Reportable.

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No 17663/98

In the matter between:

DE BEERS MARINE (PTY) LTD	First Applicant
ADDAX BV GENEVA BRANCH	Second Applicant
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
CALTEX OIL (SA) (PTY) LTD	Second Respondent
COCKETT MARINE OIL AND TRADING LTD	Third Respondent
STURROCK SHIPPING (PTY) LTD	Fourth Respondent

JUDGMENT DELIVERED ON 6 DECEMBER 2000

Duminy, A.J.

1. The main issue in this application is whether fuel levy and excise duty in terms of the Customs and Excise Act, 91 of 1964 (hereafter called the Act), are payable on fuel delivered by the MV *Argun* to the first applicant's fleet

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of diamond mining and exploration vessels as ships' bunkers on three voyages during April to August 1997.

2. The first applicant, De Beers Marine (Pty) Ltd (to which I shall refer as De Beers Marine) owns a fleet of six mining, survey and prospecting vessels that operate off the coast of South Africa and Namibia. It uses those vessels to provide contracting and consulting services in the exploration, evaluation, mining and management of marine diamond deposits. Four of them carry vertical drilling equipment for the recovery of diamond-bearing gravels from the seabed. A fifth one uses a seabed crawler for that purpose and an airlift suction device conveys the gravels from the crawler to the vessel. The mining operations of these vessels are described in the founding affidavit as follows:

"The mining operations of these vessels are conducted in what are termed 'blocks' and 'sub-blocks'. Marine concessions are divided in a grid pattern of blocks. Each block is divided into sub-blocks in extent 50m x 50m. A mining vessel will complete drilling operations in a sub-block before moving to the next sub-block. The vessel drops four anchors, two ahead and two astern. Drilling is done whilst the vessel is so positioned. In each sub-block a number of holes are drilled in overlapping patterns so as to ensure that the entire block is covered. The vessel is moved within the sub-block into new positions by using its anchor chains and/or its own engines which are always kept running. Drilling of each hole in the normal course of events takes approximately 15 minutes whereafter the vessel is repositioned.

"The vessels sometimes spend more than two years at sea before returning to Cape Town (their port of registration) for major refits, overhauls or repairs."

3. The sixth vessel of the fleet, the *Zealous*, is a geosurvey vessel, which collects technical information by means of side-scan sonar, seismic measurement, core sampling and visual survey.

4. Each vessel is equipped with a helicopter-landing pad. Changes of crew, supplies and stores are airlifted to the vessels or delivered by supply ships. Bulk supplies of drill pipes, plant, spares and so forth are delivered by tug. Refuelling takes place at the rendezvous point mentioned below. The De Beers Marine vessels steam to that point from wherever they are working to take on bunkers.

5. De Beers Marine purchases its supplies (including bunker fuel) from Cockett Marine Oil and Trading Ltd, the third respondent (hereafter called Cockett). Cockett employs the second applicant, Addax BV (hereafter called Addax), a Swiss company that engages in such offshore bunkering and provisioning, to deliver the required supplies to the De Beers Marine fleet. One of the vessels used for that purpose is the *Argun*, which Addax operates off the coast of West Africa from Cape Town to the bulge.

6. By arrangement the *Argun* delivers supplies to the De Beers Marine fleet at a point approximately 50 nautical miles off the coast and on the South African side of the ocean border between South Africa and Namibia. In this case it is called the **"rendezvous point"**. De Beers Marine chose the rendezvous point after discussions with the South African Department of Transport relating to pollution control considerations. Although most of its fleet operates above the Namibian continental shelf most of the time, it preferred to have deliveries made where it would have to deal with the South African rather than the Namibian authorities if a pollution problem arose. Its vessels steam to the rendezvous point from wherever they are engaged to be refuelled and return to their operational areas thereafter.

7. The rendezvous point is situated outside the territorial waters of the Republic of South Africa but within its exclusive economic zone as defined in the Maritime Zones Act, 15 of 1994. That act provides that the sea within a distance of 12 nautical miles from certain shore baselines shall be the territorial waters of the Republic, and the exclusive economic zone is defined as the sea beyond the territorial waters but within a distance of 200 nautical miles from the baselines.

8. The bunker fuel with which this case is concerned was purchased by Addax from Caltex Oil (SA) (Pty) Ltd (hereafter called Caltex), the second respondent, in Cape Town. Caltex stored it in a customs and excise warehouse approved by the Commissioner for the South African Revenue Service, the first respondent, under s.19 of the Act. In terms of s.20(4) of the Act no goods which have been stored in a customs and excise warehouse may be taken or delivered from it except in accordance with the rules made under the Act and upon due entry for one or other of the following purposes:

> **"(a) home consumption and payment of any duty due thereon;**
>
> **(b) rewarehousing in another customs and excise warehouse or removal in bond as provided in section 18;**
>
> **(c) (deleted)**
>
> **(d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft)."**

9. As appears from subsections 20(4)(a) and (d) quoted above, whether or not duty is payable depends on whether the bunkers were removed for **"home consumption"**, in which event duty and fuel levy are payable, or for

