IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

DATE:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

24/10/2006
DATE

SIGNATURE

CASE NO: 11883/04

IN THE MATTER BETWEEN:

DISTELL LIMITED	FIRST APPLICANT
STELLENBOSCH FARMERS' WINERY LIMITED	SECOND APPLICANT
AND	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	FIRST RESPONDENT
MINISTER OF FINANCE	SECOND RESPONDENT

JUDGMENT

SERITI, J

1. INTRODUCTION

This matter came before court by way of a notice of motion.

In the said notice of motion it is stated that the first applicant will apply for an order in the following terms:

A.

1. The determination made by the Commissioner for the South African Revenue Service ("the Commissioner") on 13 0ctober 2004 that the products listed in annexure "A" (the "final wine cooler products") fall to be classified in tariff item 104.15.50 before the amendment of Part 2A of Schedule no 1 to the Customs and Excise Act, no 91 of 1964 ("the Act") dated 18 February 2004, is set aside.

2. It is declared that, prior to the amendment of Part 2A of Schedule no 1 to the Act (dated 18 February 2004) only the wine portion used in the manufacture of the final wine cooler products is liable to excise duty under item 104.15.10 of Part 2A of Schedule no 1 of the Act.

3. The determination made by the Commissioner on 13 0ctober 2004 that the final wine cooler products fall to be classified in tariff item 104.17.15 after the amendment of Part 2A of Schedule no 1 to the Act (dated 18 February 2004) is set aside.

4. It is declared that after the amendment of Part 2A of Schedule no 1 to the Act (dated 18 February 2004) the whole of the final wine cooler products is classifiable in tariff item 104.17.22 of Part 2A of Schedule no 1 to the Act.

5. The determination made by the Commissioner on 30 November 1995 in respect of Crown Premium and on 10 September 1996 in respect of Bernini Sparkling Grape Beverage (both determinations having been confirmed on 13 0ctober 2004) are set aside and substituted with the following determination: "0nly the wine portion used in the manufacture of Crown Premium and Bernini Sparkling Grape Beverage are subject to excise duty under tariff item 104.15.10 of Part 2A of Schedule no 1, as it read prior to 18 February 2004."

6. It is declared that after the amendment of Part 2A of Schedule no 1 to the Act (dated 18 February 2004), Crown Premium and Bernini Sparkling Grape are classifiable in tariff item 104.17.22 of Part 2A of Schedule no 1 to the Act.

7. The refund amount that the applicants are respectively entitled to will not be adversely affected by the fact that, firstly the final wine cooler products and/or Crown Premium and Bernini Sparkling Grape Beverage were initially incorrectly determined; or secondly that SARS procrastinated in dealing with this matter.

8. Refund amounts resulting from the relief sought in paragraphs 2 and 5 above will be claimable for the period starting two years prior to the first determination made for each of the products referred to therein.

9. The period within which any of the relief claimed in this application as originally launched is (to the extent that it is necessary) extended in terms of section 96(1)(c)(ii) of the Act and/or section 92(2) of the Promotion of Administrative Justice Act 3 of 2000 until 12 May 2004; and the said period is further extended until 23 December 2004 for the relief claimed in the application as supplemented; and the said period is further extended until the date of service on the first respondent of the application for the joinder of the second applicant.

10. Section 76B(1) of the Customs and Excise Act no 91 of 1964 (prior to and after its amendment by section 29 of Act 34 of 2004 on 27 January 2005) is inconsistent with the Constitution of the Republic of South Africa of 1996 to the extent that:

10.1 the words "such determination, new determination or any amendment of such determination, whichever occurs last" are not deleted and replaced with the words "the initial determination"; alternatively

10.2 the words "of such determination, new determination or amendment of such determination, whichever date occurs last" are not deleted and replaced with the words "on which the

Commissioner could have acquired knowledge of the error giving rise to such refund by exercising reasonable care".

11. Section 76B(1) of the Customs and Excise Act no 91 of 1964 (prior to and after its amendment by section 29 of Act 34 of 2004 on 27 January 2005) should be read as if:

11.1 the words "such determination, new determination or any amendment of such determination, whichever date occurs last" were deleted and replaced with the words "the initial determination"; alternatively

11.2 the words "of such determination, new determination or amendment of such determination, whichever date occurs last" were deleted and replaced with the words "on which the Commissioner would have acquired knowledge of the error giving rise to such refund by exercising reasonable care".

B. In the event and to the extent of the first applicant's application failing in respect of Crown Premium, the second applicant will apply for an order in terms of prayers 4 to 14 above in respect of Crown Premium only.

Prayers 12 and 13 of Part A deals with the question of costs and prayer 14 is alternative relief.

2. FOUNDING AFFIDAVIT

Same was deposed to by Mr Johannes Wessels de Wet.

He alleges that during January 2001 two companies, namely Distillers Corporation Limited and Stellenbosch Farmers Winery (Pty) Ltd, merged to form a new company Distell (Pty) Ltd. The name of Distell (Pty) Ltd was subsequently changed to Distell Ltd ("Distell"). Distell is a major wholesale manufacturer of liquor products and the supplier of such products to the local and international markets.

The nature of the application can be gleaned from the notice in terms of section 96 of the Customs and Excise Act no 91 of 1964 ("the Act").

The salient features of the said notice in terms of section 96 of the Customs and Excise Act are the following:

"(1) The Commissioner is called upon to give written confirmation that only the wine portion used in the manufacture of the final wine cooler products is liable to excise duty under item 104.15.10 of Part 2A of Schedule no 1 of the Act, as in law he should. He has failed to do so.

(2) The Commissioner is called upon to give written determination withdrawing his previous determinations and confirming that Crown Premium and Bernini Sparkling Grape Beverage are subject to excise duty on the wine portion used in the manufacture of the final product under tariff item 104.15.10 as in law he should. He has failed to do so.

(3) The Commissioner is called upon to confirm that the refund amounts that Distell are entitled to will not be negatively affected by the fact that firstly the products in question were initially incorrectly determined and secondly SARS had procrastinated in finally resolving this matter. The Commissioner is in law obliged to do so, but has failed to comply."

The section 96 notice mentioned above is dated 15 December 2003 and was served on the first respondent on the same date.

The Commissioner has failed to give the confirmations and determinations as requested.

During June 2002 Distell conducted a review of the excisable products it manufactures. It was found that although excise duty was being paid on all the excisable products it manufactures, formal tariff determinations had not been issued for all the products as provided for in section 47(9) of the Act.

The review found that Distell was not in possession of valid determinations for a number of "wine coolers" it manufactures ie Bernini Grape Liquor, Bernini Dry Grape Liquor, Tiffany's Buck Fizz Cooler, Tiffany's Blackcurrant Cooler, River Dew Peach Chenin Blanc Cooler, River Dew Raspberry Pinotage Cooler, River Dew Tropical Sauvignon Blanc Cooler, River Dew Blackcurrant Cabernet Cooler and Castello Fizz Cooler.

0n 23 July 2002 Distell addressed a letter to the Controller of Customs and Excise, Stellenbosch, requesting that tariff determinations be issued for the abovementioned products.

SARS determined the nine products referred to above to be liable to excise duty in terms of tariff item 104.15.50 of Part 2A of Schedule no 1 on 14 August 2002.

0n 7 0ctober 2002 Mr Abraham Venter Labuschagne of KPMG Services (Pty) Ltd on behalf of the first applicant addressed a letter to Mr Christo van Wyk, a senior functionary in SARS's Excise Division, contending that the final wine based products manufactured by Distell are not subject to excise duty as provided for in the Act, and that only the quantity of wine used in the manufacture of the products should be liable to the payment of excise duty at the rate provided for in tariff item 104.15.10 of Part 2A of Schedule no 1 to the Act, and requested the Commissioner to confirm this.

