IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

2002/11/10 .....
DATE

..... SIGNATURE

CASE NO: 6241/2001

DATE 2002/11/10

In the matter between:

PAYEN COMPONENTS SOUTH AFRICA LTD **Applicant**

and

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

JUDGMENT

BERTELSMANN, J

1. The applicant applies for the review of a decision made by the respondent in terms of section 3(2) of the Customs and Excise Act, Act 91 of 1964 ("the Act").

2. The applicant claims that the decision was made by the respondent in a manner which was administratively unfair.

3. The respondent concedes that the decision was in fact reached in a manner which violated the applicant's rights to fair administrative procedure and agrees to the decision being set aside.

4. The parties are at loggerheads, however, as to the exact terms upon which the decision ought to be set aside.

5. Applicant furthermore wishes the court to substitute its own order for the respondent's decision rather than to refer the matter back to the respondent. The respondent contends that he is entitled to reconsider the matter.

6. The precise ambit within which the respondent can reconsider the matter is also in dispute.

The facts

7. The applicant is a public company, a manufacturer and importer of gaskets. It is represented in these proceedings by management consultants in the customs and excise field.

8. The respondent is the Commissioner for the South African Revenue Services, the administrating authority of the Act.

9. The applicant imports gaskets for engines.

10. On 16 November 1990, the respondent determined that the gaskets used in motor vehicle engines fell within the ambit of a tariff item 8484.10.90. This tariff item attracted customs duty.

11. The determination was made in terms of section 47(9)(a)(i) of the Act, which reads as follows:

> "(9)(a)(i) The Commissioner may in writing determine the tariff headings, tariff subheadings or items of any Schedule under which any imported goods or goods manufactured in the Republic shall be classified.
>
> (ii) The acceptance by any officer of a bill of entry or the release of any goods as entered shall be deemed not to be any such determination.

" (b) Any determination so made shall, subject to appeal to the Court, be deemed to be correct for the purposes of this Act, and any amount due in terms of any such determination shall remain payable as long as such determination remains in force.

(c) The Commissioner may publish any such determination by notice in the *Gazette*.

(d) The Commissioner may whenever he deems it expedient amend any such determination or withdraw it and make a new determination with effect from -

(i) the date of first entry of the goods in question;

(ii) the date of the notice referred to in paragraph (c);

(iii) the date of the determination made under paragraph (a);

(iv) the date of such new determination; or

(v) the date of such amendment."

12. The applicant paid the duty imposed upon the gaskets in terms of this determination.

13. The applicant was dissatisfied with the respondent's determination. After resorting, apparently unilaterally, to paying customs duties only during 1995 upon the imported gaskets, it approached its agent to take the matter up with the respondent in order to obtain a ruling that the gaskets did not attract excise duty.

14. On 28 October 1996, the agent addressed a letter to the respondent in which it suggested that gaskets should be classified under tariff headings 84.07 and 84.08, which deal with machinery, including, as the applicant suggested, stationery engines, plant or tractors.

15. The agent requested the respondent to confirm that its interpretation was correct.

16. On 12 November 1996, the respondent wrote a letter to the applicant's agent, confirming that the gaskets had to be classified under the tariff heading relating to machines.

17. This meant that the gaskets imported under these tariff headings were free from duty.

18. On 23 April 1997, the agent approached the respondent again, requesting him to confirm that the new determination would be effective as at 16 November 1990, the date of the original determination.

19. On 28 May 1997, the respondent replied that the amended determination would apply as from 18 November 1990.

20. This would mean that the applicant would be entitled to repayment of all the duty paid upon imported gaskets since 1990.

21. On 21 August 1997, the applicant's agent duly applied for repayment of all the duty paid by applicant upon the imported gaskets aforesaid.

22. After originally, on 12 September 1997, agreeing that the new determination applied retrospectively to 18 November 1990, the first respondent's office on 20 October 1997 provisionally withdrew the new determination, "... pending further investigation".

23. On 1 December 1997, the respondent wrote a further letter to the applicant's agent, of which the relevant portion reads as follows:

"After due and proper consideration of all the facts and circumstances prevailing, the decision conveyed to you by letter dated 28 May 1997 as well as the confirmation thereof on 12 September 1997, are (*sic*) hereby withdrawn in terms of the provisions of section 3(2) of the Customs and Excise Act, 1964. The decision of 12 November 1996 is, however, confirmed but the effective date thereof is hereby determined to be 12 November 1996 and not 18 November 1990 as previously advised. The effect of this is that refund claims will only be considered for imports of the relevant goods entered for customs duty purposes on or after 12 November 1996."

24. It is this determination which the applicant attacks as having been taken without compliance with the constitutional imperative of due administrative process, more particularly a failure to consult the applicant upon the amendment of the date upon which the new determination became effective.

25. The practical effect of the amendment is, of course, to deny the applicant the claims for repayment of the duties paid upon gaskets imported from 1990 to 1996.

26. The applicant launched a review application during 1998. It is unnecessary to deal with the twists and turns of the resulting litigation. It suffices to say that, when the matter was argued before me, the parties were *ad idem* that the amendment of the

determination in terms of which the correct tariff item applied from 1990, as advised on 1 December 1997, fell to be set aside.

27. The applicant now contends that this determination only related to the date upon which the correct tariff came into operation, and that the determination relating to the correct tariff which applies to the imported gaskets is not affected by the decision which was conveyed to applicant's agent on 1 December 1997.

