

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 2008-11-14

UNREPORTABLE

Case Number: A1031/06

In the matter between:

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

Appellant

and

DURO PRESSINGS (PROPRIETARY) LIMITED

Respondent

JUDGMENT

SOUTHWOOD J

[1] This appeal is concerned with the correct classification of steel plates (which can also be described as steel sheets or panels) ('the goods') for the purposes of Schedule 1 to the Customs and Excise Act 91 of 1964 ('the Act'). The goods were imported into South Africa on 27 July 2004 and the respondent's clearing agents declared the goods under tariff heading 7210.70. The customs authorities confirmed that the classification of goods under tariff heading 7210.70 was correct and because the goods were imported from Australia and the width

exceeded 600 mm they were liable to anti-dumping duties in terms of Schedule 2 to the Act. As a result the respondent was obliged to pay an anti-dumping duty, value added tax and a penalty. The respondent paid the duty, tax and penalty under protest and has continued to import the goods and pay the duty under protest.

- [2] The respondent appealed in terms of section 47(9)(e) of the Act against the appellant's (Commissioner's) determination, seeking an order that the Commissioner's determination be set aside and substituted with a determination that the goods be classified under tariff heading 7308.30 alternatively tariff heading 7308.90.90 or such other tariff heading as the court may deem fit. The court *a quo* upheld the appeal and found that the correct tariff heading is 7308.30. (It is common cause that the order erroneously refers to tariff heading 73.10.30). With the leave of the court *a quo* the Commissioner appeals against the judgment and order.
- [3] The respondent is a South African company which manufactures, supplies and installs steel garage doors for single and double garages. It makes the garage doors with the goods which it imports from Australia. The respondent obtains the goods from an Australian company, B & D Australia (Pty) Ltd ('B & D'). The respondent provides B & D with specifications for the goods and B & D manufactures the goods in accordance with these specifications.

- [4] B & D manufactures the goods from a specialised steel called G2NS which is unobtainable in South Africa and which it sources from suppliers in Australia, New Zealand, Korea and other Asian countries. The steel is supplied in coils of flat-rolled sheets of non-alloy steel which is pre-painted and coated with plastic. B & D decoils and levels the steel and cuts it to the respondent's specified section length. It then applies a plastic film to the plates to protect the painted surface from being scratched or damaged during installation. B & D then imprints an imitation wood grain pattern into each plate using a mould which is pressed against the steel plate under a load of 20 tons. On some of the plates which are required for particular garage doors B & D imprints a square pattern. It does this with special metal dies which are pressed against the plates in a stamping press under a load of 400 tons. The plates can be bent along their length to form 'male' and 'female' interlocking features. Otherwise they are supplied as flat plates. Previously the respondent imported plates which had already been bent to form the interlocking features. However, to reduce shipping costs the respondent decided to import flat plates as substantially more flat plates fit into a container than bent plates.
- [5] After importation the respondent uses the plates to make complete garage doors. It does this by installing the plates in the door frame. First, each plate is bent along its length to produce the female edge on the one side and the male edge on the opposite side. On some single doors two additional small lines are impressed in the middle along the

length. Second, holes are drilled at various points to secure the steel hinge reinforcing unit. Third, polyurethane sealant is applied onto the side of each steel reinforcing column which lies vertically against the plate. The reinforced plates are then ready to be joined into a complete garage door. The garage door assembled consists of a number of bent plates which have been joined to each other. Because of the wood grain pattern impressed on the plates the door has the appearance of a wooden garage door. The respondent supplies its customers with complete garage doors.