The "wine cooler products" in question consist of wine of grapes, water, sweetening agents, coloring agents and natural flavourants.

The final products are in some cases carbonated. Where the final product is carbonated, the pressure does not exceed 300KPA.

The letter mentioned above was hand delivered.

Mr Labuschagne on several occasions contacted SARS' official for a response to his letter.

0n 12 March 2003 two faxes in response to the letter of KPMG mentioned above were received from SARS.

In the first faxed letter SARS advised that the determination for eight of the ten products to which the present matter related, issued on 14 August 2002, had been withdrawn and that a new determination was issued "with effect from 14 August 2002". The new determination provided that the eight products mentioned above (excluding Crown Premium and Bernini Sparkling Grape Beverage) are liable to payment of excise duty in terms of tariff item 104.15.10.

In the second faxed letter, SARS stated that previous determinations had been issued for two of the products, ie Crown Premium in 1995 and Bernini Sparkling Grape Beverage in 1996.

The said letter further stated that as an appeal against these determinations had to be prosecuted within three months and as that was not done timeously, the said determinations cannot be challenged at this stage.

SARS' position therefore was that although these two products were essentially identical to the other eight products, it was not prepared to correct its previous incorrect determinations to ensure uniform tariff treatment of the goods in question.

On 20 March 2003 Mr Labuschagne of KPMG held a meeting with Ms Enslin of SARS. At the said meeting Ms Enslin confirmed that although it is not clear from their letter of 12 March 2003 the intention of SARS was to determine that only the wine portion used in the manufacture of the eight products was liable to the payment of excise duty as provided for in tariff item 104.15.10. Mr Van Wyk, also an official of SARS earlier, express a view similar to that of Ms Enslin mentioned in the previous paragraph.

On 27 March 2003 Mr Danie Folscher of KPMG addressed a letter to Mr Van Wyk requesting the Commissioner to reconsider his decision not to amend the previous determinations of Crown Premium and Bernini Sparkling Grape Beverage, stating *inter alia* that the previous determinations issued for Crown Premium and Bernini

Sparkling Grape Beverage were made in *bona fide* error of law. Therefore based on the provisions of the Act as well as principles of fairness, the Commissioner was obliged to amend the previous determinations in order to bring them in line with the other eight substantially identical products.

No reply was received from SARS despite several attempts to secure a response from SARS.

On 25 February 2004 there was a meeting held between Mr Labuschagne of KPMG on the one hand, and Mr Louw and Ms Enslin both of SARS. Oral and written representations were made on behalf of Distell. At the said meeting Mr Louw advised the applicant that the parties should attempt to resolve the matter and requested the applicant to furnish the amounts that applicant claims it is entitled to as refunds. On 19 March 2004 applicant complied with the request of Mr Louw.

To date first respondent has not as yet made a decision.

Prior to that, on 3 March 2004, KPMG, on behalf of the applicant addressed a letter to the first respondent, requesting that an extension be granted to the period of extinctive prescriptions in terms of section 96(1)(c)(i) of the Act. In its letter dated 5 March 2004 first respondent stated that it has decided to grant an extension until 12 May 2004 to institute the contemplated action.

As the applicant was running out of time, it had no choice but to launch the current proceedings.

In order to conduct its business in an effective and efficient manner, Distell requires formal advice from SARS, failing which an order from this court, on the following issues:

(a) written confirmation from the Commissioner, failing which an order from this Court that only the wine portion used in the manufacture of the final wine cooler products was liable to excise duty under item 104.15.10 of Part 2A of Schedule no 1 to the Act, as it read prior to 18 February 2004;

(b) a written determination from the Commissioner failing which an order from this Court, that the Commissioner has withdrawn its previous determinations and confirmation that Crown Premium and Bernini Sparkling Grape Beverage were subject to excise duty on the wine portion used in the manufacture of the final product under tariff item 104.15.10 as it read prior to 18 February 2004;

(c) confirmation from SARS failing which an order from this Court that the refund amounts that Distell are entitled to will not be adversely affected by the fact that the products in question were initially incorrectly determined and that SARS had procrastinated in finally resolving this matter.

The deponent referred to the confirmatory affidavit of Mr Labuschagne which was annexed to the papers.

At a later stage the first applicant served and filed a supplementary affidavit also deposed to by Mr Johannes Wessels de Wet, as a result of certain developments.

In the said supplementary affidavit he alleged that the notice of motion originally filed in this matter was amended as a result of certain determinations issued by the Commissioner for the South African Revenue Service in terms of section 47(9) of the Customs and Excise Act 91 of 1964.

The determinations issued by the Commissioner on 13 0ctober 2004 amount to the following:

(i) confirming a previous determination issued by the Commissioner on 30 November 1995 stating that the product "Crown Premium" is classifiable in tariff item 104.15.50 of Part 2A of Schedule no 1 to the Act prior to the amendment of that schedule on 18 February 2004, and further determining that the product falls to be classified in tariff item 104.17.15 subsequent to the amendment;

(ii) confirming a previous determination dated 10 September 1996, stating that the product "Bernini Sparkling Grape Beverage" is classifiable in tariff item 104.15.50 of Part 2A of Schedule no 1 to the Act prior to the

amendment of that schedule on 18 February 2004, and determining further that the product falls to be classified in tariff item 104.17.15 after the amendment;

(iii) in dealing with the other eight products, the Commissioner withdrew a previous determination dated 12 March 2003 stating that the products fall to be classified in tariff item 104.15.10 and substituting therefore a determination stating that with effect from 14 August 2002 the products are classifiable in tariff item 104.15.50. These products are also determined to be classifiable in tariff item 104.17.15 subsequent to the amendment of Part 2A of Schedule no 1 on 18 February 2004.

The products ie Crown Premium, Bernini Sparkling Grape Beverage and the other eight products are for classification purposes identical to one another and can collectively be referred to as "wine coolers".

Prior to 12 March 2003 the wine cooler products were considered by the Commissioner to be classifiable in tariff item 104.15.50 by virtue of the fact that the products are considered to be "mixtures of fermented beverages and non-alcoholic beverages" (ie a mixture of wine, water and flavouring substances) of tariff heading 22.06 of Part 1 of Schedule no 1 to the Act.

In a submission to the Commissioner made on behalf of Distell Limited dated 7 0ctober 2002, it was pointed out that the class of product being "mixtures of fermented beverages and non-alcoholic beverages" was not provided for in the terms of tariff item 104.15.50. The effect thereof was that only the wine portion of the manufactured wine coolers was subject to excise duty at the rate of duty prescribed for products classifiable in tariff item 104.15.10.

After considering the submissions of Distell the Commissioner appeared to agree with the said submissions and accordingly issued a determination on 12 March 2003 stating that the final wine cooler products were classifiable in tariff item 104.15.10.

Also on 12 March 2003 the Commissioner advised that he was not going to amend the determinations issued for Crown Premium and Bernini Sparkling Grape Beverage as the time period within which Distell had to appeal against these determinations in terms of the Act has lapsed. From the determinations issued by the Commissioner on 13 0ctober 2004, it appears that the Commissioner no longer considers the wine coolers to be "mixtures of fermented beverages and non-alcoholic beverages" but now considers the products to be "other fermented beverages (for example cider, perry, mead)" as provided for in the first part of the terms of the heading of 22.06. This class of products did appear in the terms of tariff item 104.15.50 prior to the amendment of Part 2A of schedule no 1 on 18 February 2004.

