IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

20/2/2013 pp
DATE SIGNATURE

CASE NO: 71629/2011

Heard: 10 August 2012

Delivered: 20 February 2013

In the matter between:

TERRAPLAS SOUTH AFRICA (PTY) LTD Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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J U D G M E N T

MAKGOKA, J:

[1] This judgment has taken inordinately long to deliver. A combination of factors, including personal circumstances, contributed to this. Those factors have been discussed with, and appreciated by, the Judge President. I regret any inconvenience caused to the parties by the delay.

[2] On 15 February 2013 I made an order upholding the appellant's appeal with costs, concomitantly setting aside of the commissioner's tariff determination. I undertook to furnish the reasons for that order. These are the reasons.

[3] This is an appeal in terms of s 47(9)(e) of the Customs Excise Act, 91 of 1964 (the Act). The applicant, an importer of tiles, appeals against a tariff determination made by the respondent (the Commissioner) in respect of certain goods imported by it. The goods in issue are plastic tiles described by their manufacturer as *'Terra tile (terraflor) pitch protection tiles' and 'terrapak plus temporary drivable roadway tiles'*. They are 1 metre squared, and are designed to clip together and to cover and protect the turf floor in stadiums when such stadiums are being used for non-sporting events.

[4] The commissioner classified the tiles under tariff heading 3926.90.90, on which the tiles will be subject to import duty at the rate of 10%. The appellant contends for tariff heading 3918.90.40, on which classification the tiles will attract import duty at the rate of 1.3%.

[5] Tariff heading 39.26, contended for by the commissioner, reads:

> 'Other articles of plastics and articles of other materials of headings 39.01 to 39.25'. The sub-headings to tariff heading 39.26 then refer to various particular articles, as follows:
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> | | | |
> |---|---|---|
> | "3926.10 | - | Office or school supplies; |
> | 3926.20 | - | Articles of apparel and clothing accessories (including gloves, mittens and mitts); |
> | .20 | - | Protective jackets and one-piece protective suits, incorporating fittings for connection to breathing apparatus; |

.90	-	Other;
39.26.30	-	Fittings for furniture, coachwork or the like;
39.26.40	-	Statuettes and other ornamental articles;
3926.90	-	Other;
.03	-	Beads, not coated with pearl essence;
.05	-	Sheets consisting predominantly of polyethylene, with one side not exceeding 160 mm and the other side not exceeding 465 mm, with 16 flat plastic spoons affixed to it;
.15	-	Protectors, heat shrinkable or pre-stretched, specially designed for the protection, insulation and strain relief of wire, cable, cable joints and the like from abrasion, corrosion and moisture;
.17	-	Laboratory ware (excluding those of polymers of vinyl chloride);
.20	-	Transmission belts;
.25	-	Power transmission line equipment;
.27	-	Washers;
.30	-	Anti-noise ear protectors;
.33	-	Cinematographic film, perforated, without sound track;
.36	-	Fishing net floats;
.43	-	Face shields;
.80	-	Tags of plastic, with imprinted identification markings, used for marking live fish;
.85	-	Saddle-trees;
.87	-	Condoms;
.90	-	Other

[6] The tariff sub-heading 3918.90.40, contended for by the appellant, reads as follows:

'39.18 Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles; wall or ceiling coverings of plastics, as defined in note 9 to this chapter:

3918.10	-	of polymers of vinyl chloride;
3918.90	-	of other plastics;
.20	-	of polyethylene terephthalates, not self-adhesive;
.30	-	of silicones;
.40	-	of other condensation, polycondensation or polyaddition products;
.90	-	other.'

The issue

[7] The issue for determination is whether the tiles are 'floor coverings' as contemplated by TH39.18.

[8] Note 9 is not relevant to the present case as it addresses wall or ceiling coverings. TH3918.10 caters for such coverings when they are made of 'polymers of vinyl chloride', which the tiles are not, and TH3918.90 caters for coverings made 'of other plastics', which the tiles are. Thereafter, TH3918.90.30 caters for coverings 'of silicones'. TH3918.90.90 is applicable if the said coverings fall under 'other'. It is common cause that if TH29.18 were applicable, the relevant sub-heading would be 3918.90.40, given the fact that the appellant's tiles are manufactured from high-density polyethylene (HDPE); and the base material for the tiles is a poly-addition polyethylene.