- [6] Imported products must be classified in the form in which they were presented for importation. The Commissioner contends that the most appropriate tariff heading is 7210.70. The respondent contends that the most appropriate tariff heading is 7308.30.
- [7] Classification of internationally traded goods takes place in accordance with the Harmonized System or 'Nomenclature' which consists of headings and subheadings and their related numeral codes pertaining to all international goods as well as the section, Chapter and subheading notes and the general rules for the interpretation of the Harmonized System.
- [8] The Harmonized System is divided into 'Sections' which are divided into 'Chapters'. Sections and Chapters have titles to indicate the categories or types of goods covered by them. Each Chapter contains

the tariff headings and tariff subheadings which identify the specific goods to be classified: i.e. each heading and subheading consist of a description of the goods covered by the tariff heading and tariff subheading as well as the relevant corresponding sequential numbered code. Each Section and Chapter contains notes referred to as 'Section Notes' and 'Chapter Notes'. The Harmonized System also contains General Interpretative Rules the first of which provides:-

'The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the heading and any relative section chapter notes and, provided such headings or rules do not otherwise require, according to the following provisions.'

In addition, there are Explanatory Notes to the Harmonized System which are amended from time to time to take account of changes in technology and international trade patterns. These Explanatory Notes, generally referred to as the 'Brussels Notes', are also used to interpret or explain the tariff headings and tariff sub-headings. See e.g. **Secretary, Customs & Excise v Thomas Barlow & Sons 1970 (2) SA 660 (A)** at 675D-676F.

[9] In **International Business Machines SA (Pty) Ltd v Commissioner of Customs and Excise 1985 (4) SA 852 (A)** ('the IBM case') at 863G-H the court said:

'Classification as between headings is a three-stage process: 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 these goods; and third, the selection of the heading which is most appropriate to such goods.'

Interpretation

- [10] As already mentioned, the first general interpretative rule states that the titles of sections, chapters and sub-chapters are provided for ease of reference only: for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. The Brussels Notes are not regarded as peremptory injunctions. What is required is that the interpretation of the relative headings and section and chapter notes shall be conformity with and not contrary to the Brussels Notes – **see section 47(8)(a) of the Act; *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 676C-D; the IBM case at 864A-C.**
- [11] The competing tariff headings, 7210.70 and 7308.30, fall under section XV of Part 1 of the Schedule. ('Base Metals and Articles of Base Metals'). Chapter 72 covers 'Iron and Steel' and chapter 73 covers 'Articles of Iron or Steel'.

[12] Tariff heading 72.10 covers 'FLAT-ROLLED PRODUCTS OF IRON OR NON-ALLOY STEEL, OF A WIDTH OF 600 MM OR MORE, CLAD, PLATED OR COATED.' Tariff sub-heading 7210.70 covers 'PAINTED, VARNISHED OR COATED WITH PLASTICS'. According to chapter 72 chapter note 1(k) the expression 'flat-rolled products' means, *inter alia*, -

'Rolled products of solid rectangular (other than square) cross-section, which do not conform to the definition at (i)(j) above in the form of:

- coils of successively superimposed layers, or
- straight lengths, which if of a thickness less than 4.75 mm are of a width measuring at least 10 times the thickness or if of a thickness of 4.75 mm or more are of a width which exceeds 150 mm and measures at least twice the thickness.

Flat-rolled products include those with patterns in relief derived directly from rolling (for example, grooves, ribs, chequers, tears, buttons, lozenges) and those which have been perforated, corrugated or polished, provided that they do not thereby assume the character of articles or products of other headings.'

[13] The last part of the note quoted extends the meaning of 'flat-rolled products' at the beginning of the note to include –

- (a) those with patterns in relief derived directly from rolling (i.e. the pattern must be higher than the plane of the sheet and must be the result of rolling); and

- (b) those which have been perforated (i.e. pierced with one or more holes), corrugated (i.e. bent into regular curved folds or grooves) or polished (i.e. made smooth or glossy by friction) subject to the proviso –

‘(T)hat they do not thereby assume the character of articles or products of other headings.’

It is clear from this proviso that a flat-rolled product can lose its character as such and assume the character of articles or products of other headings. This is consistent with the General Note –

‘This Chapter covers the ferrous metals, i.e. pig-iron, spiegeliesen, ferralloys and other primary materials (sub-chapter I), as well as certain products of the iron and steel industry (ingots and other primary forms, semi-finished products and the principal products derived directly therefrom) of iron or non-alloy steel (sub-chapter II), of stainless steel (sub-chapter III), and of other alloy steel (sub-chapter IV).

