

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 11185/99

In the case between:

THE HERITAGE COLLECTION (PTY) LTD Applicant

and

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE** 1st Respondent

THE MINISTER OF FINANCE 2nd Respondent

JUDGMENT: 23 October 2000

VAN REENEN, J:

The Applicant carries on a mail order business from Claremont, Cape Town.

The first defendant is the official charged with the administration of the provisions of the Customs and Excise Act, No. 91 of 1964 (the Act).

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The second Respondent is the Minister responsible for the administration of the Act.

The Applicant has since 1991 imported various devices from certain Asian countries, the stated purpose whereof is healing by means of magnets applied to various parts of the human body. The manufacturers of these devices claim that magnetic fields that emanate from such magnets cure or alleviate, inter alia, fibrositis, arthritis, rheumatism, muscular cramps and spasms, stress-induced tension and circulatory problems.

The applicant concedes that the claimed attributes of these devices are controversial.

The applicant during or about July 1998 imported from Taiwan, through Cape Town as the port of entry, a quantity of pairs of magnetic in-soles.

First respondent on 20 October 1998 determined that the said in-soles should be classified under the tariff heading 6406.99.60 **“other removable fittings for footwear”** attracting an advalorem customs duty of 20%.

The applicant contends that the said in-soles should be classified under tariff heading 8505.19 (5) **“Permanent magnets and articles intended to become permanent magnets after magnetisation”** attracting no customs duty at all.

The applicant, in terms of section 47(9)(e) of the Act, has launched an appeal on notice of motion (See: **Metmak (Pty) Ltd v Commissioner of Customs and Excise** 1984(3) SA 892 (T) at 895 G – 896 C), in which the following relief is claimed: -

- “A) That the determination of the First Respondent, made on 20 October 1998, that certain magnetic inner soles entered for home consumption by the Applicant be classified as **“other removable fittings, for footwear”**, under tariff heading 6406.99.60 of Schedule 1 to the Customs and Excise Act, No 91 of 1964 (“the Act”), be set aside;
- B) that such determination be replaced by a classification of such goods as **“permanent magnets”** under tariff heading 85.05.19(5) of Schedule 1 to the Act;
- C) That this Court grant the Applicant such alternative relief as may be deemed fit;
- D) That the First Respondent pay the costs of the application.”

First respondent opposes the application and has filed answering affidavits in support of the correctness of the determination made by it.

Second respondent abides the court's decision.

The in-soles that form the subject-matter of this appeal are roughly shaped in the form of a foot. Each in-sole consists of two layers. The bottom layer is made up of a smooth tightly woven green fabric mounted on a thin black rubber backing. The top layer is made up of a soft loosely woven absorbent green fabric similarly mounted on a thin black rubber backing. The two layers of rubber backing have been glued together so that there is green fabric on both sides of every in-sole. The upper half of each in-sole, ie that side with the absorbent fabric, has eight holes corresponding with the positions of an equal number of dome-shaped permanent ferrite magnets of different sizes that have been affixed to the rubber backing of the bottom layer of the in-sole by means of double-sided tape. The shape of an in-sole allows it to be placed inside a shoe with the magnets facing upwards.

The manufacturer of the in-soles, on the packaging thereof, claims that the magnets therein embedded stimulate certain reflexology points on the soles of the feet resulting in benefits to other parts of the body. The words "Health Insole" in yellow against a dark blue background feature prominently on the front as well as the back of the packaging. The figures and words "16 magnets" in smaller white lettering appear underneath.

The in-soles retail at R55 per pair compared to conventional in-soles that retail at approximately R10 per pair.

In terms of section 47(8)(d) of the Act the interpretation of Part 1 of Schedule 1 shall be subject to the Explanatory Notes to the Harmonized System and to the Customs Co-operation Council Nomenclature issued by the Customs Co-operation Council, Brussels from time to time.

Schedule 1 of the Act under the heading "**Customs, Excise, Advalorem, Levies: General Notes**" contains general rules for its interpretation, the first whereof was held by Trollip JA in **Secretary for Customs and Excise v Thomas Barlow & Sons (Pty) Ltd** 1970(2) SA 660 (A) at 675 in fine - 676 A, to render the

relevant headings and section- and chapter notes of paramount consideration in determining which classification as between headings should apply in any particular case.

