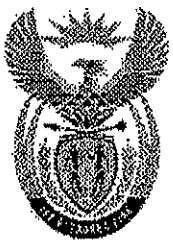

THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 431/06

Reportable

In the matter between

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

and

THE BAKING TIN (PTY) LTD **RESPONDENT**

CORAM: SCOTT, BRAND, LEWIS, MAYA JJA, MHLANTLA AJA

HEARD: 17 AUGUST 2007

DELIVERED: 14 September 2007

SUMMARY: Tariff determination by Commissioner in respect of aluminium containers confirmed: intention of importer as to use not a determinant of objective characteristics of containers.

This case may be referred to as CSARS v The Baking Tin [2007] SCA 100 (RSA)

JUDGMENT

LEWIS JA

[1] When is an aluminium container used for cooking or baking not a kitchen article? That is the question raised in this appeal. More precisely, are aluminium foil containers imported by the respondent, The Baking Tin (Pty) Ltd, table, kitchen or other household articles for the purpose of levying customs and anti-dumping duties under the Customs and Excise Act 91 of 1964? The Baking Tin imported the aluminium containers from Hong Kong as 'catering consumables' which were supplied to manufacturers for the preparation and packaging of pies and other pre-cooked foods. The dispute between the parties centres on the customs tariff applicable to the containers. The Baking Tin contends that they are not dutiable, being consumables. The appellant, the Commissioner, who is charged with the implementation of the Act, determined, on the other hand, that the aluminium containers constituted hollowware for table or kitchen use, dutiable at the rate of 30 per cent and liable to anti-dumping duty.

[2] An appeal to the Commissioner against that determination failed, but an appeal in terms of s 47(9)(e) of the Act to the Cape High Court succeeded. The Commissioner's determination was set aside by Foxcroft J. It is against his decision that the Commissioner now appeals, with leave of this court.

[3] The relevant chapter (76) of the Schedule to the Act is headed 'Aluminium and Articles Thereof'. The heading in issue is 76.15. It reads:

'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:

. . .

7615.19.20 - - - Hollowware for table or kitchen use (*excluding buckets*) - 30%

7615.19.90 - - - Other - - - 20%'

[4] The explanatory notes to 76.15 state that the heading covers the same type of articles as are described in the explanatory notes to headings 73.23 and 73.24, 'particularly the kitchen utensils, sanitary and toilet articles described therein'. Heading 73.23 deals with table, kitchen or other household articles and parts thereof, of iron or steel. The note to 'Table, kitchen or other household articles and parts thereof' state:

'This group comprises a wide range of iron or steel articles, not more specifically covered by other headings of the Nomenclature, used for table, kitchen or other household purposes; it includes the same goods for use in hotels, restaurants, boarding-houses, hospitals, canteens, barracks, etc.'

Further: 'The group includes

(1) Articles for kitchen use such as saucepans, steamers, pressure cookers, preserving pans, stew pans, casseroles, fish kettles; basins; frying pans, roasting or *baking dishes* and plates; . . .

(2) Articles for table use such as trays, *dishes, plates*, soup or vegetable dishes . . .' (my emphasis).

[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*[1] 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

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[1] 1985 (4) SA 852 (A) at 863F-H.

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*[2] Trollip JA said that 'they are not worded with the 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*.[3]

[7] The contentions of The Baking Tin are, first, that the containers imported by them are not durable, and therefore do not fall under 76.15: they are not table, kitchen or other household articles. Second, even if they do fall under the heading, they do not constitute 'hollowware'. The essence of the first argument is that they are not intended for ongoing household use. The aluminium containers are consumables, contends The Baking Tin: they are supplied to manufacturers of food for the purpose of preparing food for the consumer who ordinarily disposes of them once the food is consumed. They cannot thus be classified as kitchen or household articles.

[8] This argument was accepted by Foxcroft J in the high court who considered that the articles described in the notes to 73.23 (above), by contrast, are of a 'permanent or semi-permanent nature'. He said:

'Durability is a feature of all these items and speaks for itself. Obviously, for example, teapots made out of thin aluminium foil would not last very long. When one has regard to the category of items listed, it becomes clear that to call a container usually coming into the kitchen as packaging, a roasting pan after it has fulfilled its primary

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[2] 1970 (2) SA 660 (A) at 676C-D.
[3] 65 (2003) SATC 172 paras 3-9.

purpose, is not only a distortion of language, but a denial of the nature and characteristics of this container.'

The learned judge accordingly found that the articles in question did not fall under tariff heading 76.15 and thus made no finding as to whether the containers constituted hollowware.