Upon consideration of the terms of headings 22.01 and 22.02 of Part 1 of Schedule no 1 to the Act, Distell concluded that the water used in the manufacture of the wine coolers should, for classification purposes, be regarded to be a beverage. The conclusion that water is considered to be a beverage is furthermore supported by the General Note to Chapter 22 as contained in the Explanatory Notes to the Harmonised Commodity Description and Coding System which refers to "water and other non-alcoholic beverages".

Certain senior officials of SARS namely Mr Lester Millar and Ms Laetitia Culbert agreed with the above views of Distell. This they confirmed during the meeting they held with Mr Labuschagne of KPMG.

0nly after it was pointed out to SARS that "mixtures of fermented beverages and non-alcoholic beverages" did not attract excise duty and after it became apparent that refunds of excise duty would become payable by SARS, did SARS management decide that its previous classification was no longer correct and that the wine cooler products were no longer considered to be "mixtures", as water was no longer considered by SARS to be a beverage. It was only then that SARS decided that wine coolers fell to be classified in tariff heading 22.06 as being "other fermented beverages", a classification which would not result in refunds being payable by SARS. 0n the contrary, such a classification would create additional retrospective liability for excise duty for Distell.

A confirmatory affidavit of Mr Labuschagne was attached.

3. FIRST RESPONDENT'S ANSWERING AFFIDAVIT

The said affidavit was deposed to by Ms Jacoba Vermaak prior to the joinder of the second applicant.

In the introduction part of her affidavit she alleges that in terms of section 47(9)(a)(iii)(aa) of the Act any written tariff determination made by the Commissioner operates only in respect of goods mentioned therein and the person in whose name it was issued.

Any tariff determination made by the Commissioner in terms of section 47(9) of the Act may be appealed against. In terms of sections 47(9)(e) and (f) such appeal lies to the High Court and is subject to the provisions of section 96(1) of the Act, and the said appeal should be prosecuted within one year from the date of the determination.

She further alleges that it is clear from the founding papers that the real purpose of this application is to enable the applicant, should it be successful, to institute claims against the Commissioner for the payments of refunds which could be as high as R150 million.

Section 76B of the Act deals with refunds and provides that the refund of any duty arising from any determination, new determination or amendment of any such determination in terms of *inter alia* section 47(9) of the Act, shall be limited to refunds in

respect of goods entered for home consumption during a period of two years immediately preceding the date of such determination, new determination or amendment thereof, whichever date occurs last.

In terms of three letters dated 13 0ctober 2004:

(a) a new determination in respect of the product known as Crown Premium was issued in the name of Distell Ltd;

(b) a new determination in respect of the product known as Bernini Sparkling Grape Beverage was issued in the name of Distell Ltd.

The determination made on 12 March 2003 in respect of the nine final wine cooler products was withdrawn and substituted with a new determination – determination of 12 March 2003 withdrew the earlier determination of 14 August 2002.

Even if the court were to find in the applicant's favour as far as the proper classification of the products in issue is concerned, any refunds that the applicant may be entitled to will by virtue of the provisions of section 76B of the Act be limited to goods entered during the period of two years immediately prior to 13 0ctober 2004.

When dealing with the merits of the application the deponent stated, *inter alia*, that she denies that any rights which the applicant's predecessor might have acquired in

terms of the Act pertaining to the tariff classification of products manufactured by them, could be, and were, transferred to the applicant (first applicant).

Locus standi of the applicant is denied despite the history of the formation of the applicant.

She referred to a letter dated 30 November 2001 addressed by Distell (Pty) Ltd on a letterhead of Distell Group Ltd to SARS. In the said letter it is stated *inter alia*:

> "The applicant is Distell (Pty) Ltd (Distell), the operating subsidiary of Distell Group Ltd. During this year Distell took over Stellenbosch Farmers' Winery Ltd (SFW), its operations and its products. The trading operations of SFW, including the production of Crown Premium (Crown) was transferred to Distell on 1 January 2001."

In her view the above history differs fundamentally from the history as contained in the founding affidavit.

In the letter of 30 November 2001 the applicant continued and said:

> "This is the first time that the newly formed company, Distell, applies for a tariff determination on a product transferred from SFW, namely Crown. Previously a determination was issued to SFW. This Distell application is therefore a new application for a determination."

In so far as Crown Premium and Bernini are concerned until the determinations made in terms of the letters of 13 0ctober 2004 no tariff determination had been issued to the applicant. The tariff determinations in place in respect of the said products had been issued to Stellenbosch Farmers' Winery Ltd and Distillers Corporation Ltd ("Distillers"). There were thus no previous determinations issued in the name of the applicant in respect of which the applicant could demand a withdrawal.

She further alleges that on or about 17 July 1995 the Commissioner determined Crown Premium to be classifiable under tariff item 104.15.80 under Part 2A of Schedule 1. The manufacture of Crown Premium at that time and the entity in whose name the determination was issued was SFW.

0n 1 December 1995 the determination under Schedule 1 Part 2A was amended from 104.15.80 to 104.15.50.

SFW never appealed any of the aforesaid determinations.

She referred to the letter of SARS dated 13 0ctober 2004 addressed to Distill Ltd/Distill (Pty) Ltd. In the said letter tariff classification of Crown Premium issued to Stellenbosch Farmers' Winery and Distell (Pty) Ltd are dealt with.

In terms of a written determination dated 21 June 1996 Bernini Sparkling Grape Beverage was determined to be classifiable under tariff heading 22.00.90 and under tariff

item 104.15.80. The said determination was issued in the name of Distillers Corporation Ltd.

In terms of a written determination dated 10 September 1996 the determination under Part 2A was amended from 104.15.80 to 104.15.50.

In terms of the determination dated 13 October 2004 the determination issued in the name of Distillers:

(i) was amended from tariff heading 2206.00.90 to 2206.00.80;

(ii) the classification under tariff item 104.15.50 was confirmed.

In terms of the aforesaid letter new determinations issued in the name of Distell Ltd/Distell (Pty) Ltd were made in terms of which Bernini was classified under tariff heading 2206.00.80 under tariff item 104.17.15.

She admitted the manufacturing processes of the products as contained in the founding affidavit.

She further alleges that the decision taken on 14 August 2004 determining the products to be classifiable under tariff item 104.15.50 was correct and accordingly the withdrawal thereof as well as the new determination determining the goods to be classifiable under tariff item 104.15.10 were wrong.

from the respondent's determination, new determination and/or amendment on 13 October 2004 of the tariff classification of the relevant beverages in terms of section 47(9) of the Customs and Excise Act 91 of 1964, should be limited to the two years immediately preceding 13 October 2004 in terms of section 76B of the Act; or whether the refund period should be extended retrospectively from 13 October 2004 to the date two years prior to the date of the initial tariff classification in respect of such goods.

Firstly, the applicant contends that the respondent's tariff classification made on 13 October 2004 regarding all ten wine cooler products (subject to this application) were made in error as contemplated in section 47(9)(d)(i)(bb) of the Act. The error applies to both the period before 18 February 2004 (the date of the applicable amendment of Part 2A of Schedule no 1 to the Act) and in respect of the period after 18 February 2004.

Applicant accordingly asks that the determinations be set aside and substituted by the correct classification, viz tariff item 104.15.10 before 18 February 2004 and 104.17.22 thereafter.

Secondly the applicant says that it will become entitled to refunds of excise duty arising from the determination, new determination and/or amendment of such tariff classification in accordance with the relief asked for in this application. Regarding the initial determination the respondent erred in two respects namely firstly he overlooked that the water added to the products was "a non-alcoholic beverage" for purposes of the

determination and secondly the Commissioner overlooked that in terms of section 37 of the Act excise duty was only payable on the wine portion of the mixture.

Furthermore the affidavit deals with legal argument.

