THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 204/09

In the matter between:

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

and

FASCINATION WIGS (PTY) LTD **Respondent**

Neutral citation: ***CSARS v Fascination Wigs*** **(204/09) [2010] ZASCA 6 (4 March 2010)**

Coram: HARMS DP, LEWIS and LEACH JJA, and THERON and SERITI AJJA

Heard: **16 February 2010**

Delivered **4 March 2010**

Summary: Tariff classification under Customs and Excise Act 91 of 1964: wefts imported for attachment to hair are not prepared for making of a wig or the like and thus fall under tariff heading 67.04 which covers finished items of false hair.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Prinsloo J sitting as court of first instance):

1 The appeal is upheld with costs including those of two counsel.

2 The order of the high court is replaced with the following:

'The applicant's appeal in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964 is dismissed with costs, including the employment of two counsel'.

JUDGMENT

LEWIS JA (Harms DP, Leach JA and Theron and Seriti AJJA concurring)

[1] At issue in this appeal is whether synthetic hair products imported by the respondent, Fascination Wigs (Pty) Ltd (Fascination Wigs), are to be classified as completed products for the purpose of levying customs duty on them, or whether they fall under a tariff heading that attracts no customs duty. Wigs, for example, are dutiable. Are wefts or weaves or braids?

[2] On 6 December 2005 the appellant, the Commissioner for the South African Revenue Service (the Commissioner), acting in terms of s 47(9)(a)(i)(aa) of the Customs and Excise Act 91 of 1964, determined that certain synthetic hair products imported by Fascination Wigs should be classified under tariff heading 6704.19 of Part 1 of Schedule 1 to the Act.

Fascination Wigs appealed against that determination in terms of s 47(9)(e) of the Act. The high court upheld the appeal, and the Commissioner appeals to this court with the leave of the high court.

[3] Fascination Wigs imports a number of natural hair products and synthetic or animal hair. Although initially the parties disputed the classification of human hair imports as well as animal and synthetic hair, the question of the human hair products was not pursued in the high court and we are not concerned with it on appeal. The products in issue fall into two classes: 'weaves' for integration into a person's hair or for gluing on to a scalp, and 'braiding fibres' for integration into hair by braiding (plaiting) it. Weaves are also referred to as wefts. Indeed, the term weave is but the American word for a weft. A weft, in general terms, comprises fibres woven or stitched together. In the world of hairdressing, a weft comprises a number of fibres (natural or acrylic) stitched together to form tufts. They are used in making wigs or are attached to a person's own hair by different processes.

[4] The essence of the dispute is whether the wefts in question, which are attachable by braiding or weaving into a person's natural hair, or gluing them to the scalp, are to be classified, in broad terms, as items used for making up a wig, or as completed or finished products. If they fall into the first category they are not dutiable. In the second category they would attract duty. Naturally, Fascination Wigs contends that they are items used in making up wigs, or the like, and the Commissioner contends that they are completed products that are not themselves changed in any way after importation, even

though a complex and time-consuming process may be required to attach them to hair or to a head.

[5] The specific tariff categories in issue are in chapter 67 of Schedule 1 of the Act. Fascination Wigs contends that the wefts are to be classified under tariff heading 67.03, while the Commissioner has determined that they fall under 67.04.

[6] The headings and relevant explanatory notes are as follows:

'67.03 - Human hair, dressed, thinned, bleached or otherwise worked; wool or other animal hair or other textile materials, *prepared for use in making wigs or the like*' (my emphasis).

The explanatory notes include the following (excluding references to human hair):

'This heading also includes wool, other animal hair (eg, the hair of the yak, angora or Tibetan goat) and other textile materials (eg, man-made fibres), prepared for use in making wigs and the like, or dolls' hair. Products prepared for the above purposes include, in particular:

(1) Articles consisting of a sliver, generally of wool or other animal hair, interlaced on two parallel strings and having the appearance of a plait. These articles (known as "crape") are normally presented in long lengths and weigh about 1 kg.

