grouped under, and classifiable as, "*fork-lift trucks*" and consequently classifiable under tariff sub-heading 8427.20.50. It was further argued that on the applicant's own evidence, and a proper reading of the second part of tariff heading 84.27 (i.e. after the semi-colon), the machine is not a works truck "***fitted with***" lifting or handling equipment.

The respondent also contended that the explanatory notes should be used as was set out in the **Barlows** matter, as a guide and it was contended that it does not contradict the heading and sub-heading.

The wording of the tariff heading especially the use of "other" makes it clear that "fork-lift trucks" in the tariff heading does not refer to only one specific type of lifting equipment. Therefore it will in my opinion be incorrect to only

apply the so called golden rule of interpretation by merely looking at the ordinary dictionary meaning of a fork-lift truck.

Although the golden rule of interpretation should be applied the following which was stated in the **Coopers & Lybrand** matter, *supra* at p 767 I – 768 E must also be considered.

*“The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself. See Swart en ‘n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202C (per Rumpff CJ):*

*‘Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in ‘n kontrak bepaal moet word, die woorde onmoontlik uitgeknipt en op ‘n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat ‘n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel’.*

*The correct approach to the application of the ‘golden rule’ of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:*

- (1) *to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ supra;*

- (2) *to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. Delmas Milling Co Ltd v Du Plessis 1955(3) SA 447(A) at 454G-HJ; Van Rensburg en Andere v Taute en Andere 1975(1) SA 279(A) at 305C-E; Swart's case supra at 200E-201A and 202C; Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others 1994(2) SA 172 (C) at 180I-J.*
- (3) *to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. Delmas Milling case at 455A-C, Van Rensburg's case at 303A-C, Swart's case at 201B, Total South Africa (Pty) Ltd v Bekker NO 1992(1) SA 617 (A) at 624G, Pritchard Properties (Pty) Ltd v Koullis 1986(2) SA 1 (A) at 10C-D".*

The applicant's argument requires one to do exactly what was cautioned again in **Coopers**, *supra*, as it implies that the grammatical meaning should be isolated from the context and background.

I thus come to the conclusion that it would indeed be an oversimplification to merely apply the ordinary grammatical meaning to the words in the sub-

heading for classification purposes. Due consideration should be given to the tariff heading, sub-heading and explanatory notes and classification should occur within the background and context of the Harmonized System. Although the heading is the first and paramount consideration, words should not be seen in isolation and it will be a natural and correct progression, in the process, to move on to the explanatory notes for further assistance and guidance. In my view the expansion in meaning of a fork-lift truck in the explanatory notes does not contradict the plain meaning of the tariff heading. The purpose of the explanatory notes is, as was stated in the **Barlows** matter, to give guidance in doubtful or difficult cases. The explanatory notes in this instance explain and supplement the heading and sub-heading. If due consideration is given to the heading, sub-headings and explanatory notes it would seem that the Commissioner's classification cannot be faulted.

In view of all the facts and circumstances I find that the Commissioner's determination that the truck is classifiable under tariff heading 8427.20.50 is correct.

Accordingly I make the following order.

1. The appeal is dismissed with costs, which will include the costs of two counsel.

  
JUDGE R G TOLMAY