He further alleges that on 2 November 1995 the Commissioner determined that the beverage "Crown Premium" was classifiable under tariff item 104.15.50 ("other still fermented beverages, unfortified) in respect of which excise duty at a specified rate per liter was payable.

Pursuant thereto Stellenbosch Farmers' Winery Ltd and after 1 January 2001 Distell Ltd paid excise duty on the total volume of Crown Premium entered for home consumption in the period 30 November 1995 to 18 February 2004. Excise duty should have been paid only on the wine portion of such volume in terms of section 37 of the Act and at the rate of duty specified for goods of tariff item 104.15.10 ("unfortified still wine") a rate of duty substantially lower than that specified for goods of tariff item 104.15.50. This resulted in an overpayment of some R135 499 582,72.

The applicant being the manufacturer of the product known as "Bernini Sparkling Grape Beverage" has since commencing production of the product in 1994 up to the amendment of the legislation on 18 February 2004 paid excise duty on the total volume of manufactured product at the tariff prescribed for wine (104.15.10). The applicant

should have paid excise duty only on the wine portion of that volume of tariff item 104.15.10. This resulted in an overpayment of some R12 676 765,58.

On 12 March 2003 the Commissioner made a new determination that the eight beverages earlier described as the "final wine cooler products" were classifiable in tariff item 104.15.10. On same date the Commissioner withdrew his initial determination of 14 August 2002 determining that the final wine cooler products were classifiable in tariff item 104.15.50 ("other still fermented beverages, unfortified") and made a new determination that such products were classifiable in tariff item 104.15.10 ("unfortified still wine") which new determination was made effective retrospectively to 14 August 2002, the date of the initial determination. In respect of these products the applicant paid excise duty at the tariff item 104.15.10 rate on the total volume period commencing in the late 1990's to March 2003, and paid excise duty on the wine portion thereof for the period May 2003 to 18 February 2004. The applicant should have paid excise duty on these products on the wine portion thereof at the tariff in item 2204.21.40 since inception to 18 February 2004. This resulted in an overpayment of an amount of R3 657 632,89.

Since 1995 the Commissioner has known that Crown Premium is a "mixture of a fermented beverage (wine) and a non-alcoholic beverage (water)" not elsewhere specified or included.

The Commissioner further has known since 1995 that only the wine portion of Crown Premium is excisable.

On 7 October 2002 the applicant formally requested the Commissioner to make a new determination in order to rectify the errors in the initial determinations.

There was ostensibly no disagreement between the parties that the new determination should accord with the applicant's contentions. This caused the applicant to have the legitimate expectation that the Commissioner would make a new determination which would accord with the applicant's submissions in respect of all ten products.

Eventually on 13 March 2003 the Commissioner made a new determination that the eight final wine cooler products were classifiable in item 104.15.10 effective with retrospective effect to 14 August 2002.

On the same day the Commissioner took the prescription point on Crown Premium refusing the applicant's request to rectify the errors in the initial tariff classification determination thereof.

The Commissioner conceded that the new determination made on 13 March 2003 entitled the applicant to certain refunds.

On 18 February 2004 the Commissioner amended Part 2A of Schedule no 1 in order to ensure that the applicant paid excise duty on the relevant products thereafter.

Applicant instituted these proceedings and on 13 0ctober 2004 the Commissioner made the latest determination, the import of which is that the applicant is deprived of any refunds.

In terms of the determination which the Commissioner made on 13 March 2002, the Commissioner made the effective date with retrospective effect to the initial determination. In terms of the new determination of 13 March 2004 the effective date did not operate retrospectively. There seems to be no explanation for such differential treatment other than to deprive the applicant of any refunds or that the Commissioner exercised his discretion in this regard for an ulterior purpose and unreasonably.

The excise duty which the applicant pays on the products to a certain extent determines the price at which the applicant sells them. To a certain extent the applicant recovers such excise duty from its customers. For the period May 2003 to 0ctober 2004 the applicant paid excise duty on the eight final wine cooler products at the lower rate under tariff item number 104.15.10 and only on the wine portion thereof.

0n 13 0ctober 2004 the Commissioner made a new determination that the said products were classifiable in tariff item 104.15.50 being an excise liability at a higher tariff effective with retrospective effect to 14 August 2002. The applicant is prejudiced thereby since it is unable to recover the additional duties for the period May 2003 to 13 0ctober 2004 from its customers.

The ulterior purpose of the determinations which the Commissioner made on 13 0ctober 2004 was patently to deprive the applicant arbitrarily, capriciously and unreasonably of its entitlement to refunds.

The deponent further states that on or about 1 January 2001 the applicant and Stellenbosch Farmers' Wineries Ltd entered into a written agreement in terms of which the applicant acquired the business of SFW as a going concern. Since then the applicant has been manufacturing Crown Premium and paying excise duty thereon and has been dealing in all respects with the Commissioner on that basis.

The applicant in terms of the said agreement obtained cession of all the rights pertaining to the product. Accordingly the applicant has *locus standi* in this application in connection with Crown Premium in respect of all the relief sought in this application.

0n 16 January 2001 the applicant changed its name from Distillers Corporation Ltd to Distell (Pty) Ltd.

0n 9 April 2002 the applicant changed its name from Distell (Pty) Ltd to Distell Ltd.

The deponent further alleges that on consideration of the Commissioner's answering affidavit the applicant decided to raise the issue that section 76B(1) of the Act

is unconstitutional, alternatively that the Commissioner's determination of 13 0ctober 2004 fall to be set aside for being unreasonable as contemplated in the Constitution and PAJA.

A confirmatory affidavit of Mr Labuschagne was attached to the replying affidavit.

5. REJOINDER AFFIDAVIT

Same was deposed to by Ms Vermaak who deposed to the first respondent's answering affidavit. She alleges that in its replying affidavit the applicant has formally introduced a number of new legal bases on which it seeks to rely. These are the following:

(a) the constitutionality of sections 47(9)(d)(ii)(dd) and 76B of the Customs and Excise Act;

(b) a plea of estoppel;

(c) unreasonable administrative action by the Commissioner as contemplated in section 33 of the Constitution of the Republic of South Africa Act of 1996 read with sections 6(2)(d), (e), (f) and (h) of the Promotion of Administrative Justice Act 3 of 2000.

She further alleges that the Commissioner is advised that:

(i) the constitutional challenge should have been introduced by the applicant in its founding papers;

(ii) as a result of the constitutional challenge the Minister of Finance should have been joined as a party to the proceedings;

(iii) the manner in which the constitutional challenge was introduced is improper and insufficient;

(iv) as a result of the aforesaid shortcomings both individually and collectively the constitutional challenge is fatally defective and should consequently not be entertained by the court.

The issues to be decided by the court and the order in which they are to be decided are the following:

(a) The applicant's *locus standi* to appeal and/or review the tariff determination and/or any legal consequences flowing therefrom in respect of Crown Premium given to Stellenbosch Farmers Winery Ltd.

(b) Whether having regard to the provisions of section 47(9)(e) of the Act the tariff determinations made by the Commissioner in 1995 and 1996 in respect of Crown Premium and Bernini Sparkling Grape Beverage could still be appealed by the applicant.

(c) Whether having regard to the common law and the provisions of PAJA the consequences flowing from the tariff determination referred to above could still be reviewed.

(d) A finding on the classification of the products in terms of Part 2A of Schedule 1 to the Act. This will *inter alia* require an investigation into the classification of "water" in terms of Part 1 of Schedule 1 to the Act.

(e) Whether the Commissioner should have made the determination retrospectively with effect from the dates of the first determinations in respect of Crown Premium and Bernini.

(f) Whether the constitutionality of section 76B can and should be adjudicated at this juncture.