The explanatory notes

[9] Note 1 to chapter 30 states:

> 'Throughout this schedule the expression 'plastic' means those materials of heading 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of external influence'.

[10] The explanation note to chapter 39 indicates that the chapter covers substances called 'polymers', and that many of the polymers described in the chapter are known by their abbreviations. One such polymer is HDPE (high-density polyethylene), from which the tiles are manufactured. The explanatory notes to TH39.18 state, 'the first part of the heading covers plastics of the types normally used as floor covering, in rolls or in the form of tiles. It should be noted that self-adhesive floor covering are classified in this heading'. Regarding TH39.26, the explanatory notes state that the heading covers articles, not elsewhere specified or included, of plastic (as defined in note 1 to the chapter) or of other materials of headings 39.01 to 39.14.

[11] The commissioner initially classified the tiles under tariff heading 39.18, accepting that they were 'floor coverings'. At that stage, the dispute between the commissioner and the appellant was whether the plastic tiles fell under tariff sub-heading 3918.90.20 or 3918.90.40. Pursuant to an internal administrative appeal lodged by the appellant to resolve that dispute, the initial determination was amended, and the commissioner determined that the tiles should be classified under tariff sub-heading 3926.90.90. Thereafter, the appellant appealed to the

commissioner's national appeals committee (the NAC) in terms of s 71 of the Act. The NAC confirmed the classification of the tiles under tariff sub-heading 3926.90.90.

[12] The sources of law applicable in matters of tariff classification are firstly, Part 1 of Schedule 1 of the Act, and secondly, the Explanatory Notes to the Harmonised system, issued by the Customs Co-operation Council, Brussels (now the World Customs Organisation). Part 1 of Schedule 1 of the Act contains: (a) The General Rules for the Interpretation of the Harmonised System; (b) Section Notes; (c) Chapter Notes; (d) The terms of tariff headings and sub-headings; (e) The rate of duty applicable to every heading and sub-heading.

[13] As to the Interpretative Rules, Rule 1 of the Interpretative Rules which states that the titles of sections, chapters and sub-chapters are provided for ease of reference only and that, 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 (unless such headings or notes otherwise indicate) according to paragraphs 2 to 5 of the interpretative rules. Rule 3 provides that when goods are *prima facie* classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. Rule 6 applies the same principle similarly as between the sub-headings.

[14] The interpretative rules are to applied hierarchically i.e. rule 2 can only be resorted to if a classification cannot be done by application of rule 1, rule 3 can only be resorted to is a classification cannot be effected by application of rule 2, etc.

Rule 3(a) provides that when by application of Rule 2(b) or for any other reason, goods are *prima facie*, classifiable under two or more headings, classification shall be effected by preferring the heading which provides the most specific description to headings providing a more general description.

[15] The Harmonised System includes Explanatory Notes thereto. In terms of s 47(8)(a) of the Act, the interpretation of any tariff heading or sub-heading in part 1 of Schedule 1, the general rules for the interpretation of Schedule 1, and every section note and chapter note in that Part, is 'subject to' the Explanatory Notes. However, this provision does not mean that the notes are to be regarded as peremptory injunctions.

[16] In *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (A) at 675H-676F Trollip JA pointed out that Rule 1 of the interpretative rules rendered the headings and section and chapter notes not only the first but also the paramount consideration in determining which classification should apply in any particular case. The Explanatory Notes, he said, merely explain or perhaps supplement the headings and section and chapter notes and do not override or contradict them. See also *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A); *Commissioner for Customs and Excise v C I Caravans (Pty) Ltd* 1993 (1) SA 138 (N); *Commissioner for Customs and Excise v Capital Meats CC* 1999 (1) SA 570 (SCA); *Commissioner, South African Revenue Services v Komatsu Southern Africa (Pty)* 2007 (2) SA 157 (SCA) ; *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* 2007 (6) SA 545 (SCA).

