HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 68281/2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ~~**YES**~~ **/ NO**
(2)	OF INTEREST TO MANY JUDGES: ~~**YES**~~ / **NO**
(3)	REVISED.✓
Date: **27/3/2019**	Signature:

In the matter between:

CANYON RESOURCES (PTY) LTD **Applicant**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE **Respondent**

Coram: Davis J

Summary: *Customs and Excise Act 91 of 1964 – Rebate item 670.04 – "diesel refund" – application for setting aside determination made by Commissioner – "wet rates" and "dry rates", interpretation of - post-recovery and post-mining activities, interpretation of in respect of mining of coal.*

J U D G M E N T

DAVIS, J

[1] Introduction

The Applicant conducts open cast coal-mining operations. For purposes hereof, it utilizes contractors for mining, washing, crushing and transport activities. The Applicant claimed a "diesel refund" from the South African Revenue Services ("SARS") in respect of diesel purchases in respect of its mining operations. The Commissioner of SARS ("the Commissioner") determined that the Applicant's claims do not qualify for the rebate item in question allowing for such refunds. The Applicant seeks a setting aside of this determination together with certain ancillary relief. The application is in the nature of a tariff appeal in terms of section 47(9)(*e*) of the Customs and Excise Act 91 of 1964 ("the Act"). It is common cause that such an appeal constitutes a hearing *de novo.*

[2] Relief claimed:

2.1 The Applicant claimed the following relief (as summarized in the practice note filed on behalf of the Applicant):

> *"1. Order setting aside the determination made by the Commissioner under rebate item 670.04 provided for in the Customs and Excise Act 91 of 1964, and substituting that determination with an order that the diesel refunds claimed by the Applicant under rebate item 670.04 (save for the diesel refunds claimed in respect of diesel supplied to Ingwenya Mineral Processing (Ply) Ltd) qualms under rebate item 670.04.*
>
> *2. Order that the Respondent make payment to the Applicant in the amount of R15 186 109.42.*
>
> *3. Order that the Respondent make payment to the Applicant of interest on R15 186 109.42 from date of submission of claims for diesel refunds to date of payment.*
>
> *4. Order that the Respondent make payment to the Applicant of interest a tempore morae at 9% per annum from date of judgment to date of payment."*

2.2 There is also a separate claim for the setting aside of a penalty imposed by the Commissioner relating to the issue of the diesel refunds in question.

[3] Statutory framework

3.1 In terms of section 75(1)(*d*) of the Act, subject to whatever conditions the Commissioner may impose, a refund of the fuel levy and the Road Accident Fund levy levied on fuel may be granted in certain circumstances.[1]

3.2 To qualify for such a refund, the "user" of the fuel (which includes diesel) has to be registered as such.[2] Rebate Item 670.04 included in Part 3 of Schedule 6 of the Act ("the rebate item") determines under which circumstances a user's purchases of diesel becomes "eligible" for consideration of refunds. The relevant parts of Note 6 of the rebate item read as follows:

> *"6(b) The extent of refund for eligible purchases ...*
>
> (i) *... mining on land is 128, 8 cents per liter fuel levy on 80 per cent of eligible purchases plus 193 cents per liter Road Accident Fund levy on 80 per cent of eligible purchases …*
>
> *(f) Mining on land: Refund of levies on eligible purchases for distillate fuel for mining as specified in paragraph (b)(i) to this Note.*
>
> *f(i)(aa) In accordance with the definition of "eligible purchases", the distillate fuel must be purchased by the user for use and used as fuel for own primary production activities in mining as provided in subparagraphs (ii) and (iii) to this note...*
>
> *f(ii) The mining activities which qualify for a refund of levies must be carried on—*
>
> *(aa) for own primary product by the user or by a contractor of the user who is contracted on a dry basis; ...*

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1 **75 Specific rebates, drawbacks and refunds of duty**

(1) Subject to the provisions of this Act and to any conditions which the Commissioner may impose—…

(*d*) in respect of any excisable goods of fuel levy goods manufactured in the Republic described in Schedule 6, a rebate … or of the fuel levy and of the Road Accident Fund levy specified respectively in Part 5A and Part 5B of Schedule 1 on respect of such goods … or a refund of the fuel levy or Road Accident Fund levy actually paid … shall be granted to the extent and in the circumstances stated on the item of Schedule 6 in which such goods are specified, subject to compliance with the provisions of the said item and any refund under this paragraph may be paid to the person who paid the duty or any person indicated in the notes to the said Schedule 6: Provided that any rebate, drawback or refund of Road Accident Fund levy as contemplated in paragraph (*b*), (*c*) or (*d*), shall only be granted as expressly provided in Schedule 4, 5 or 6 in respect of any item of such Schedule.

2 Section 75 (1C)(*b*) For the purposes of this section and the said item of Schedule 6—

(i) shall mean, according to the context and subject to any note in the said Schedule 6, the person registered for a diesel refund as contemplated in subsection (1A)

(ii) 'distillate fuel' includes diesel and 'diesel' includes distillate fuel.

f(iii) Own primary production activities in mining include the following:

(aa) …

(bb) …

(cc) Operations for the recovery of minerals those ... but not including any post-recovery or post processing of those minerals.