(g) Whether the constitutional attack dealt with in the replying affidavit has been properly raised.

(h) Whether section 76B of the Act infringes the applicant's rights and if so whether it is justifiable.

She then deals with the abovementioned points one after the other. Furthermore, she replies to the contentions made by the applicant. She further alleges that during the period 1 May 2003 to 18 February 2004 excise duty was paid only on the wine used in the manufacturing of the coolers.

The issue relating to the applicant's entitlement to impugn the 1995 tariff determination in respect of Crown Premium goes much further than just prescription. The Commissioner's case is that by virtue of the provisions of section 47(9)(a)(iii)(bb) of the Act the applicant simply does not have *locus standi* to attack any tariff determination given to SFW relating to Crown Premium.

As stated earlier the constitutionality of section 76B of the Act is academic in the present circumstances. The applicant has not lodged any claims for refunds in respect of the classification of the products in question and it did not do so after the amendment dated 12 March 2003. It would only be entitled to do so if and once this matter has been decided in its favour.

6. APPLICANT'S SURRE-JOINING AFFIDAVIT

Same was deposed to by Mr J W de Wet. He alleges that there are essentially two issues in these proceedings. Firstly, is the applicant's contention regarding the appropriate tariff classification, or the respondent's tariff classification of the relevant products correct? Secondly, what is the extent of the retrospective period in respect of

which the applicant would be entitled to claim refunds should the applicant succeed on the tariff classification dispute?

He further alleges that on or about 3 July 1996 the applicant received a letter from the Commissioner classifying Bernini Sparkling Grape in tariff heading "2206.00.90 – Schedule 1 Part 2A 104.15.80". In response thereto on behalf of the applicant a letter was written to the Commissioner requesting that Bernini be classified in tariff subheading 104.15.10.

Applicant then paid excise duty relating to Bernini on tariff item 104.15.10.

On or about 21 August 2002 the applicant received note to the effect that the respondent has classified Bernini together with eight other wine coolers manufactured by the applicant in tariff heading 104.15.50. Pursuant thereto applicant wrote a letter to the Commissioner advising him that applicant is utilising tariff item 104.15.10 for purposes of calculating the excise duty payable on the said products. Applicant then requested the Commissioner to grant permission to delay any payment of any underpaid duty following the determination made until such time as the question of the correct tariff item to be utilised is sorted out. He further alleges that they did not receive the determination of 10 September 1996 from the Commissioner.

On 17 March 2006 applicants obtained a court order joining the second respondent.

7. FIRST RESPONDENT'S REBUTTING AFFIDAVIT

Same was deposed to by Mr Samuel Walters.

He alleges that he finds it strange that the applicant alleges that Distell never received the determination of 10 September 1996.

A formal application for a tariff determination of Bernini was made on 24 May 1996.

On 21 June 1996 Bernini was determined to be classified under tariff item 104.15.80 and by letter dated 3 July 1996 Distell was accordingly advised.

Distell was not satisfied with the Commissioner's decision as a result of which a written re-submission was lodged on 23 July 1996.

It appears that during a discussion that Mr De Wet had with an ex custom's official, Mr Louis Pieterse, prior to the lodging of the re-submission, it was agreed that pending an application to have Bernini reclassified Distell would be allowed to continue paying duties in accordance with the much lower rate prescribed by tariff item 104.15.10.

On 10 September 1996 and consequent upon the lodging of the re-submission Bernini was determined to be classifiable under tariff item 104.15.50. This determination according to Mr De Wet was never communicated to Distell.

If the new stance of Mr De Wet is correct then the determination of 10 September 1996 did not become effective, then the determination of 24 June 1996 (in terms of which it was determined to fall under tariff item 104.15.80 has remained valid and effective. This means that for the period 3 July 1996 until 21 August 2002 Distell was liable to pay duty at the rate prescribed by tariff item 104.15.80 which rate was more than double the rate payable in terms of tariff item 104.15.50.

8. SECOND RESPONDENT'S ANSWERING AFFIDAVIT

The affidavit was deposed to by Mr Elias Lesetja Kganyago. He alleges that the second respondent is the national executive authority that is responsible for the administration of the Customs and Excise Act 91 of 1964 as amended. The second respondent opposes the relief sought in this application in so far as the first and second applicants attack the constitutional validity of section 76B of the Act.

On 6 May 2004 the first applicant instituted proceedings against the first respondent in which it primarily sought to set aside several determinations made by the first respondent in terms of section 47 of the Act. The second applicant was subsequently joined to this application.

Fundamental to the relief sought is the applicant's contention that the determinations sought to be set aside were made incorrectly and that as a result thereof the applicants had acquired a liability to pay, or has in fact paid excise duty more than they were obliged to pay in respect of goods manufactured by them and entered for home consumption in the Republic of South Africa.

Applicants did not in the notice of motion claim a refund of the amount of excise duty which it claims to have overpaid. In the founding affidavit there is no allegation that the applicants have lodged a claim in terms of the relevant provisions of section 76B of the Act for a refund of the excise duty which the applicants claim to have overpaid as a result of the determinations sought to be set aside.

The notice of motion was amended on several occasions by the applicant.

On or about 25 February 2005 first applicant issued a notice in terms of rule 16A of the Uniform Rules of Court.

In the said notice a prayer was incorporated which alleges that the provisions of section 76B of the Act are inconsistent with the provisions of sections 9, 25 and 33 of the Constitution of the Republic of South Africa Act of 1996 as amended.

The remedy sought in terms of the said notice is that in the event the constitutional attack is successful some words in the impugned section should be severed

therefrom and others be read into the impugned section so as to remedy the perceived constitutional invalidity.

On 11 October 2005 an application for the joinder of the second respondent to these proceedings was launched and same was heard and granted by this Court on or about 17 March 2006.

In the amended notice of motion the only provisions which the applicants have identified as the subject-matter of the constitutional attack are those set out in section 76B of the Act, although in the replying affidavit dated 25 February 2005 the applicants claim that the provisions of section 47(9)(d)(i)(bb) of the Act are inconsistent with the Constitution.

In terms of rule 16A, the applicants are required in the subsequent joinder application of the second respondent to specify or identify all the statutory provisions of the Act which are the subject-matter of its constitutional attack.

The provisions of section 76B kick in only after a person has established that he/she/it is entitled to a refund or drawback of duty.

At this stage of the proceedings the applicants' attack on the provisions of section 76B of the Act is premature. The nature and extent of the dispute between the parties can

reasonably, adequately and conveniently be resolved without a need for the determination of the constitutional attack of the provisions of section 76B of the Act.

Section 47 of the Act deals with the determination of the rate of excise duty payable in terms of the Act. Schedule 1 of the Act classifies various excisable goods according to various tariff headings and sub-headings. The extent of excise duty to be paid depends upon the tariff heading or sub-heading under which classification of excisable goods is made.

Power to make a classification is vested upon the first respondent. Section 47(9)(a) confers a discretion on the first respondent to classify excisable goods under a tariff heading or sub-heading in schedule 1 of the Act. A determination made by the first respondent is valid only in respect of goods mentioned therein and in respect of the person to whom it relates.

Section 47(9)(d) imposes an obligation on the first respondent to amend or withdraw a determination and make a new determination whenever the initial determination was made in error, or good cause has been shown for such an amendment or withdrawal of the initial determination. A determination may also be amended or withdrawn and a new determination be made by the first respondent whenever the Court so directs.

In a scenario mentioned above certain consequences may follow namely:

(i) a claim for recovery of excise duty which has been underpaid as a result of the initial determination – where such a consequence arises then the claim for recovery of underpaid excise duty shall be dealt with in terms of section 44(11) of the Act; or

(ii) results in a claim for a refund or drawback of excise duty overpaid as a result of the initial determination which has been amended or withdrawn. In that event the claim for a refund or drawback of duty shall be dealt with in terms of sections 76(4) and 76B of the Act.