28. For this reason, it also contends that the court should substitute its own finding as to the correct date only, and consequently should order that the correct tariff (attracting no duty) should apply as from November 1990.

29. The respondent, on the other hand, contends that the effect of the setting aside of the determination of 1 December 1997 amounts to a setting aside of the determination relating to the correct tariff as well. The respondent argues that he is at liberty to reconsider the correct tariff applicable to gaskets imported by the applicant once the determination of 1 December 1997 is set aside.

30. The court is consecuently called upon to decide whether the determination by the respondent which is under attack, includes the determination relating to the correct tariff, or is aimed only at the amendment of the date upon which the new tariff is applied to imported gaskets.

31. In order to be able to determine this question, the relevant provisions of the act have to be considered.

32. There is no decision directly in point.

33. I have already quoted the provisions of section 47(9) above.

34. The provisions of section 3(2), relating to the effect of any decision by the commissioner or any authorised officer reads as follows:

"Any decision made and any notice or communication signed or issued by any such officer may be withdrawn or amended by the Commissioner or by the officer concerned (with effect from the date of making such decision or signing or issuing such notice or communication or the date of withdrawal or amendment thereof) and

"shall, until it has been so withdrawn, be deemed, except for the purposes of this subsection, to have been made, signed or issued by the Commissioner."

34. Mr Raath SC, on behalf of the commissioner, has drawn an unreported decision dealing with *inter alia* section 47(9)(d) to my attention, the matter of *Masterparts (Pty) Ltd v Commissioner of Customs and Excise*, case No A246/94, of 4 August 1995, delivered by SELIKOWITZ, J in the Cape of Good Hope Provincial Division. Dealing with the power of the commissioner to make determinations and to determine the date upon which such determination comes into effect, the learned judge says on page 6 of the judgment the following:

"It is clear from the terms of section 47(9) of the Act that the Commissioner is entitled to make an original determination and that whenever he deems it necessary, he is entitled to amend his determination or he is entitled to withdraw it and substitute it with a new determination which has to have effect from one of five dates as set out in the Act, which range from the date that the entry was first made to the date of the amendment or new determination.

It is firstly clear on the facts that at no stage was the respondent asked to make a new determination, he was simply asked to reconsider his October 1992 determination and

"inasmuch as his response was that he was not persuaded to make any amendment, I am satisfied that he did not make any new determination."

35. From the above it is clear that the making of a new determination entails a process which consists of two steps:

(a) the decision to determine the correct tariff heading and consequently the tariff applicable to imported goods; and

(b) the date upon which such determination ought to become operative.

36. Whether any monies are due either by the importer to the respondent, or have to be repaid to the importer by the respondent as not having been due in the first instance, may depend upon the date so determined, and does so in this case.

37. It is clear that the legislature was aware that a determination included two distinct steps. This appears from the wording of section 47(9)(b):

"... any amount due in terms of any such determination shall remain payable as long as such determination remains in force."

38. Depending upon the date upon which the determination becomes effective, monies may or may not be payable in terms thereof.

39. The offending determination of 1 December 1997 was clearly aimed at ensuring that no monies would be payable by the respondent to the applicant as a consequence of the amendment of the tariff heading under which imported gaskets had to be classified.

40. From this it is clear that a new determination, made in terms of section 47(9) of the Act read with section 3(2) of the Act may be aimed either at the amendment of the tariff heading, or at the date upon which such tariff is to apply, or at both.

41. From the history of this matter it is clear that the determination which falls to be set aside dealt with the date upon which the amended determination became effective only, and was only intended to amend the date upon which the correct determination came into force.

42. It is consequently only this determination which will be set aside.

43. From the aforegoing it is clear that the respondent cannot contend that the setting aside of this determination also amounts to a setting aside of the identification of the correct tariff applicable to the imported gaskets. For present purposes, the court is only concerned with the determination of the date upon which the new determination came into effect, and the monies which were payable by the respondent to the applicant as a result thereof.

44. (The respondent is, of course, at liberty to reconsider the determination relating to the tariff itself, and may do so at any time after the delivery of this judgment. The respondent will obviously have to observe due administrative processes in doing so.)

45. I consequently declare that the granting of prayer 1 of the notice of motion relates only to the date upon which the new tariff became effective.

46. As far as the applicant's contention is concerned that the court should itself determine the effective date, I am not persuaded that a proper case has been made out for this relief. The principal attack which the applicant launched upon the respondent's determination was a failure to observe due administrative process, and in particular to allow the applicant as an affected party to make proper representations prior to the decision being taken.

47. There is no suggestion on the papers that the respondent would not, or will not, take such representations into account, or that the respondent is imbued with bias against the applicant.

48. Indeed, the very ground upon which the applicant suggests that the determination should be set aside implies that the applicant wishes to be heard by the respondent. This runs counter to any suggestion that the court could determine the effective date. Such a step should only be taken where there is proof positive, or at least a well-founded apprehension, that the applicant will not be accorded a due and fair hearing prior to the new determination being made.

49. I consequently make the following order:

1. Prayer 1 of the notice of motion is granted by agreement.

2. It is declared that this prayer relates only to the date upon which the determination of the correct tariff applicable to the imported gaskets came into operation. The determination relating to the tariff itself is not affected by this order.

3. The prayer that the court should correct the decision itself is refused.

4. The respondent is ordered to pay the applicant's costs.

E BERTELSMANN
JUDGE OF THE HIGH COURT