“Further worked articles, such as castings, forgings, etc, and sheet piling, welded angles, shapes and sections, railway or tramway construction material and tubes are classified in Chapter 73 or, in certain cases, in other Chapters.”

[14] Tariff heading 73.08 covers 'STRUCTURES (EXCLUDING PRE-FABRICATED BUILDINGS OF HEADING NUMBER 94.06) AND PARTS OF STRUCTURES (FOR EXAMPLE, BRIDGES AND BRIDGE-SECTIONS, LOCK-GATES, TOWERS, LATTICE MASTS, ROOFS, ROOFING FRAME-WORKS, DOORS AND WINDOWS AND THEIR FRAMES AND THRESHOLDS FOR DOORS, SHUTTERS, BALLUSTRADES, PILLARS AND COLUMNS), OF IRON OR STEEL; PLATES, RODS, ANGLES, SHAPES, SECTIONS, TUBES AND THE LIKE, PREPARED FOR USE IN STRUCTURES, OF IRON AND STEEL.' Tariff heading 7308.30 specifies 'DOORS, WINDOWS AND THEIR FRAMES AND THRESHOLDS FOR DOORS.'

[15] The heading note states that –

'This heading covers complete or incomplete metal structures, as well as parts of structures. For the purpose of this heading, these structures are characterised by the fact that once they are put in position, they generally remain in that position. They are usually made up from bars, rods, tubes, angles, shapes, sections, sheets, plates, wide flats including so-called universal plates, hoop, strip, forgings or castings, by riveting, bolting, welding etc. ...

Apart from the structures and parts of structures mentioned in the heading the heading also includes products such as:

Pit head frames ... large-scale shelving for assembly and permanent installation in shops, workshops, storehouses etc;

stalls and racks; certain protective barriers for motorways, made from sheet metal or from angles, shapes and sections.

The heading also covers parts such as flat-rolled products, “wide flats” including so-called universal plates, strip, rods, angles, shapes, sections and tubes, which have been prepared (e.g., drilled, bent or notched), for use in structures.’

[16] According to the heading 73.08 and the heading note, plates and sections of iron and steel which are prepared for use in structures are covered. According to the note, even flat-rolled products (i.e. products falling within the definition already referred to) will be covered if ‘prepared for use in structures’.

[17] For the purposes of customs classification of goods the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance is decisive. See ***Commissioner, SARS v Komatsu Southern Africa (Pty) Ltd 2007 (2) SA 157 (SCA)*** at 160F-G. Generally, the subjective intention of the designer or what the importer does with the goods after importation are irrelevant considerations. However, they may become relevant in determining the nature, characteristics and properties of the goods – see ***Commissioner, SARS v Komatsu Southern Africa (Pty) Ltd supra*** at 161A-B. Evidence may always be received as to the nature, form, character and functions of the goods – see ***Secretary for Customs and Excise v Thomas Barlow & Sons Ltd 1970 (2) SA 660 (A)*** at 677B-E; ***Autoware (Pty) Ltd v Secretary for Customs and***

Excise 1975 (4) SA 318 (W) at 321H-322A; **Commissioner, SARS v Komatsu Southern Africa (Pty) Ltd supra** paras 10 and 13.