…

(ss) Quarrying activities necessary solely for obtaining, extracting and removing minerals from the quarry, but excluding any secondary activities to work or process such minerals (including crushing, sorting and washing° whether in the quarry or at the place where the mining operation is carried on.

(tt) The transport of ores or other substances containing minerals form the mining site to the nearest railway siding."

3.3 The explanation of what is meant by contracting a contractor on a "dry basis" as contemplated in Note 6(*f*)(ii)(*aa*) above is defined in Note 6(*a*)(ii) as follows:

6(a)(ii) Definitions

…

"dry" or "contracted or hired on a dry basis" means that any vehicle, vessel, machine or any other equipment whatsoever using distillate fuel is hired or a person using such vehicle, vessel, machine or other equipment is contracted by a user for the purpose of performing any qualifying activity and the user supplies the distillate fuel from eligible purchases.

3.4 It is contrasted with contracting a contractor on a "wet basis" (which would not qualify for a refund), which is defined as follows:

6(a)(ix) "wet" or "contracted or hired on a wet basis" means distillate fuel is supplied with the vehicle, vessel, machine or other equipment contracted or hired as contemplated in the definition of "dry";

3.5 For purposes of keeping track of the amounts of fuel in respect of which refunds are claimed, the user must keep sufficient records.[3]

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[3] Note 6(*q*) deals comprehensively with this issue as discussed in the "Compliance" issue in paragraph [9] hereinlater.

[4] The refund claims:

4.1 The Applicant initially claimed refunds in respect of six contractors utilized by it at either or both of its collieries (being the Hakhano and Phalanndwa mines) during the "assessment period". These contractors were:

4.1.1 Close-Up Mining (Pty) Ltd ("Close-Up") who performed mining operations.

4.1.2 Trollope Mining Services (2000) (Pty) Ltd ("Trollope") who also performed mining operations.

4.1.3 Alcedopro (Pty) Ltd ("Alcedopro") who provided feeding, hauling and handing services in respect of run-of-mine (ROM) coal at and between processing plants at the two collieries.

4.1.4 Minerals Operations Executive (Pty) Ltd ("Minopex") who provided coal-washing and crushing services.

4.1.5 Ingwenya Mineral Processing (Pty) Ltd ("Ingwenya") who provided the same services as Minopex.

4.1.6 Ni-Da Transport (Pty) Ltd ("Ni-Da") who provided transport from one of the collieries to a rail station and, mostly, to the Sized Coal Terminal, Maputo Main Port, Mozambique.

4.2 For use by its contractors, the Applicant purchased diesel from Chevron South Africa (Pty) Ltd ("Chevron"). According to an unsigned copy of the contract between the Applicant and Chevron, the Applicant would purchase a minimum of one million liters of diesel per calendar year at a discounted price and with diesel being supplied on a 30 day after statement payment basis.

4.3 The Applicant authorized each of its aforesaid contractors to place orders directly with Chevron and consignments of diesel were thereafter delivered to tanks at the respective collieries allocated by the Applicant to each of its contractors.

4.4 During the course of 2012 and 2013, the Applicant submitted sixteen VAT returns in which it claimed diesel refunds in respect of diesel which it had purchased from Chevron and supplied to its contractors. The manner in which the total of the diesel supplied in each month by the Applicant was calculated is set out in a separate reconciliation document relative to each month. Copies of each monthly pair of documents, consisting of a VAT201 form and a reconciliation document were annexed to the Applicant's founding affidavit.

[5] The Commissioner's determination and the appeal thereof:

5.1 In a letter dated 2 November 2012 the Commissioner expressed the *prima facie* view that the Applicant's diesel refund claims in respect of the period of February 2012 – July 2012 ought to be disallowed due to the fact that the Applicant's contract with Close-Up was a "wet" contract and that the Applicant's logbooks did not sufficiently record the quantity of diesel used and the purpose of each vehicle using such diesel.

5.2 In a further letter of 22 July 2013, labelled in the papers as the "Revised Letter of Demand") the Commissioner advised that the period under investigation had been expanded to include the period from February 2012 to May 2013 (referred to as the "assessment period"). The Commissioner also indicated that he had resolved to disallow the Applicant's diesel refund claims in respect of use of those contractors mentioned in paragraph 4.1 above. The basis for the resolution was stated that the contracts with Close-Up and Ni-Da were entered into on a "wet" basis and that the logbooks used to substantiate some of the alleged diesel usage, as kept by Alcedopro, Close-Up, Ni-Da, Ingwenya and Minopex were not compliant with the requirements of Schedule 6 of the Customs Act.

5.3 The Applicant lodged an administrative appeal against the above determination. On 24 June 2015 the SARS Appeal Committee notified the Applicant that the appeal was unsuccessful. The appeal letter, inter alia, states the following:

> *"There was non-compliance with Note 6(a)(ii) and (ix), read with Note 6(e)(i)(bb)(B) and Note 6(f)(ii)(aa), in that the user entered into various contracts on a wet basis, and submitted these claims as eligible claims;*
>
> *Whilst the claimant supplies the fuel to the contractor, it effectively charged the contractor for that fuel and the contractor's price to claimant includes fuel i.e. on a "wet" basis. The fact that the fuel is sourced from the claimant is incidental, as the contractor is being charged for the fuel (indirectly);"*

5.4 It is against this refusal of the Applicant's diesel refund claims that the present tariff appeal has been lodged.

5.5 As this is a "wide" appeal where the adducing of new evidence is permissible, the parties have not only filed extensive papers but also, to a larger or lesser degree, sought to rely on purported expert reports:

5.5.1 SARS, through the State Attorney, had, prior to the delivery of its answering affidavit, in writing indicated to the Applicant that "an expert may provide a concise overview of the matter, possibly curtailing the legal issues to be

decided on, alternatively, create an avenue for possible settlement negotiations..."