"export", in which case they are not. (Rewarehousing is not relevant to this case.) Before each of the three voyages mentioned above, clearing agents acting for Caltex completed and submitted bills of entry for export in a standard format known as a DA25 to the Controller of Customs and Excise in Cape Town. There is a block on the form where the name or code for **the "country of final destination"** must be filled in. In one case the agent filled in **"CG"** for the Congo, and in one case **"GA"** being Gabon. Of course, the bunker fuel with which this case is concerned, was not delivered to recipients in the countries of final destination but to the De Beers Marine fleet in the area described before. The fuel was, however, removed from the customs and excise warehouse of Caltex upon entry for export and therefore without duty having been paid thereon. The issue is whether, in the circumstances, it was correctly so entered, or whether it should have been entered for home consumption and duty (consisting of fuel levy and excise duty) paid thereon.

10. It is convenient to mention at this point that Namibia was admitted as a party to the common customs agreement between South Africa, Botswana, Lesotho and Swaziland in 1990. By reason of s.18A of the Act an export for purposes of duty must involve the removal of the exported goods from the common customs area, which includes the territories governed by Namibia. The Namibian Customs and Excise Act contains provisions which are the same as those contained in s.5 of the Act, with which I deal below.

11. The Act does not define **"export"**. In their argument, *Mr Owen Rogers,* who appeared with *Mr Muller* for De Beers Marine, submitted that, subject to s.5 of the Act, removal of the fuel from the land area of the Republic is sufficient to constitute an **"export"** for the purposes of the Act, but that it would make no difference if removal from the territorial waters of the

Republic were required, since the rendezvous point was situated beyond them. The Supreme Court of Appeal indeed held in Schlumberger Logelco Inc v Coflexip SA 2000 (3) SA 861 (SCA) that the Republic includes its territorial sea or waters, but for the reason stated above it does not affect this case.

12. It was argued for the first applicant that the ordinary meaning of the word **"export"** denotes the sending out of goods from a country, regardless of whether they are destined for delivery in another country. That argument is based on definitions in two dictionaries, namely *Chambers 20th Century Dictionary,* which defines it as **"to carry or send out of a country, as goods in commerce"** and *Longmans Dictionary of the English,* as **"1. to carry away; remove 2. to carry or send (e.g. a commodity) abroad for purposes of trade"**.

13. *Mr Puckrin,* who appeared with *Mr Vorster,* for the Commissioner submitted, with reference to two equally authoritative dictionaries, that the ordinary meaning of **"export"** requires the goods in question to be sent to some foreign destination. According to *The New Shorter Oxford English Dictionary* it means **"send (esp. goods) to another country"** and *Webster's Third New International Dictionary* defines it as **"to carry or send (a commodity) to some other country or place"**.

14. The issue evidently cannot be settled by consulting dictionaries. It was submitted on behalf of the first applicant that the decision in Muller v Baldwin (1873) 9 QB 457 supports their interpretation. That case concerned so-called "River Tyne export dues", which were payable, *inter alia*, on coals exported from the port of Newcastle-on-Tyne. A vessel had taken on bunker coal in that port and a dispute arose as to liability for the dues. The court of first instance referred to a secondary meaning which the

word **"exported"** had acquired, namely **"carried out of the port for commercial purposes"** and considered that the bunker coals were not subject to the dues because they were not destined for trade but for consumption *en route*. On appeal the court **"agree(d) as to the reasonableness of making a distinction between coals taken away for sale and coals taken for the necessary use of the vessel"**, but held that **"export"** had been used in its ordinary sense, namely carried out of port, and that because the enactment did not exclude bunkers from the tax, the dues were payable. The decision turned on the specific wording of the statute, which imposed the tax on coals **"exported from the port"**, and does not purport to lay down a general definition of the word **"export"**.

15. Whatever the correct meaning of **"export"** might be, it involves at least the removal of goods from the Republic. Section 5 of the Act is important in this regard because it extends the definition of the Republic for purposes of the Act. The parts of section 5(c) underlined by me in the quotation below are particularly significant. Section 5 provides as follows:

"5. Application of Act.—Notwithstanding anything to the contrary in any other law contained, for the purposes of this Act—

(a) (deleted)

(b) the continental shelf as referred to in section 8 of the Maritime Zones Act, 1994

shall be deemed to be part of the Republic.

(c) Any installation or device of any kind whatever, including any floating or submersible drilling or production platform, constructed or operating upon, beneath or above the said continental

shelf for the purpose of exploring it or exploiting its natural resources shall be deemed to be constructed or operating within the Republic.

(d) Any goods mined or produced in the operation of such installation or device and conveyed therefrom to the shore whether by pipeline or otherwise and any person or other goods conveyed by any means to and from such installation or device shall be deemed to be so conveyed within the Republic."