As a general rule the recovery of underpaid duty in terms of section 44(11) and a claim for a refund or drawback of overpaid duty in terms of sections 76(4) and 76B of the Act may only be made for a period of two years.

Whenever the first respondent amends a determination or withdraws it and makes a new determination he has a discretion to determine a date when an amended determination or a new determination may take effect.

9. APPLICANTS' REPLYING AFFIDAVIT TO SECOND RESPONDENT'S ANSWERING AFFIDAVIT

Same was deposed to by Mr J W de Wet. He alleges that it appears to be common cause between the applicants and the first respondent that substantial

overpayments have been made in respect of excise duty payable on all ten wine coolers under consideration.

The applicants in substance apply for orders to the effect that the wine coolers be determined to fall under tariff item 104.15.10 with retrospective effect to the first respondent's initial wrong tariff determination.

First respondent raised section 76B as a defence to the orders that the applicants seek in these proceedings. The applicants contend that to the extent that section 76B is an obstacle in their quest to obtain such orders section 76B should be declared unconstitutional. On that basis the applicants contend that the constitutionality of section 76B is ripe for hearing.

The thrust of the applicant's case is that section 76B allows the first respondent to deprive the applicants of their claims for refunds caused by delays on the part of the first respondent to correct tariff determinations made in error and in breach of its duty to correct such wrong tariff determinations. There appears to be no rational or justifiable connection between the need for such delays and the deprivation of the applicants of their claims for refunds.

The applicants contend that on the date of the determination of the applicable tariff classification of wine coolers correcting the first respondent's earlier wrong tariff determination they will acquire an enrichment claim against the first respondent for

amounts which they have paid in respect of excise duty on the wine coolers and for which they were not liable. Applicants' enrichment claims will be brought in terms of the *condictio ob causam finitam*. They do not arise by virtue of section 76B. The Act does not create the applicants' claims for refund. The applicants' claim for refunds is an unjustified enrichment claim.

Applicants do not persist that section 76B is inconsistent with the fundamental right to equality contained in section 9 of the Constitution but persists that the said section is inconsistent with section 25 of the Constitution.

The applicants' claim for refunds is a debt which is properly in terms of section 25 of the Constitution. To the extent that section 76B limits the *quantum* of the applicant's claim for refunds it deprives the applicants of their property.

The applicants' attack is aimed at the first respondent's administrative acts of 13 0ctober 2004, viz his tariff determination of the eight wine coolers from tariff item 104.15.10 to 104.15.50 and the first respondent's refusal to reclassify Crown Premium and Bernini Sparkling Grape from tariff item 104.15.50 to 104.15.10. For this attack the applicants rely on the review grounds in section 6 of PAJA.

10. FINDINGS

Both the first and second respondents raised certain points *in limine*.

I will first deal with the first respondent's points *in limine*, and if necessary, thereafter deal with the preliminary objections raised by the second respondent.

10.1 The first point *in limine* raised by the first respondent is the first applicant's *locus standi* to impugn the determination given to Stellenbosch Farmers' Winery, relating to Crown Premium and the application to have Stellenbosch Farmers' Winery joined as a second applicant.

Section 47(9)(a)(iii)(aa) of the Act provides that any tariff determination made by the Commissioner shall operate only in respect of the goods mentioned therein and the person in whose name it is issued.

As stated earlier, the determination relating to Crown Premium was made by the Commissioner for the South African Revenue Service on 30 November 1995 and was issued to Stellenbosch Farmers' Winery.

In his heads of argument the applicant's counsel submitted that first applicant purchased and took transfer of the second applicant's business as a going concern with effect from 1 January 2001. Said counsel further submitted that in substance, the first applicant applies for a correction of the tariff classification of Crown Premium for the period prior to 18 February 2004.

On the other hand, the first respondent's counsel submitted that, on the basis of section 47(9)(a)(iii)(aa) of the Act mentioned above, the rights derived by the person in whose name the determination was made attaches to such person and are not capable of being transferred, either by way of cession or otherwise.

The wording of section 47(9)(a)(iii)(aa) mentioned above, is very clear, and I do not believe that any agreement entered into between the first applicant and the second applicant can alter the meaning of the section.

If the second applicant was dissatisfied with the determination of the first respondent, it was open to the second applicant to challenge the said determination, which it failed to do.

10.2 The other issue which needs adjudication is the joinder of Stellenbosch Farmers' Winery as the second applicant. The current proceedings were instituted by the first applicant on 6 May 2004 and on 11 October 2005 there was an application to join the second applicant.

In terms of section 47(9)(f) of the Act read in conjunction with section 96(1) thereof any proceedings against the first respondent are to be instituted within one year from the date on which an aggrieved party's cause of action arose.

Section 96(1)(c)(ii) of the Act provides that the Court may extend the said period of one year if extending the said period will be in the interest of justice.

Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 stipulates that judicial review proceedings are to be instituted not later than 180 days after the date on which the entity concerned was informed of the administrative action in question.

Section 9 of the Promotion of Administrative Justice Act *supra* contains provisions similar to those of section 96(1)(c)(ii) of the Customs and Excise Act *supra*.

Prior to the advent of the Promotion of Administrative Justice Act *supra* our common law provided that review proceedings had to be instituted within a reasonable time after the alleged offensive decision was taken.

The first respondent made the determination relating to Crown Premium almost ten years ago.

In his heads of argument the first respondent's counsel submitted that, in the founding affidavit relating to the joinder application of the second

applicant, there is no allegation or explanation for the delay of almost ten years before Stellenbosch Farmers' Winery challenged the determination made by the respondent almost ten years ago nor why the interests of justice call for the adjudication of the said determination.

In *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 2 SA 302 (SCA) at 322C-J the Court pointed out that if there was unreasonable delay in instituting review proceedings, the applicant should explain the cause of the delay before the Court can condone the delay.

In *Mamabolo v Rustenburg Regional Council* 2001 1 SA 135 (SCA) at 141F the Court implied that if there is an unreasonable delay in instituting review proceedings, the applicant should explain the delay in the papers. See also *Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union and Others* 2001 4 SA 149 (SCA) at 156G-157J.

In my view there is no justification for the joinder of the second applicant. It has not been stated on the papers before me why the second applicant delayed for such a long time before challenging the determination of the first respondent, furthermore as to why the interests of justice calls for the adjudication of the said determination.

My opinion is that the determination made by the first respondent in 1995 relating to Crown Premium cannot be challenged at this stage.

10.3 Another point, which was raised as a point *in limine* by the first respondent, is the tariff determination of the first respondent made on 10 September 1996 relating to Bernini Sparkling Grape.

In his heads of argument the first applicant's counsel submitted that this is an application to compel the first respondent to comply with his/her duty in terms of section 47(9)(d)(i)(bb) of the Act, to correct his/her erroneous determination of the tariff classification of Crown Premium and Bernini Sparkling Grape.

The first tariff determination by the Commissioner relating to Bernini Sparkling Grape was issued on 10 September 1996.

In the amended notice of motion, as stated earlier, the first applicant is seeking an order setting aside the first respondent's determination of 10 September 1996 and confirmed on 13 0ctober 2004.

0n 15 December 2003 in a letter addressed to the first respondent by KPMG, consultant of the first applicant gave notice to the first respondent

complaining, *inter alia*, about the previous determinations and confirmations of Bernini Sparkling Grape's tariff determination.