5.5.2 This prompted the Applicant to, pre-emptively it appears, procure the services of a Mr Stride and deliver supplementary founding papers wherein an expert "report" was included in the form of an affidavit.

5.5.3 Due to various reasons, these supplementary papers did not come to the notice of the relevant role-players of SARS and, after yet further supplementary papers had been filed by the Applicant, containing additional logbook information and the like, the answering affidavit was accompanied by a report of a Mr Hatzkilson. In his report, he did not deal with Mr Stride's opinion evidence.

5.5.4 Subsequently, SARS also procured a report of a Mr Passelaqua and the Applicant's Mr Stride has produced two further reports in reply.

5.6 In my view, the experts could only provide assistance insofar as they contributed to the factual analysis of the Applicant's record-keeping and that of its contractors, including the various logbooks. The expert's opinions as to the interpretation of the various contracts and the issue of "wet" / "dry" as set out in Note 6 were either irrelevant or inadmissible, but in any event neither useful or convincing. Even on the issue of credit notes (to which I shall revert hereinlater), comments such as "credit notes are, in Mr Stride's experience, issued to correct a mistake or to reduce an overstated invoice" or "neither of SARS' experts can explain why Canyon recovered only the cost of diesel at a base rate" or "Mr Stride highlights the absence of any commercial sense in such a transaction", are neither factual nor the expression of an expert opinion of a professional nature on which a court could rely.

5.7 In the matter of *KPMG Chartered Accountants v Securefin Ltd and another* 2009 (4) SA 399 (SCA), Harms, DP held as follows:

> "[38] ...
>
> *It is accordingly necessary to say something about the role of evidence and, more particularly, expert evidence in matters concerning interpretation.*
>
> *[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of jural act, entrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1908 (3) SA 927 (A) at 943B [also reported at [1980] 2 All SA 366 (A) Ed]). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury*

question: Hodge M Malek (ed) Phipson on Evidence (Med 2005) paras 33-64). Third, the rules about admissibility of evidence in this regard do not patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Ply) Ltd 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualize the document (since 'context is everything) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible' (Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 455B-C)."

5.9 Trollip JA in *Gentiruco AG v Firestone (SA) (Pty) Ltd* 1972 (1) SA 589 (A) at 617F-618C dealt with the admissibility of expert evidence in interpreting a document and quoted with approval from a speech of *Lord Tomlin in British Celanese Ltd v Courtaulds Ltd* (1935) 52 RPC 171 (HL):

'The area of the territory in which in cases of this kind an expert witness may legitimately move is not doubtful . he is entitled to explain the meaning of any technical terms used in the art... he is not entitled to say nor is counsel entitled to ask him what the [document] means, nor does the question become any more admissible if it takes the form of asking him what it means to him as an [expert]'.

5.10 In the matter of *Ruto Flour Mills Pty Ltd v Adelson* 1958 (4) SA 235 (TPD), the Court expressed the following view in respect of expert evidence:

"According to Wigmore on Evidence, vol. Para. 1918 at p.10, the true theory of the opinion rule is simply that of the exclusion of supererogatory evidence. It is not that there is any fault to find with the witness himself or the sufficiency of his sources of knowledge or the positiveness of his impression, but simply that his testimony, otherwise unobjectionable, is not needed, is superfluous. Thus, wherever inferences and conclusions can be drawn by the Court as well as by the witness, the witness is superfluous. An expert's opinion is received because and whenever his skill is greater than the Court's. According to Wigmore (loc. Cit.) at pp. 13 and 21, all witnesses, whether testifring on observed data of their own or on data furnished by others, may state their inferences so far only as they have some special skill which can be applied to interpret or draw inferences from these data ... The learned author at p21 refers to Taylor v Munro 43 Connecticut 44 where Loomis, J is reported to have said — The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many person or few have some knowledge of the matter, but it is whether the witness offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or jury in determining the question at issue."

5.11 I will come to the issue of interpretation later but, in respect of expert evidence, it needs to be restated that an expert cannot usurp a court's functions by proffering final opinions on an ultimate issue. The expertise of a witness should not be elevated to such heights that sight is lost of a court's own capabilities in drawing inferences from the evidence. See: *Holtzhausen v Roodt* 1997 (4) SA 766 (W) and *Schneider No v Aspeling* 2010 (5) SA 203 (WCC).

[6] The triable issues:

Turning now to the issues at hand, they are primarily the following:

6.1 Did the Applicant employ its contractors on a "wet" or "dry" basis? The latter would entitle the Applicant to a diesel refund and the former not.

6.2 Had diesel been used by the Applicant (through one of its contractors) for post-recovery processes (which does not entitle the Applicant to a diesel refund) or not?

6.3 Do the records of the Applicant and its contractors demonstrate the utilization of diesel by the contractors for eligible purposes with sufficient particularity that SARS and the Commissioner can be satisfied as to the entitlement and extent of the refund claimed?