[17] Rule 3 only comes into play when the goods are *prima facie* classifiable under more than one heading. In *The Heritage Collection (Pty) Ltd v Commissioner, SARS* 2002 (6) SA 15 (SCA) the following was stated (in the context of Rule 3(b) at 12:

> [T]he Rule comes into play only where 'goods are prima facie, classifiable under two or more headings'. If the goods, once classified in accordance with the ordinary process of classification, properly fall under two or more headings, the Rule determines which headings is to be given preference. It has no application, in my view, in a case like the present one, until it is found that on ordinary principles, the goods are properly classifiable under both headings. The Rule, in other words, is not a mechanism for determining the correct classification of goods: it is a mechanism for determining the preferent classification where more than one classification would, *prima facie*, be correct'.

[18] The respondent contends that Rule 3(a) finds no application in the present case, as, so is the argument, the tiles cannot be said to be *prima facie* classifiable under two headings. The respondent asserts that the mere fact that one of the two competing headings is 'other' means that the goods cannot be classifiable under more than one heading. They are either classifiable under the 'specific' heading or they are not, and if they are not, then by default become classifiable under the residual heading.

Interpretation

[19] In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* (supra) at 863G-H it was remarked that the interpretation of Schedule 1 for purposes of classification must be effective, first, with reference to the headings and their subheadings falling under the chapters and subchapters. Second, reference should be had to the notes to each section or chapter, which are a guide

to interpretation, and lastly, to general rules and notes. Once a meaning has been given to the potentially relevant words, and the nature and characteristics of the goods must be selected. Nicholas AJA identified three stages in the tariff classification process as follows:

> '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.'

[20] TH 39.18 provides as follows:

> "Floor coverings of plastics, whether or not self adhesive, in rolls or in the form of tiles; wall or ceiling coverings of plastics, as defined in note 9 to this chapter:"

[21] The first Explanatory Note to Tariff Heading 39.18 provides as follows:

> 'The first part of the heading covers plastics of the types normally used as floor coverings, in rolls or in the form of tiles. It should be noted that self-adhesive floor coverings are classified in this heading'

[22] The commissioner contends that, read in context of the complete tariff heading, and with reference to authoritative dictionaries, 'floor' is to be interpreted as meaning:

(a) the lower surface of a room;

(b) 'the surface in a room or building upon which one walks;

(c) the layer of boards, bricks, tiles, stones, etc., covering the base of a room or other compartment; the lower surface of a room;

(d) the inside lower horizontal surface (as of a room, hallway, tent, or other structure);

[23] The commissioner submits that TH39.18 has grouped together in this heading, plastic products used to cover the three facets of a room, namely floor, walls and ceiling, and therefore, there is no basis upon which to conclude that the legislature intended tiles designed and used to protect the turf in sport stadiums to be grouped together with coverings for interior walls and ceilings.

[24] The commissioner's determination is predicated on two premises. The first is that the tiles are not a 'floor covering', when regard is had to a proper interpretation of a 'floor'. This argument flows from the commissioner's view that the surface on which the tiles are placed (the turf surface of a sports stadium) is not a floor, and therefore that the tiles cannot be said to constitute a 'floor covering'. The second premise, flowing from the first, and stated in the answering affidavit, is that the tiles are not a 'floor covering' but a 'floor', and as such are not classifiable as a 'floor covering' as contemplated in tariff heading 39.18, but that a grass surface, when covered by the tiles, would constitute a 'floor'.

[25] The difficulty raised by the above contentions is glaring. On the one hand, the commissioner contends that the turf surface of a stadium is not a floor, and on the other, that the same surface, when covered by the tiles, is a floor. This is clearly untenable. Counsel for the respondent sought to overcome this difficulty by submitting that since the appeal calls for a determination afresh in a hearing *de novo* in terms of the principles and process of classification, the reasoning followed and meanings expressed by Messrs Mabusela and Mahape (on behalf of the

commissioner) are totally irrelevant. Counsel's submission is correct, as a general statement of the law. Having said that, the reasoning underpinning the commissioner's determination, cannot simply be overlooked.

The reasoning relied on for the commissioner's determination is set out in a determination report of Mr C Mabusela, pursuant to an internal administrative appeal. It reads as follows:

> 'It is not considered, within the context of the common or ordinary lexicographical meaning of 'floor' or 'floor covering', read in conjunction with 'tile' as provided for in the heading text to heading 39.18, that a grassed area is a 'floor'.