[18] There was some debate as to whether the evidence relating to the manufacture of the goods in Australia and the purpose for which the goods were made is admissible for the purpose of classification. The appellant's counsel relied on statements in **African Oxygen Ltd v Secretary for Customs and Excise 1969 (3) SA 391 (T)** at 397B-C and 397G. These passages do not assist the appellant. At 397B-C the court said that it was the court's duty to exclude from consideration the court's knowledge of the importer's purposes and intentions, as well as those of the supplier 'insofar as they may possibly be gathered from invoices, correspondence or a name or description applied to the goods'. At 397G the court merely stated that the relevant heading (in that case) did not make the intention of the importer or prospective user of the goods the criterion for classification: i.e. the court clearly recognised that the wording of the heading could do so. In my view this dispute does not directly affect the evidence tendered as to the nature, characteristics and functions of the goods. It is clear from the cases referred to that such evidence may be received to explain to the court what, objectively, it is dealing with. It seems obvious that in order to determine whether the goods are rolled-steel products evidence would be necessary to show that they are indeed rolled-steel products. Similarly, if the goods are cut according to specified dimensions and imprinted with patterns so that they can be used for a specific

purpose or function evidence can be led to show this. After all, on importation, all that the customs authorities see is a number of steel plates of a uniform size imprinted with an imitation wood grain and/or square pattern.

Nature and characteristics of the goods

- [19] The goods consist of steel plates cut according to specified dimensions from rolled steel, imprinted with an imitation wood grain and/or square pattern and coated on the pattern side with a plastic film. The plates are made in this way to be installed in steel garage doors for single and double garages. That is their only function.

Heading most appropriate to the goods

- [20] The first question to be decided is whether the goods are covered by tariff heading 7210.70 read with Chapter Note 1(k). The chapter note is crucial as it provides the meaning for 'flat-rolled products'. For present purposes it is only necessary to consider the last paragraph of the note already referred to. It is common cause that only the first category is relevant as the plates are not perforated, corrugated or polished. During argument the appellant's counsel conceded that the appellant could not contend that the relief patterns (i.e. the imitation wood grain and square patterns) 'derived directly from rolling'. The evidence shows clearly that the patterns are imprinted in a separate

process after, and distinct from, rolling. In my view the concession was properly made and that means the goods cannot be classified under tariff heading 7210.70. Strictly speaking, that is the end of the enquiry. Nevertheless, the other reasons for excluding the goods from tariff heading 7210.70 will be considered.

[21] The proviso to the chapter note 1(k) provides that flat-rolled products with patterns in relief derived directly from rolling must not thereby assume the character of articles or products of other headings. The imprinting of the patterns on the goods alters their appearance to such an extent that it is clear that they are to serve a specific purpose. This can be seen from the relevant photographs. In my view this is sufficient to bring the goods within the ambit of tariff heading 7308.30. According to the relevant note the tariff heading covers plates as well as flat-rolled products 'which have been prepared for use in structures'. It is clear from the evidence that the goods have been prepared for use in structures. In my view the most appropriate tariff heading is 7308.30 and the finding of the court in this regard was correct.

[22] Finally it seems clear that even if the goods could be covered by the two contending tariff headings the provisions of Rule 3(a) of the General Rules for Interpretation would be decisive. Tariff heading 7308.30 provides the more specific description of the goods and must be preferred.

- [23] The parties agree that the order of the court *a quo* erroneously refers to tariff heading 73.10.30 and should have referred to tariff heading 7308.30 and that the order must be amended even if the appeal is unsuccessful. They also agree that the costs of two counsel are justified.

Order

- [24] I The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel;
- II Paragraph 2 of the order of the court *a quo* is amended to read as follows:

- ‘2. The determination that the applicant’s product be classified under tariff heading 72.10.70 is set aside and substituted with the following:

“The applicant’s product be classified under tariff heading 7308.30”.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

I agree

A.P. LEDWABA
JUDGE OF THE HIGH COURT

CASE NO: A1031/06

HEARD ON: 5 November 2008

FOR THE APPELLANT: ADV. E.W. DUNN SC
ADV. T. KHATRI

INSTRUCTED BY: Mr D.C. du Toit of the State Attorney

FOR THE RESPONDENT: ADV. A.P. JOUBERT SC
ADV. C.J. McASLIN

INSTRUCTED BY: Mr. A. Suliman of MacRobert Inc.

DATE OF JUDGMENT: 14 November 2008