[7] Ad: "wet" or dry" contracting:

7.1 As set out above, this issue emanates from Note 6(*f*)(ii)(*aa*) read with Note 6(*a*)(ii).

7.2 The parties are *ad idem* that, whatever the form of the contracts between the Applicant and its contractors, the question is more one of substance than of form. The starting point remains, however the written contracts entered into between the Applicants and its contractors.

7.3 In the first instance then, one has to examine the basis upon which Close-Up has been contracted:

7.3.1 The contract provides for both "wet" and "dry" rates. There is a price and calculation method set out for the "wet" rates. It cannot reasonably be in dispute that Close-Up had (initially, at least) invoiced the Applicant on a "wet" rates. The Applicant's case is that this "wet" rate basis was "converted" to a "dry" rate basis. This was allegedly done by requiring Close-Up to pass credit notes in favour of the Applicant for the diesel that it had used. This was done at an agreed price/litre.

7.3.2 In essence then, what had happened was that the Applicant had purchased diesel from Chevron, who delivered it on site in a tank or tanks designated by the Applicant for Close-Up's use. After having performed each month's contracted services, Close-Up would then invoice the Applicant at the agreed

"wet" rate but issue credit notes against this invoice to the value of the agreed price in respect of diesel used.

7.3.3 The reason for the aforesaid elaborate procedure, argued the Applicant, is, on the one hand to "convert" the "dry" rate to a "wet" rate and, on the other hand, to ensure effective use of diesel. The Applicant alleged that it does not want to pay a "dry" rate to a contractor and run the risk of supplying diesel to an ineffective contractor or one with dilapidated or diesel-guzzling equipment. It therefore, in a schedule to its agreement wherein the rates had been set out, prescribed "caps" on the volume of diesel used for various activities.

7.3.4 The explanation raised more problems than it solved. Firstly, if Close-Up was contracted at a dry rate, why did it not simply invoice at that rate? The diesel usage or effectiveness thereof could be kept track of separately. Further, what does the "cap" imply in respect of the diesel usage? Does it mean that, once over the limit of the "cap", the credit notes for the balance of the usage comes out of Close-Up's own pocket (by way of a reduction of the amount paid by the Applicant)? That means, at absolute best for the Applicant, that the portion of services rendered by the Applicant's contractor which is done by making use of diesel in excess of the imposed "cap" is done on a "wet" basis. As to the "conversion" argument, why not deduct from the "wet" rate the difference between it and the "dry" rate prior to invoicing? Why the credit note procedure? A credit note is simply a bookkeeping exercise whereby a creditor reduces the amount which a debtor is indebted to it, by passing a credit, but without money actually exchanging hands (which would also have resulted in a credit entry). The Commissioner's view that this is exactly the same as a purchase of diesel by the contractor is logically sound: rather than actually paying for the diesel it used, the contractor issued credit notes i.e. book entries rather than payment sounding in money.

7.3.5 When the Applicant realized the consequence of the above described "wet" rate procedure, it had Close-Up invoice it on "dry" rates. This took place in respect of the third period for which diesel refunds are claimed, i.e. the period from October 2012 to May 2013. The Applicant's deponent acknowledged this fact in so many words: *"invoices rendered during this period made use of "diy" rates and no longer as in the first and second periods "wet" rates and no corresponding monthly credit notes were issued".*

7.3.6 The claims for periods one and two were on this basis accordingly correctly refused by the Commissioner. The claim for period three still needed to pass

the compliance test in respect of the keeping of records and logbooks as discussed in paragraph [9] below.

7.4 The Ni-Da contract worked on a similar system as the first two periods of the Close-Up contract, except that, instead of credit notes for diesel used, a "reduction" by way "credits" was used. The procedure was as follows: Ni-Da erected a tank at the Hakhano Colliery. The Applicant would procure diesel from Chevron which would be delivered to this tank and, according to the Applicant's deponent and, in accordance with clause 9.4 of the contract between the Applicant and Ni-Da, the diesel would, upon such delivery, become the sole property of Ni-Da. How would Ni-Da pay for this diesel? It would render a tax invoice to the Applicant by the 5th day of each month in respect of the services performed at a rate of R282.50 per tonne excluding Vat. This is termed by the Applicant's deponent to be a "globular rate". From this invoice, according to the Applicant's schedules produced, credits are then passed in favour of the Applicant for the diesel used by Ni-Da at an agreed price per litre. The Applicant argued that this manner of computing resulted in the "composite rate of 8282,50 (excluding VAT) per tonne [being] reduced to an effective 'dry' rate". The reason for this method was again described as an efficiency measure. It does not differ materially from the substance of the contract with Close-Up in the first two periods of assessment and suffers the same fate i.e that it is found to be a "wet" rate contract.