(2) Waved (curled) slivers of textile fibres put up in small bundles each containing a length of 14 to 15 m and weighing about 500g.

(3) "Wefts" consisting of man-made fibres dyed in the mass, folded in two to form tufts which are bound together, at the folded ends, by a machine-made plait

of textile yarns approximately 2 mm wide. These “wefts” have the appearance of a fringe in the length.’

67.04 – ‘Wigs, false beards, eyebrows and eyelashes, switches and the like, of human or animal hair or of textile materials; articles of human hair not elsewhere specified or included.

-Of synthetic textile materials:

6704.11 – Complete wigs

6704.19 – Other

6704.20 – Of human hair

6704.90 – Of other materials’

The explanatory notes state:

‘This heading covers:

(1) Made up articles of postiche of all kinds manufactured of human or animal hair or of textile materials. These articles include wigs, beards, eyebrows and eyelashes, switches, curls, chignons, moustaches and the like. They are usually of high-class workmanship intended for use either as aids to personal toilet or for professional work (eg, theatrical wigs).

. . . .’

[7] The principles applicable in determining whether articles fall under a particular classification are well-settled. I shall not rehearse them, save to refer to the basic principles briefly. In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*[1] Nicholas AJA said:

'The process of classification

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

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.'

[8] A court must also have regard to the General Rules for the Interpretation of the Harmonized System (the Brussels Notes),[2] Rule 1 of which states that 'for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions'.

[9] The explanatory notes are guides to classification and interpretation. In *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd*[3] 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'. On the general principles of classification see too *Commissioner for Customs and Excise v Capital Meats CC (in liquidation)*;[4] *Lewis Stores (Pty) Ltd v Minister of Finance & another*;[5] *CSARS v Komatsu Southern Africa (Pty) Ltd*[6] and *CSARS v The Baking Tin*

[2] Section 47(8)(a) of the Act.
[3] 1970 (2) SA 660 (A) at 676C-D.
[4] 1999 (1) SA 570 (SCA) 573A-E.
[5] 65 (2003) SATC 172 para 8.
[6] 2007 (2) SA 157 (SCA) para 8.

(Pty) Ltd.[7] These cases all affirm that when classifying imported goods one must have regard to their objective characteristics at the time of importation.

[10] The parties accept that the essential difference between tariff headings 67.03 and 67.04 is that the former covers 'products prepared for use' in making wigs or the like – that is, *components* of articles such as wigs, hairpieces, switches, false eyebrows, beards and moustaches, whereas the latter covers the *complete* articles. The components that are non-dutiable have been processed or worked upon to a point where they can be used in the making of articles of postiche, as referred to in the explanatory notes to 67.04. 'Postiche' means false hair. In the Shorter Oxford English Dictionary it is defined, inter alia, as 'an imitation substituted for the real thing'.[8]

[11] The Commissioner contends that the wefts or braids imported by Fascination Wigs are complete articles. Nothing further need be done to them for use. Fascination Wigs, on the other hand, maintains that the articles need further working in order to constitute postiche. The fibres cannot simply be attached to the head. They must be woven or braided onto a person's hair, or glued onto the scalp, with skill and expertise. The final appearance of the false hair is like a wig – very different from the product as imported. And counsel for Fascination Wigs argues that the conclusive words in the heading of 67.03 are 'prepared for use in making wigs *or the like*' (my emphasis). The contention is thus that when a skilled hairdresser attaches the fibres to a

[7] 2007 (6) SA 545 (SCA) paras 5 and 6.
[8] Third ed 1988. The word does not appear in the 10th ed of the Concise Oxford English Dictionary (2002).

person's head he or she is preparing something like a wig and that the final appearance is postiche.