16. It is common cause that De Beers Marine's vessels operate above the continental shelf of South Africa and Namibia for the purpose of exploring it and exploiting its natural resources. The present issue is whether a vessel of that kind falls within the class of **"installation or device"** contemplated by s.5. *Mr Rogers* submitted that nobody with a passing familiarity with the English language would use either of those words in relation to a ship and that a ship can never be regarded as an installation or a device. *Mr Puckrin* argued that both words might quite aptly describe the ships of the De Beers Marine fleet. I am inclined to agree with *Mr Puckrin* on this issue, for the reasons that follow.

17. Firstly, **"device"** in the sense applicable here, is a general word of wide import. It denotes a machine, tool or contrivance used for a specific task (*Collins English Dictionary*), or any thing made or adapted for a special purpose (*The Pocket Oxford Dictionary*). Those descriptions apply quite readily to the first five De Beers Marine vessels, the operations of which are described above. They are, on my understanding of the papers, ships equipped and adapted for the special purpose of diamond mining and exploration, a purpose that falls squarely within the scope of s.5(c). I can see no reason why a ship which is adapted and used for that purpose should not be regarded as a **"device"**.

18. Secondly, the five mining vessels described above would also fall within the general meaning of **"installation"** most of the time. According to the *Collins English Dictionary* **"installation"** means a large device, system or piece of equipment that has been placed in position and connected and adjusted for use. *The Pocket Oxford Dictionary* defines it as equipment placed in position ready for use. Both those definitions describe the De Beers Marine mining vessels very well, while they are engaged in mining. In a letter addressed to the Controller of Customs and Excise in July 1992 the first applicant's attorneys said that the De Beers Marine vessels **"operate as diamond research and recovery platforms"** (p. 455A of the papers). That is an apt summary of the way the vessels are used. In my view they are clearly **"installations"**, at least when they are engaged in mining operations.

19. These conclusions are, I think, in accordance with the general scheme and context of s.5. It extends the area in which the Act applies beyond the territorial waters of the Republic to the waters and airspace above the continental shelf as defined in the Maritime Zones Act. That act declares that **"the continental shelf as defined in article 76 of the United Nations Convention on the Law of the Sea, 1982, adopted at Montego Bay on 10 December 1982 shall be the continental shelf of the Republic"**. In summary, that article of UNCLOS defines the continental shelf of a coastal state as the seabed and subsoil of the submarine areas that extend beyond the territorial waters through the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines (as defined), whichever is the greater. UNCLOS itself gives a coastal state sovereignty over its continental shelf. The Maritime Zones Act follows the same principle, by defining the exclusive economic zone of the Republic as the sea beyond the territorial waters but

within a distance of 200 nautical miles of the baselines, and declaring that in respect of all natural resources of the exclusive economic zone the Republic shall have the same rights as it has in respect of its territorial waters (s.7 of the Maritime Zones Act). Section 5 of the Customs and Excise Act does likewise. For purposes of duty it regards exploitation and exploration undertaken by any installation or device up to the edge of the continental shelf as being undertaken within the Republic. Consequently, the use of goods on them falls within the scope of **"home consumption"** and, concomitantly, goods mined or produced by the operation of those installations and devices are treated as domestic production, not imports. If the first applicant's arguments were to be accepted, it would imply that all the diamonds mined or produced by the De Beers Marine fleet would be subject to import duty. There is no suggestion that such duty is payable on those diamonds, and I feel certain that if that were the case De Beers Marine would have made a point of it in its papers.

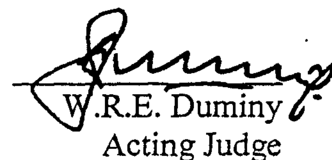
20. To sum up on this aspect, in my view all six the vessels in question are **"devices"**, and the five mining vessels are also **"installations"**, at least while they are engaged in mining operations, which is most of the time. All of them operate upon or above the continental shelf of Namibia for the purpose of exploring it or exploiting its natural resources. Indeed, it is hard to imagine anything that would fall within the purview of s.5(c) more clearly than the vessels of the De Beers Marine fleet.

21. For the reasons stated above the delivery of bunkers by the *Argun* to the vessels of the De Beers Marine fleet at the rendezvous point did not amount to **"exports"** for purposes of the Act.

22. Section 6 of the Territorial Sea and Exclusive Economic Zone Act of Namibia provides that the continental shelf of Namibia shall be regarded as

part of Namibia and shall for purposes of the exploitation of the natural resources of the sea and any law relating to mining, precious stones, metals or minerals, be deemed to be state land. As mentioned before, the Namibian Customs and Excise Act contains a provision identical to s.5 of the South African Act. The result is that the **"devices and installations"** that operate above the Namibian continental shelf are deemed to be territories governed by the government of Namibia, at least for duty purposes. Their use of the bunker fuel therefore does not occur outside the common customs area, as required by s.18A of the Act.

23. For the reasons stated above, I am unable to accede to the application. It is accordingly dismissed with costs, including the costs of two counsel. The same costs order is made in respect of the proceedings on 8 March 2000.



W.R.E. Duminy
Acting Judge