7.5 It is clear that Note 6 and the descriptions of "wet" and "dry" rates envisage that, when a user contracts a contractor on a "wet" basis, the contractor procures diesel (and pays for it) and invoices the user with an invoice which includes the total of the costs for services rendered i.e. including diesel costs. When a contractor is contracted on a "dry" basis however, it invoices the user with a price or tariff which excludes the diesel. The reason for this is that the diesel is then supplied by the user at his own cost. The contractor then has no diesel expenses to pay by way of payment (or credits). It is clear in both the Close-Up and Ni-Da instances (for the relevant periods), the contractors rendered "globular", "composite" or inclusive invoices. If these had been paid in full, the contractors then would still have had to pay for the diesel used by them. Rather than write out cheques or making interbank or electronic transfer payments, they issued credits or credit notes and received payment of the balance of their invoices from the Applicant. Despite the Applicant's denial that it effectively sold the diesel, it received a "credit" or a reduction in respect of each invoice rendered to it by these contractors in respect of each litre of diesel used by them in the generation of the services reflected in their invoices. To argue that this "converted" their contracts to "dry" contracts amounts to nothing other than an attempt to avoid the prescripts of the Note to the rebate item.

7.6 Having reached the aforesaid conclusions, I need not entertain the Applicant's further arguments regarding the eligibility of the claim in respect of diesel utilized by Ni-Da. In this regard, the Applicant relied for a substantial portion of the claim, on Note 6(*f*)(iii)(*tt*) which provides that *"own primary production activities in mining include ... the transport of ores or other substances containing minerals from the mining site to the nearest railway siding".* In the case of the claim for a refund in respect of diesel used by Ni-Da, the Applicant contended that the use of transport by road all the way to Maputo was essential to the Applicant's business model as there was no other "rail capacity" available to it. As I have stated, I need not make a finding as to the correctness or not of these contentions.

7.7 The disputes pertaining to Trollope and Alcedopro, appear to pertain more to the recordkeeping ("compliance") aspects which I shall deal with hereinlater.

[8] <u>The Minopex claim</u>

8.1 Although it appears that Minopex was contracted on a "dry" rate basis, the question is whether scope of its operations fell inside or outside the qualifying condition of "own primary production" of "mining on land" contained in note 6(*f*)(iii)(*cc*) which exclude *"any post- recovery or post-mining processing of ... minerals".* I.e. only diesel used in primary recovery of minerals can qualify or be eligible for diesel refunds.

8.2 The Applicant described the method used in its collieries as follows: first, topsoil and soft overburden are separated and removed to the relevant stockpiles, secondly hard overburden is blasted and heaved into the immediately adjacent pit. Lastly, coal is dug free and removed to be stockpiled. "Parting" (i.e. soil and other material) is then removed and what remains is known as "ROM" coal.

8.3 Eskom is the primary buyer of ROM coal in South Africa (according to yet another expert, Mr Alli who styles himself as a "coal marketing expert") together with brickworks and cementers. This is because the high ash content of ROM coal makes it suitable for their applications.

8.4 The Applicant alleged that the sale of ROM coal to the abovenamed relatively small range of customers "fall beyond its business model" and therefore ROM coal does not constitute a "mineral" that has been recovered as envisaged in Note 6(*f*)(iii)(*cc*). It further contends that *"both 'mineral' and 'recovered' fall to be interpreted in the context of Canyon's business model",*

8.5 The Applicant's business model apparently entails that when it puts the ROM coal that it has recovered from its collieries through a crushing and washing plant, thereby reducing the ash content and refining it "to a desired colorific value and product size" it can export the coal at a much higher price. It did so during the assessment period by exporting 450 000 tonnes of coal per annum in the form of large "nuts" and "peas" through the Maputo Main Port to Turkey. The Applicant's expert explained it as follows: *"coal of this type commanded a better price when sold to the export market as washed coal than it would if sold either as washed coal to the domestic market or as ROM coal to the domestic or international market. If coal of that sort were sold to Eskom, it would command a price that is lower than the price that it would command if washed and exported."*

8.6 The Applicant's argument implies that, when one interprets a tax regime of general application in respect of the Applicant's refund claim, one must do so in a manner that corresponds with the Applicant's own individual maximization of its profits. Put otherwise, the Applicant contends that ROM coal only constitutes a mineral for purposes of a refund claim when sold locally or to Eskom but, as the Applicant wants to sell coal to Turkey, ROM coal does not constitute a mineral.

8.7 Apart from the glaring absurdities inherent in the above arguments it is clear, particularly from Mr Alli's exposition quoted above, that ROM coal is a saleable mineral. It is recovered during mining operations on land. Washing thereof clearly then constitutes "post-recovery or post-mining processes of those minerals" as contemplated in Note 6(*f*)(iii)(*cc*) which are excluded from the definition of "eligible purposes".

8.8 Accordingly, the claim for a diesel refund in respect of use by Minopex as a contractor must fail. The claim in respect of the other contractor used by the Applicant for similar purposes at the other colliery, namely Ingwenya, whose scope of operations would also fall in the exclusion referred to above, was expressly abandoned by the Applicant because, in its own words in its founding affidavit, it *"accepts that the Ingwenya logbooks are not compliant with Note 6".*

[9] Ad: "Compliance"

In its papers and in the various sets of heads of argument filed on its behalf and also in oral argument, the Applicant distinguished between two main "themes", namely eligibility (including the "wet"/ "dry" issue, the post-recovery issue and various transport issues) and compliance. Lastmentioned entails the question of whether the Applicant and/or its contractors had maintained adequate records of the diesel used to either qualify for or quantify the extent of its diesel refund claims.