[9] The court found that the items imported by The Baking Tin fell under tariff sub-heading 76.16.99.90 – 'Other articles of aluminium .... Other' which attract neither anti-dumping nor customs duty. It thus set aside the Commissioner's determination.

[10] The Baking Tin argues that this finding is correct: the containers are designed for the purpose of packaging and intended for use once, when the consumer uses the food prepared in it, even if the food in the container is cooked or heated up. It contends that these containers are different from those available for use in kitchens where the consumer buys the container and prepares and cooks food in it. It contrasts its imports with those of a local manufacturer which are sold in supermarkets and are 'more durable and therefore more suitable for use in the household and kitchen'. The Baking Tin does not claim that the containers imported by it cannot be used more than once – only that that is not their primary purpose.

[11] There are two difficulties with the finding of the court below. First, nowhere in the tariff heading 76.15 is there any requirement of durability and permanence. Although support for the finding was found by the court in comparing the aluminium containers with the items described in the explanatory notes, which it regarded as items for permanent or semi-permanent kitchen use, there is nothing to suggest that these containers were not durable or at least of a semi-permanent nature, nor that they need to be such in order to be articles for use in a kitchen. Counsel for The Baking Tin argued that the containers were intended to be disposable. He did concede that they could be used more than once when the food initially prepared in

them had been consumed. But that, The Baking Tin contends, was not their primary purpose, which is for the baking of pies and other food, and as packaging for pre-prepared food.

[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.[4] Thus the purpose for which they are manufactured is not a criterion to be taken into account in classification. In *Commissioner, SARS v Komatsu Southern Africa (Pty) Ltd*[5] 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.'[6]

[13] The last sentence of this passage is invoked by The Baking Tin in support of its argument that the intention of the designer, or the use to which the goods are put, may affect what appear to be the objective characteristics of the goods and thus change their classification. It seems to me, however, that the court was suggesting no more than that light may be thrown on the characteristics of the article by subjective factors. The principle remains the same: it is not the intention with which they are made, nor the use to which they may be put, that characterise the containers in question. It is their objective characteristics. Thus the mere fact that the containers are regarded as disposable by The Baking Tin, and perhaps other suppliers and

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[4] See for example, *African Oxygen Ltd v Secretary, Customs & Excise* 1969 (3) SA 391 (T) at 394D-E and 397B-C.
[5] 2007 (2) SA 157 (SCA) para 8. See the further authorities cited in the footnotes to para 8.
[6] See *African Oxygen* above at 397F-G, where the court said that tariff headings may themselves refer to the intention of the importer or prospective user of the goods.

manufacturers in the chain, does not necessarily make them disposable by nature.

[14] The chapter notes set out above do not, as I have said, indicate that in order for the containers to fall under the heading they must be durable or of a permanent nature. And in any event the objective characteristics of the articles do not preclude re-use as a kitchen article. The heading, moreover, includes items such as pot scourers, scouring or polishing pads, and gloves. It is clear to me, therefore, that it was not intended to apply only to rigid articles of a durable nature.

[15] A connected argument raised by The Baking Tin was that in the explanatory notes relating to iron and steel kitchenware and household articles, the items are said to be for household use, and then list a number of other places where they may be used, such as hotels, hospitals, canteens, restaurants . . . 'etc'. The Baking Tin, however, supplies the containers to wholesalers, who in turn supply to manufacturers who use them in 'industrial kitchens', which are not specified in the notes. However, apart from the fact that the notes are not exhaustive, and are but guides to interpreting the headings (*International Business Machines*[7]) they make it plain, by the use of the term 'etcetera' that articles used in other environments may be included. There is thus no merit in this contention. In my view, therefore, the court below was incorrect in finding that the containers did not fall under tariff heading 73.15.

[16] The second question remains: are these containers 'hollowware'? Various dictionary definitions were placed before us. The simplest is in *The New Oxford Dictionary of English* which defines it as 'hollow articles of cookware or crockery, such as pots, kettles and jugs'. Hollowware is to be contrasted with 'flatware', defined (in the same dictionary) as 'relatively flat

[7] The passage cited above.

items of crockery such as plates and saucers'. Counsel for The Baking Tin conceded that the containers are not flatware: their depth differs, but is not insignificant, ranging up to three centimetres in height: they have sides and none is flat. There is no minimum depth that the 'hollow' must have. The aluminium containers are in my view hollowware. Accordingly, the Commissioner's determination in this regard was also correct.

[17] The appeal is upheld with costs. The order of the court below is set aside and replaced by:

"The tariff determination of the imported goods under tariff heading 7615.19.20 is confirmed.

The appeal is dismissed with costs.'

C H Lewis
Judge of Appeal

Concur:
Scott JA
Erard JA
Maya JA
Mhlantla AJA