In its founding affidavit the first applicant alleged that during June 2002 it conducted a review of the excisable products it manufactures. It was found that, although excise duty was being paid on all the excisable products it manufactures, formal tariff determinations had not been issued for all the products as provided for in section 47(9) of the Act.

The above statement cannot be correct as far as at least Bernini Sparkling Grape is concerned as tariff determination thereof, as mentioned above, was made on 10 September 1996 and issued to Distillers Corporation Ltd.

If the said Distillers Corporation Ltd was not satisfied with the said tariff determination, it should have challenged same within the prescribed time frames as mentioned in 10.2 above of this judgment.

Furthermore the determination of 10 September 1996 were issued to an entity which is not the current first applicant. In terms of section 47(9)(a)(iii)(aa) of the Act, the rights derived by the person in whose name the determination was made attaches to such person and are not capable of being transferred, either by way of cession or otherwise.

The first applicant is barred from challenging the said determination, firstly because of the time period that has expired and there is no explanation for the delay and secondly, the said determination was issued to another company and not the first applicant.

My opinion is that the court cannot interfere with the tariff determination of the first respondent of 10 September 1996 relating to Bernini Sparkling Grape.

10.4 Tariff classification

Section 47(9)(a)(i)(aa) of the Act provides as follows:

"(9)(a)(i) The Commissioner may in writing determine

(aa) the tariff headings, tariff subheadings or tariff items or other items of any schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified."

Section 47(9)(d)(i)(bb) of the Act reads as follows:

"(d)(i) The Commissioner shall-

(aa) ...

(bb) amend any determination or withdraw it and make a new determination if it was made in error or any condition or obligation on which it was issued is no longer fulfilled or

any other good cause shown, including any relevant ground for review contemplated in section 6 of the Promotion of Administrative Justice Act (no 3 of 2000)."

As stated earlier, on 30 November 1995 the first respondent issued a determination in terms of section 47(9) of the Customs and Excise Act 91 of 1964 in the name of Stellenbosch Farmers' Winery Ltd determining that Crown Premium was, for purposes of the payment of excise duty, classifiable under tariff heading 2206.00.90 and tariff item 104.15.50. Bernini Sparkling Grape was said to be classifiable under tariff heading 2206.00.90 and tariff item 104.15.80 on 3 July 1996.

On 14 August 2002 first respondent determined that the eight wine coolers and Bernini Sparkling Grape were classifiable under tariff heading 2206.00.90 and tariff item 104.15.50. At this stage, all the eight wine coolers, Crown Premium and Bernini Sparkling Grape were classified under the same tariff heading and tariff item.

On 7 October 2002 a consultant from KPMG Services (Pty) Ltd on behalf of the first applicant addressed a letter to the first respondent contending that the final wine based products manufactured by first applicant are not subject to excise duty as provided for in the Act, and that only the quantity of wine used in the manufacture of the products should be liable to the

payment of excise duty at the rate provided in tariff item 104.15.10 of Part 2A of Schedule 1 to the Act and requesting the first respondent to confirm same.

In the papers before me the first applicant alleges that the "wine cooler products" in question consists of a mixture of wine of grapes, water sweetening agents, colouring agents and natural flavourants.

On 12 March 2003 the first respondent issued, in terms of section 47(9)(d)(i)(bb) of the Act a new determination determining that the eight wine coolers were classifiable under tariff item 104.15.10. Practical effect of this new determination is that duty payable on the said eight products was reduced.

First respondent made the effective date of the new determination mentioned above retrospective from 14 August 2002.

In a letter dated same date, namely 12 March 2003 addressed to the first applicant's consultant by the first respondent, the latter refused to interfere with the classifications of Crown Premium and Bernini Sparkling Grape, which classifications were made on 30 November 1995 and 10 September 1996 respectively. In the last paragraph of the said letter the following is written:

"Your attention is drawn to the fact that in terms of the provisions of section 47(9) of the Customs and Excise Act 91 of 1964, an appeal against this determination had to be prosecuted within a period of three months from date of the determination. Any appeal against this determination is therefore time barred."

Nothing transpired between the parties and on 18 February 2004 the first respondent caused Part 2A of Schedule no 1 to the Act to be amended to provide specifically for "mixtures of fermented beverages and non-alcoholic beverages" under tariff item 104.17.22.

As stated earlier, this application was launched on 6 May 2004 and on 13 0ctober 2004 the first respondent amended the earlier determinations in respect of all the ten wine coolers. The effect of the amended determinations was the following:

(a) confirmation of the determination of 1995 in respect of Crown Premium, which determinations determined that Crown Premium was classifiable under tariff item 104.15.50 in respect of the period prior to 18 February 2004;

(b) determining that Crown Premium was classifiable under tariff heading 2206.00.80 and tariff item 104.17.15 with effect from 13 0ctober 2004;

(c) confirming the earlier determination in respect of Bernini Sparkling Grape to the effect that it was classifiable under tariff item 104.15.50 in respect of the period prior to 18 February 2004;

(d) determining that Bernini Sparkling Grape was classifiable under tariff item 104.17.15 with effect from 13 0ctober 2004;

(e) withdrawing the determination of 12 March 2003 in respect of the eight wine coolers, and determining that they were classifiable under tariff item 104.15.50 with retrospective effect to 14 August 2002 in respect of the period prior to 18 February 2004;

(f) determining that the eight wine coolers were classifiable under tariff item 104.17.15 with effect from 18 February 2004.

The need to introduce new matter in the replying affidavit by the first applicant was occasioned by the new determination of the first respondent on 13 0ctober 2004.

The first applicant was entitled to introduce new evidence in the replying affidavit and to amend the notice of motion accordingly.

10.4.1 Tariff classification prior to 18 February 2004

The applicant's counsel in his heads of argument submitted that the correct tariff classification of the ten wine coolers for excise duty purposes, entered for home consumption prior to 18 February

2004, is tariff item 104.15.10 (unfortified still wine). On the other hand, first respondent contends that the correct tariff item applicable is item 104.15.50 (other still fermented beverages, unfortified).

As mentioned earlier it is not possible for the first applicant to challenge the first respondent's determinations made in 1995 and 1996 at this stage relating to Crown Premium and Bernini Sparkling Grape.

On 14 August 2002 the first respondent issued a determination of the eight wine coolers determining that they are liable to excise duty in terms of tariff item 104.15.50 of Part 2A of Schedule 1.

On 7 October 2002 a letter was addressed on behalf of the first applicant to the first respondent objecting to the determination.

As stated earlier, on 12 March 2003 a new determination was issued determining that the eight wine coolers were classifiable under tariff item 104.15.10.

In my view the first applicant did not delay unduly to challenge the determination mentioned above, and I think that the interests of

justice requires that the Court should deal with the correctness or otherwise of the said determination.

First applicant alleges that prior to 18 February 2004 only the wine portion of the eight wine coolers is liable to excise duty under tariff item 104.15.10.

The first respondent's counsel in his heads of argument submitted that in order to make a finding on this particular point under discussion, the Court must make a finding on the true nature and characteristics of the wine coolers and in particular a finding on whether water is to be regarded as a "non-alcoholic beverage" for the coolers' classification in terms of Schedule 1 of Part 1.

To me it appears that the abovementioned approach as mentioned by counsel of first respondent is the correct approach – see *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 318 (WLD) where, in the process of dealing with the classification of a particular product, COLMAN J at 321H-322A said the following:

> "That would seem to have been the approach of the Appellate Division when it came to deal with the matter on appeal in *Kommissaris van Doeane en Aksyns v Mincer*

> *Motors Bpk* 1959 1 SA 114 (AD). From a passage at p121C-E it appears ... that what the Court was applying was a test which ignored intention and rested upon the nature, form, character and functions of the vehicle, objectively determined."