9.1 The following items in Note 6 are relevant, which are repeated here for sake of convenience:

> *"6(q) Keeping of books, accounts and other documents for the purposes of this item:*
>
> (i) (aa) All books, accounts or other documents to substantiate the refund claim (including purchase invoices, sales invoices and logbooks) must be kept for a period of 5 years ...
>
> (iii) Books, accounts or other documents must show in respect of each claim how the quantity of distillate fuel on which a refund was claimed was calculated ... .
>
> (v) Documentation must show how the distillate fuel purchased was used, sold or otherwise disposed of The user must —
>
> *(aa) keep books, accounts or other documents of all purchases or receipts of distillate fuel, reflecting — (A) ... the number and date of each invoice and (B) .... the quantities purchased or received.*
>
> *(bb) keep books, accounts or other documents in respect of the storage and use of the distillate fuel ...*
>
> *(dd) keep logbooks in respect of fuel supplied to each vehicle ... used in ... on land mining."*

9.2 In addition, since 1 April 2013, the definition of a logbook has been expanded to expressly include the requirement that it should *"indicate a full audit trail of distillate fuel for which refunds are claimed, from purchase to use thereof"*.[4]

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[4] The whole definition of logbooks in Note 6(*a*)(xi) reads as follows:

" "logbooks" means systematic written tabulated statements with columns in which are regularly entered periodic (hourly, weekly or monthly) records of all activities and occurrences that impact on the validity of refund claims. Logbooks should indicate a full audit trail of distillate fuel for which refunds are claimed, from purchase to use thereof. Storage logbooks should reflect details of distillate fuel purchases, source thereof, how dispersed/disposed and purpose of disposal. Logbooks on distillate fuel use should contain details on source of fuel, date, place and purpose of utilisation, equipment fuelled, eligible or non-eligible operations performed and

9.3 The Applicant argues that substantial compliance with these requirements are sufficient and that they are merely directory and not peremptory. Having regard to the particularity required in Note (*q*), it is immediately apparent that, in order to qualify for a refund in respect of any litre of diesel, the prescribed particulars must be furnished in respect of every such litre so that the Commissioner can discern between eligible and non-eligible usage.

9.4 Counsel for the Commissioner referred me to the approach of the Appellate Division (as it then was) stated in *Maharaj & others v Rampersad* 1964 (4) SA 638 (A) in this regard at 646 C as follows:

> *"The enquiry, I suggest, is not so much whether there has been `exact', 'adequate' or 'substantial' compliance with the injunction but rather whether there has been compliance therewith. This [4]enquiry postulates an application of the injunction, to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is, is not identical with what is ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."*

(See also: *Shalala v Klerksdorp Town Council & another* 1969 (1) SA 582 (T) and *Mathope & Others v Soweto Council* 1983 (4) SA 287 (W)).

9.5 In the present case "the injunction" to users was that those who wish to claim rebates had to demonstrate with sufficient particularity "the journey the distillate fuel has travelled from purchase to supply" and then with equal particularity indicate the eventual use of every litre of such fuel in eligible purposes. Should the eventual use not be stated or sufficiently indicated, the claim fails. Should the volume of diesel used not be clearly determinable, the claim should also fail. Should the "journey" of every litre not be particularized, the claim would, once again, fail.

9.6 It is not an answer to say that a refund is only payable in respect total volume used and therefore only substantial compliance is required and that discrepancies are catered for by way of a 20% margin. The 80% of the total volume provided for in Note 6(*b*)(i) is an exact and determined figure and not an arbitrary percentage of what the user claims. I.e. if a user sufficiently, by way of compliance with Note 6(*q*) (including

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records of fuel consumed by any such machine, vehicle, device, or system. Logbook entries must be substantiated by the required source documentation and appropriate additional information that include manufacture specification of equipment, particulars of operator, intensity of use (e.g. distance, duration, route, speed, rate) and other incidents, facts and observations relevant to the measurement of eligible diesel use."

logbooks as defined from time to time) "prove" eligible purchases of say 1000 litre, he qualifies for the percentage (80%) rebate provided for in Note 6(*b*)(i) in respect such purchases used in respect of mining on land in terms of Note 6(*f*). The calculation is expressly set out in Note 6(*b*)(i)(*aa*). The "object" of the "injunction" was not to prove "substantially" 1000 litres. It is either 1000 litres or it is not. The Note is, by its nature therefore peremptory: the user must, in respect of each litre in respect of which a rebate is claimed demonstrate to the Commissioner that the diesel was (i) purchased by the user (ii) for use in mining activities on land and (iii) used by him (or in this case, his contractors) for qualifying mining activities. To strengthen this strict requirement, it is to be contrasted, for example, with sugarcane farmers with an average production of less than 1800 tons of sugarcane per year who fail to keep the logbook information as required by Note 6(*q*). They are entitled, in terms of Note 6(*h*)(viii) "to reduce their eligible distillate fuel purchase by 20 per cent to exclude potential non-eligible purchases". Users such as the Applicant are not entitled to the same dispensation.

9.7 The analyses of the Applicant's books of account, reconciliations and logbooks, show that:

9.7.1 The details of the mining activities performed with the diesel in question are often absent;

9.7.2 The volumes of diesel used as appears form the Applicant's books, do not match the totals of credit notes issued or other credits passed by the contractors who used the diesel;

9.7.3 The amounts of diesel used as disclosed in the logbooks of the contractors (of Ni-Da in particular), do not match the VAT reconciliations and show significant monthly variances.