[12] The argument is based on the evidence of hairdressers and wigmakers that the process of attachment may be complex and time-consuming, and that the finished work is like a wig. It is indeed so that the attached components – the finished appearance – may look very different from the products as imported. But the question remains whether the fibres in issue are 'prepared for use in making wigs or the like'. The Commissioner contends that they are not: they are complete products which undergo no process themselves. They are not used for making a wig or the like. The method of attachment, and the skill and time required to weave or glue the fibres onto the person's hair or head, are irrelevant. A new product does not come into being.

[13] The Commissioner contends further that although the process of attachment of the fibres (the braids and wefts) may be complex, the products are similar in effect to the false curls, switches, chignons, eyebrows, eyelashes, beards and moustaches referred to in 67.04. They are not components of something else, and are not prepared for use in making something like a wig.

[14] The high court found that the evidence of the manufacturer of the fibres (Mr Chan Kwok Keung of Evergreen Products Factory Ltd (Evergreen) in China) supported Fascination Wigs' contention that the articles should fall under 67.03: they were materials prepared for use in making wigs or the like.

[15] However, the evidence of Kueng, as argued by counsel for the Commissioner, does not support that finding. He said (in a replying affidavit to that of Ms Reinette Cremore for the Commissioner) that Fascination Wigs imports single wefts, with a single line of stitching, comprising a plait. Evergreen also manufactures, he stated, 'wigs from both single and double wefts'. The double wefts used to make wigs 'are not similar to the double wefts imported by the Applicant [Fascination Wigs]'.

[16] Keung continued:

> 'The double wefts imported by the Applicant are stitched differently in that the weft when doubled is not stitched directly on top of each other, it is stepped one on up and one down. However, if Evergreen should ever use the double wefts imported by the Applicant to make wigs, we would stitch the wefts directly on top of each other, which in my opinion would give additional volume to the design of the wig.
>
> The double wefts made by Evergreen for the Applicant are specifically made according to the Applicant's preference, in that a single weft is folded over and the weft is then sewed so that one weft is sewn above the other. Notwithstanding the latter, I maintain that the product remains a weft and confirm that it is as simple as picking the stitch to turn the double weft into a single weft.'

[17] Fascination Wigs relied heavily on the fact that explanatory note 3 to heading 67.03 refers to and defines wefts, arguing that certain of the products it imports fall within that definition. This begs the question. The wefts referred to in the definition must still comply with the heading which requires that they

are prepared for use in making wigs and the like – which is not the case here. In any event, the term weft on its own has no significance. Wefts are used to make wigs, and are expressly referred to for such purpose in the explanatory notes to 67.03, set out earlier.

[18] There is no reference to wefts in 67.04. But, as I have said, a weft is no more than a collection of fibres woven or stitched together and may be folded to form tufts. And it is not disputed that braids are also wefts. The question is not whether wefts are referred to in the explanatory notes to tariff heading 64.04. It is whether, objectively, the wefts in issue – and not wefts in general – are themselves complete and can be used without being changed or processed in any way.

[19] Keung's evidence was that if Fascination Wigs wished to use Evergreen wefts for making up wigs, it would make a product that is different from that which they actually do supply. The wefts that Evergreen supplied to Fascination Wigs, and that are in question, are not, he said, suitable for making wigs.

[20] Nor are these wefts actually used for making wigs. They are used as attachments to a person's hair or head, in the same way as are switches or chignons. The complexity of the manner of attachment and the ultimate appearance when the attachment is completed, does not change their essential nature. That seems to me to be conclusive of the dispute. The

articles were correctly classified by the Commissioner as falling under tariff heading 67.04.

[21]

1 The appeal is upheld with costs including those of two counsel.

2 The order of the high court is replaced with the following:

'The applicant's appeal in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964 is dismissed with costs, including the employment of two counsel'.

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C H Lewis

Judge of Appeal

APPEARANCES

APPELLANTS:	A Meyer SC (with him I Enslin) Instructed by State Attorney, Pretoria; State Attorney, Bloemfontein.
RESPONDENTS:	C E Puckrin SC (with him I Ellis) Instructed by Marlon Shevelew & Associates, Cape Town; Webbers, Bloemfontein.