Nicholas AJA in **International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise** 1985(4) Sa 852 A at 863 G said that the classification as between the different headings entails the following steps:

"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."

Counsel for the parties were in agreement that, having regard to the nature and characteristics of the in-soles that form the subject-matter of this appeal, the following tariff headings were applicable to the classification thereof –

- a) heading 64.06: **Parts of footwear (Including Uppers Whether or not Attached to Soles (Excluding Outer Soles)); Removable In-soles, Heel Cushions and Similar Articles; Gaiters, Leggings and Similar Articles, and Parts Thereof:**

Subheading 6406.99 = Of other materials:

Subdivision 6406.99.60 - Other removable fittings for footwear

- b) heading 85.05: **Electro-magnets; Permanent Magnets and Articles Intended to Become Permanent Magnets After Magnetisation; Electro-magnetic or Permanent Magnetic Chucks, Clamps and Similar Holding Devices; Electro-magnetic Couplings, Clutches and Brakes; Electro-magnetic Lifting Heads:**

Subheading 85.05.1 - permanent magnets and articles intended to become permanent magnets after magnetisation.

Heading 85.05 contains the following note:

"The heading does not cover

- (a) ...
- (b) Electro-magnets, permanent magnets or magnetic devices of this heading, when presented with machines, apparatus, toys, games etc., of which they are designed to form part (classified into those machines, apparatus etc.)."
- (c) ...
- (d) ... "

That note excludes from heading 85.05 the electro-magnets, permanent magnets or the magnetic devices therein mentioned if

they form part of the design of a machine, apparatus, toy or game and are presented therewith, in which event they are to be classified with such machine, apparatus, toy or game.

It is clear that the permanent ferrite magnets that are embedded in the in-soles that form the subject-matter of this appeal, form an integral part of the design thereof and provide the feature that sets them apart from conventional in-soles.

Do the in-soles that form the subject-matter of this appeal fall within the ambit of the aforementioned exclusionary note?

The answer to that question depends on the function assigned to the use of the abbreviation: "etc" therein.

Advocate Duminy SC, who with advocate Newdigate appeared for the applicant, argued that it does not find application. He submitted that the in-soles in question are not "machines", "apparatus", "toys" or "games" and that the use of the abbreviation for "etcetera", which according to the **Collins English Dictionary** means "or the like", cannot be interpreted as referring to anything other than articles similar to the ones enumerated.

Advocate Williams, who appeared for the first respondent, submitted that the *ejusdem generis* rule finds application only when words that form part of a class are followed by general words, in which event, the latter may be read as referring to other things of the same class and that as the words "machines, apparatus, toys, games" are not species of a genus the rule does not apply.

According to the Shorter Oxford Dictionary "etcetera" means "and the rest, and so forth, and so on, indicating that other things which can be inferred are included in the statement; a number of unspecified things or (improp.) persons".

In my view, the abbreviation "etc", in the context of the said explanatory note, has been used as a catch-all for unspecified things which, as part of their design, contain electro-magnets, permanent magnets or magnetic devices referred to in heading 85.05 and are presented therewith. Such magnets could conceivably form part of the design of a multitude of articles: hence the need to have made use of an all-embracing term. There appears to be no basis in principle or logic why only the enumerated categories of articles should be excluded from the

said heading and not also others that share a common attribute namely, that they contain magnets as part of their design.

As the in-soles that form the subject-matter of this appeal contain permanent ferrite magnets as part of their design they, in my view, are excluded from classification under heading 85.05.

That conclusion results therein that explanatory note (2) to tariff heading 85.05 which states that

"Permanent magnets remain classified here whatever their use"

does not apply to magnets that fall within the ambit of clause (b) of the exclusionary note and accordingly is not of any assistance in the classification of the in-soles that form the subject-matter of this appeal.

As the said in-soles cannot be classified under heading 85.05 the only appropriate classification, in my view, is under tariff heading 6406.99.60.

In the premises the appeal fails and the application is dismissed with costs.

J. van Reenen

VAN REENEN, J.