9.8 The above is a compressed summary of the statements and conclusions made and reached in the answering affidavits with reference to those factual analyses included in the reports of Messrs Hatzkilson and Passelaqua. I specifically refer to their reports in this fashion by having regard to the mathematical calculations and bookkeeping exercises conducted by them (which I treat as factual evidence) and not with reliance on any opinions expressed.

9.9 In addition to the above and insofar as the Applicant attempted to remedy the situation in its replying affidavits, the disputes of fact pertaining, not only to the compliance issues, but particularly to the correct calculation of the volume of eligible purchases utilized, were only exacerbated.

9.10 The general principles applicable to disputes of fact in motion proceedings have not been displaced by the fact that the matter is a tariff appeal. Not only does the Applicant bear the onus of convincing a court that the Commissioner's determination should be set aside but it carries the onus to indicate (on a balance of probabilities) that, on its papers (being those which had served before the commissioner supplemented by those placed before the court) it is entitled to an order reflecting its entitlement to diesel rebates in the specific amounts claimed. Should there be a factual dispute as to the lastmentioned aspect, the method of resolving those disputes in motion proceedings where final relief is sought, is trite. See: *Stellenbosch Farmers Winery Ltd v Stellenvale Winery* (Pty) Ltd 1975 (4) SA 234 (C) and the numerous annotations thereon, including the "Plascon-Evans-rule"[5]. To put it differently: In respect of the compliance issues regarding the proof and calculation of eligible purchases and the diesel refund claimed, if the Applicant's undisputed allegations are taken together with the Respondent's allegations which cannot be rejected out of hand, and the Applicant has not, on a balance of probabilities satisfied the requirements of the three items referred to in paragraph 9.6 above its application should fail.

9.11 However, at the inception of argument on behalf of the Applicant, Mr Joubert SC referred me to his supplementary heads of argument and the submission that, should the court find that material disputes of fact exist that can only be resolved by the leading of oral evidence, the matter should be so referred. He also referred me to *Marques v Trust Bank of South Africa Ltd* 1988 (2) SA 526 (W), *Fax Directories (Pty) Ltd v SA Fax Listing CC* 1980 (2) SA 164 (D & CLD) and *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) in support of the proposition that such a request can still be made, even after the close of argument, which he duly repeated.

9.12 In my view, the narrow factual disputes regarding the compliance and calculation and verification issues in respect of the diesel refund claims in respect of the Applicant's contractors Close-Up (third period only) Alcedopro and Trollope (all the "dry" contracts, apart from Minopex) fall into the category of disputes where a discretion should be exercised in favour of the Applicant. See *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at 10 A-D. Where, such as in the case of a tariff appeal, an Applicant is obliged to bring proceedings by way of notice of motion and seeks to discharge an onus of proof which rests upon him by asking for an opportunity to adduce oral evidence or to cross-examine deponents to answering affidavits, it should not lightly be deprived of that opportunity. See: *AECI Ltd v Strand Municipality* 1991 (4) SA 688 (C) at 698J-699A.

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5 *Plascon-Evans v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[10] Interest

10.1 The Applicant sought an order declaring that it is entitled to interest on the amounts of the diesel refunds which it claimed and that such interest should be calculated from the dates on which the Applicant submitted the claims.

10.2 In this regard the Commissioner relied on section 47(9)(*c*) of the Act which provides that no interest is payable in circumstances such as these. The Applicant denied the applicability of this section.

10.3 Section 47(9)(*a*)(i)(*aa*) empowers the Commissioner to determine tariff items in respect of any schedule of the Act. Section 47(9)(*a*)(i)(*bb*) of the Act in turn provides as follows: *"The Commissioner may in writing determine … whether goods so classified [in terms of section 47(9)(a)(i)(aa)] under such tariff heading, tariff sub-heading or other items of Schedule No 3, 4, 5 or 6 may be used … or have been used … as provided in such tariff items or other items specified in such Schedule."*

(My emphasis.)

10.4 It is common cause that the diesel refund claimed by the Applicant is claimed under rebate item 670.04 determined in Part 3 of the Schedule 6 to the Act, which in turn provides for rebates in respect of *"distillate fuel purchased for use and used for the purposes specified in, and subject to compliance with Note 6"*.

10.5 The determination made by the Commissioner which is under attack by the Applicant clearly falls in the ambit of the abovementioned provisions.

10.6 The relevant part of section 47(9)(*c*) then provides as follows: *"Whenever a court amends or orders the Commissioner to amend any determination made under subsection (9)(a) the Commissioner shall not be liable to pay interest on any amount refundable ... ."*

10.7 The Applicant argued that the right to a diesel refund is a "stand alone" right in terms of section 75(1)(*d*) and that a determination of whether a user's claims qualify in terms of the conditions imposed by the Commissioner does not fall under section 47(9)(*a*)(i)(*bb*). It argued that therefore, when a court amends such a determination (which is what will happen if the relief sought by the Applicant is granted), section 47(9)(*c*) will not exempt the Commissioner form the liability to pay interest. Whilst mindful of the fact that "rebates, refunds and drawbacks" of duties and catered for in Chapter X of the Act and that section 47 falls in Chapter V of the Act, I find no basis for the narrow interpretation proposed by the Applicant. On the contrary, a reading of the two Chapters indicate that the Act provides for the imposition of duties

and the determination of the extent thereof on the one hand and rebates or refunds on the other hand. If a determination is made in respect of a user not qualifying for a rebate and it is overturned or amended by a court, it falls back in the default position prescribed in Chapter V and in section 47(9)(*c*) in particular.