[26] When the matter was referred for resolution by appellant in terms of s 71 of the Act, Mr T J Mahape, on behalf of the Commissioner, confirmed the above reasoning by stating that:

> 'I am of the view that floor in the ordinary sense does not include a levelled outdoor grassed area. When one speaks of a floor, one usually refers or is understood to refer to a floor of a building, house, preferably inside. A levelled area outside a house cannot befit the description of a floor.'

[27] Counsel for the appellant criticized this reasoning on the basis that the commissioner's definition of a 'floor' is unnecessarily restrictive in that it confines 'floor' to a single, narrow definition. Counsel argued, with reference to a dictionary meaning, that the meaning of a floor includes:

> 'a level space – a ... levelled space designed for a particular activity'.

[28] Keeping in mind the first stage of the classification process, being the ascertainment of the meaning of the words used in the headings which may be relevant to the classification of the goods concerned, I agree with the appellant that

there is no basis for a restrictive interpretation contended for by the commissioner. Tariff headings, like any other documents, have to be interpreted with reference to the context in which they are used, and not in isolation. See for example, *Commissioner, SARS v Airworld CC* 2008 (3) SA 335 SCA at 345G to 346C. The meaning of the word 'floor', in the context of TH39.18, is therefore not confined to the floor of a building or a house, preferably inside. It includes a level space, and particularly one 'designed for a particular activity', such as for the playing of a sport.

[29] Counsel for the respondent also placed reliance on *Durban North Turf (Pty) Ltd v Commissioner, South African Revenue Service* 2011 (2) SA 347 (KZP). In that matter, the commissioner had classified a synthetic turf as 'a carpet or other textile floor covering'. The court upheld the applicant's contention that the imported goods should have been classified as 'sporting equipment the court overturned the determination of the Commissioner in respect of a synthetic hockey pitch cover.' The court found that the synthetic turf was more appropriately classified as sporting equipment than as a carpet, given the fact that a carpet was not usually put in the open air, or laid on a surface engineered to confer specific characteristics required for a particular sport. As such, the judgment does not support the commissioner's contention in the present case.

<u>The nature and characteristics of the imported goods</u>

[30] In the present case, the nature and characteristics of the tiles is common cause, that they are manufactured by way of injecting moulding from 100% virgin high density polyethylene (HDPE). Each tile has dimensions of 1m x 1m x 30mm, and the tiles are pinned together in blocks of 4, being 2m x 2m, and shipped on

palettes. The tiles are especially designed to cover and protect the turf floor in stadiums, when they are being used, either wholly or partially, for non-sporting events. They allow for the passage of air and light, and create a moist atmosphere under the tile, without any noticeable build-up of heat, which are essential elements of keeping natural grass healthy and green.

[31] The tiles are clipped together to form a solid, hard-wearing floor for events ranging from full stadium concerts to small on-field gatherings, marquee flooring or dance floors. The tiles are suitable for use on both natural and synthetic turf foundations. The tile floors enable the installation of chairs, staging and other equipment, and can support forklifts and other heavy moving equipment.

The most heading most appropriate

[32] Bearing in mind that the explanatory notes are not to be accorded an equal authority with the tariff headings, they still 'serve as a guide, pointing the way to the desired or intended classification'[1] In the present case, the notes explanatory notes to tariff heading 39.26, are fairly extensive, explaining what is covered by the heading, and there is no mention of any product remotely resembling the plastic tiles. At the risk of repeating myself, I am alive to the paramountcy of the headings over the explanatory notes and that the preamble to the list of products covered by the heading is not intended to be exhaustive. The explanatory notes are nevertheless illustrative of the type of goods that have been found not to fit under a more specific heading, and plastic tiles for the covering of a turf floor are not among them.

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[1] As stated in *Secretary, Customs and Excise v Thomas Barlow & Sons* (supra) at 679E.

[33] Given all the considerations, I find the most appropriate tariff heading to be 3918.90.40. In the result the appeal should succeed. The commissioner's classification should be set aside. As a result the order referred to in para [2] was made.

TM MAKGOKA
JUDGE OF THE HIGH COURT