10.8 Insofar as the Applicant may prove, in terms of the order which I intend to make, that the determination refusing all of its diesel refund claims should be amended, the Commissioner would not be liable for the payment of interest on such proved claims.

[11] Penalties

11.1 The Applicant alleged in its founding papers that the Commissioner, in his revised letter of demand, claimed a penalty of R283 898,12. The Applicant contended that there was no basis for such penalty and, with reference to two instances where aspects of Note 6 had been changed with retrospective effect, that the imposition thereof would be "unjust and not in the interest of justice".

11.2 On behalf of the Commissioner, Mr Puckrin SC (together with MS Kollapen) indicated that this issue was prematurely before the court. Section 93(2) of the Act confers upon the Commissioner the power, upon good course shown, to remit or mitigate any penalty, either conditionally or unconditionally. The Commissioner has yet to exercise a decision in this regard.

11.3 Furthermore, insofar as the calculation of the intended penalties were done with reference to the claims submitted in respect of the contractors Close-Up (third period only), Alcedopro and Trollope, a final decision can only be made after the hearing of oral evidence as envisaged in paragraph 9.12 above and in the intended order. No relief can therefore be granted in this regard. The matter of penalties can only be addressed once a final determination has been made by the Commissioner in respect of both the calculation of the penalties and whether any section 93(2) power has to be exercised or not.

[12] Conclusions:

For sake of clarity, I set out the conclusions reached in the above paragraphs:

12.1 The determination of the Commissioner that the Applicant's claims for diesel refunds claimed in respect of Close-up (first two periods), Ni-Da and Minopex do not qualify for such refunds, should be upheld.

12.2 The issue whether the Applicant's claims for diesel refunds in respect of Close-Up (third period), Alcedopro and Trollope should have been allowed should be referred to oral evidence and the validity of the attack on the Commissioner's determination should be determined at the conclusion thereof.

12.3 Even if the Applicant succeeds in proving an entitlement to diesel refunds at the conclusion of the hearing of oral evidence, it will not be entitled to interest on the amounts so proved.

12.4 The issue of penalties is, on the papers and facts as they currently stand, premature and must be refused.

12.5 The alternate claims for declaratory orders and payments also cannot succeed.

[13] Costs

Having regard to the conclusions reached above, and despite having been unsuccessful in some of its attacks on the Commissioner's determination and some related ussies, the issue of whether the Applicant has nevertheless achieved a sufficient measure of success or was substantially successful can best be determined after the conclusion of the hearing of oral evidence.

[14] Order

14.1 The Applicant's application for the setting aside and substitution of the determination by the Commissioner of the South African Revenue Services ("the Commissioner") regarding the diesel refunds claimed by the Applicant under rebate item 670.04 provided for in the Customs and Excise Act No 91 of 1964 in respect of the first two assessment periods of the Applicant's contractor Close-Up as well as the claims in respect of the Applicant's contractors Ni-Da and Minopex, is dismissed and the determination is upheld.

14.2 The issue of whether the records of the Applicant and its contractors Close-up (in respect of the third period), Alcedopro and Trollope demonstrate with sufficient particularity the entitlement to a diesel refund and the extent thereof in respect of diesel utilized by the said contractors and whether the Commissioner's determination of a refusal thereof should be upheld or not, is referred for the hearing of oral evidence on a date to be allocated by the Deputy Judge President.

14.3 The evidence in respect of the abovementioned referral shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to the following:

14.3.1 Save in the case of those witnesses who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any witness unless it has served on the other party at least 20 days prior to the hearing (in the case of the Applicant) and at least 10 days (in the case of the Respondent) a statement on oath wherein the evidence to be given is set out or the Court, at the hearing permits such person to be called despite the fact that no such statement has been served in respect of his or her evidence.

14.3.2 Either party may subpoena any person to give evidence at the hearing, whether such a person has consented to furnish a statement or not.

14.3.3 The fact that a party has served a statement as envisaged above, shall not oblige such a party to call the witness concerned.

14.3.4 Within 60 days from date of this order each of the parties shall make discovery on oath of all documents relating to the issue referred for the hearing of oral evidence whereafter the rules of court pertaining to discovery, inspection and production of documents as for trials shall apply. These rules shall also apply in respect of any expert evidence which the parties may wish to present.

14.4 Prayers 3 and 8 of the Applicant's notice of motion are refused.

14.5 No order is made in respect of prayers 2, 4, 5, 6 and 7 of the Applicant's notice of motion.

14.6 The incidence of costs (and the scale thereof) incurred up to now are reserved to be determined after the hearing of oral evidence.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 09 & 19 October 2018 and 23 and 24 January 2019

Judgment delivered: 27 March 2019

APPEARANCES:

For the Applicant:	Adv. J.P Joubert SC with Adv. L.I Schafer
Attorney for applicant:	Alant, Gell & Martin Inc., Pretoria
For the Respondent:	Adv. C.E Puckrin SC with Adv. K Kollapen
Attorney for Respondent:	The State Attorney, Pretoria