In *Int Business Machines v Commissioner for Customs* 1985 4 SA 852 (AD) at 863G NICHOLAS AJA said the following:

> "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 those goods; and third the selection of the heading which is most appropriate to such goods."

Section 47 18(a) of the Act provides as follows:

> "... interpretation of Part 1 of Schedule no 1 shall be subject to the explanatory notes to the Harmonised System and the Customs Cooperation Council Nomenclature issued by the Customs Cooperation Council, Brussels, from time to time ..."

It does not seem to be in dispute that the wine cooler products consist of a mixture of wine of grapes, water, sweetening agents, colouring agents and natural flavourants.

In the answering affidavit attested to by Ms Vermaak, a senior National Customs Specialist in the employ of the first respondent, it is pointed out that one of the cider products manufactured by the first applicant and which is marketed under the name of Hunters Gold was classified under tariff item 104.15.50 prior to 28 February 2004.

The only difference in the manufacturing process of Hunters Gold and the other wine coolers is only that Hunters Gold has as its core ingredient apple cider as opposed to grape wine which is the core ingredient of the wine coolers. Besides that, all other ingredients are the same.

She further alleges that prior to 18 February 2004 Distell paid excise duty on Hunters Gold in terms of tariff item 104.15.50 on the basis that it is classifiable under tariff heading 22.06 as "other fermented beverages".

The first respondent's counsel submitted that it would be absurd to classify the wine coolers differently because wine instead of cider is used as the alcohol component of the product.

He further submitted that as a matter of principle the wine coolers should be classified in the same category as ciders.

0n the other hand, the first applicant's counsel submitted that the attitude of the first respondent would have been correct if the product is classified as "other fermented beverage" but the applicant contends that the product is not "other fermented beverage" as no fermentation takes place in the manufacturing of the wine coolers.

Mr Duncan Allan Green who is the Group New Product Development Manager for Distel, in his affidavit referred to the wine coolers including Bernini Sparkling Grape Beverage, Crown Premium, etc and said the following:

> "These products all consist of a wine base to which water, sweetening agents and flavouring agents are added ..."

In a document provided to the Receiver of Revenue dealing with the manufacture of a product called Hunters Gold, it is stated that

apple is the core ingredient utilized in apple cider, and then water, sweetening agents, flavouring agents and colouring agents are added.

The process mentioned above and the ingredients used, are the same as those utilized in the manufacturing of the eight wine coolers mentioned above, with the exception of the core ingredient, being wine in the former and apple cider in the latter.

I cannot find any justifiable reason for the eight wine coolers and Hunters Gold to fall under different tariff items.

The contention of the applicant that no fermentation takes place in the manufacturing of the wine coolers, is not borne out by the manufacturing process detailed by Mr Green. The same process, with the exception of the core ingredient, is followed in the manufacturing of both the Hunters Gold and the wine coolers.

The applicant further contends that the eight wine coolers should be classified under tariff heading 22.06, but no tariff item provides for "mixtures of fermented beverages and non-alcoholic beverages", and the situation will then be regulated by section 37(1) of the Act.

In the manufacturing of the eight wine coolers, fermented beverages are diluted with water and other ingredients mentioned above are added. In my view the dilution by water of the core ingredient cannot be termed a mixture of fermented beverages and non-alcoholic beverage. Water cannot be said to be a non-alcoholic beverage.

My opinion is that the tariff item 104.15.50 contended for by the first respondent is the correct tariff item.

10.4.2 Tariff classification after 18 February 2004

In this subheading I will deal with the tariff classification of the ten wine coolers after 18 February 2004. The applicant contends for tariff item 104.17.22 (mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages). The first respondent contends for tariff item 104.17.15 (other fermented beverages unfortified).

Counsel for the applicant submitted that the tariff classification contended for by the applicant is appropriate as the wine coolers are mixtures of fermented beverages (wine) and non-alcoholic beverages (water).

The said counsel further submitted that the tariff classification contended for by the first respondent is inappropriate for no fermentation takes place during the manufacturing of the wine coolers.

Chapter note 3 of Chapter 22 reads as follows:

> "3. For the purposes of heading 22.02 the term 'non-alcoholic beverages' means beverages of an alcoholic strength by volume not exceeding 0,5% vol ..."

The explanatory notes to chapter notes read partly as follows:

> "The products of this chapter constitute a group quite distinct from the food stuffs covered by the preceding chapters of the nomenclature. They fall into four main groups; (a) water and other non-alcoholic beverages and ice ..."

The applicant's counsel submitted that the word "other" mentioned in the explanatory note in the previous paragraph must be given a meaning. The ordinary meaning thereof is clear and therefore it means that the said note implies that there are two kinds of

"non-alcoholic beverages" namely water and other non-alcoholic beverages.

Tariff heading 22.01 reads as follows:

> "Waters, including natural or artificial mineral waters and aerated waters not containing added sugar or other sweetening matter nor flavoured: ice and snow ..."

Tariff heading 22.02 reads as follows:

> "Waters, including mineral waters and aerated waters containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09."

From the above two tariff headings, to me it is clear that non-alcoholic beverages will be fruit juices, vegetable juices, water containing sugar or other sweetening matter or flavoured. Ordinary water like ice cannot fit the description of non-alcoholic beverage. They will remain water or ice, and will be classifiable under tariff heading 22.01.

The submission of the applicant's counsel that wine coolers are mixtures of fermented beverages (wine) and non-alcoholic beverage (water) cannot be sustained.

In my view the tariff item contended for by the first respondent is the most appropriate one.

10.4.3 Tariff determination of 13 0ctober 2004

0n 13 0ctober 2004 the first respondent issued a determination with the following effect:

(a) confirming a previous determination issued on 30 November 1995 stating that the product Crown Premium is classifiable in tariff item 104.15.50 of Part 2A of Schedule no 1 to the Act prior to the amendment of that schedule on 18 February 2004, and further determining that the product falls to be classified in tariff item 104.17.15 subsequent to the amendment;

(b) confirming a previous determination dated 10 September 1996 stating that the product Bernini Sparkling Grape Beverage is classifiable in tariff item 104.15.50 of Part 2A of Schedule no 1 to the Act prior to the amendment of that schedule on 18 February 2004, and determining further that

the product falls to be classified in tariff item 104.17.15 after the amendment.

(c) As far as the other eight wine coolers are concerned the first respondent withdrew a previous determination dated 12 March 2003 which stated that the products fall to be classified in tariff item 104.15.10 and substituted same with a determination stating that with effect from 14 August 2002 the products are classifiable in tariff item 104.15.50. These products are also determined to be classifiable in tariff item 104.17.15 subsequent to the amendment of Part 2A of Schedule no 1 on 18 February 2004.

The ingredients of all ten wine coolers, as appears from the papers, are almost identical with minor differences. Manufacturing process is also almost identical.

In my view the ten products should be classified under the same tariff item.

Prior to the amendment of Part 2A of Schedule no 1 on 18 February 2004 tariff item 104.15.50 catered for "other

fermented beverages" in which category all the ten wine coolers should have been classified.

The applicant's counsel argued *inter alia* that the first respondent was estopped by its determination of 12 March 2003 to make a new determination or to amend the said determination if such new determination or amendment would be to the detriment of the first applicant.

The first respondent has a duty to ensure proper implementation of the Act.

In *AM Moola Group Ltd v Commissioner SA Revenue Service* 2003 6 SA 244 (SCA) the court had to consider whether the principle of estoppel is applicable in almost similar circumstances as in the present case. The officials did not claim duty under circumstances in which they should have done so. At p251 para D-G the learned LEWIS JA said the following:

> "(19) The Court, after an examination of both English and Roman-Dutch authorities held that the government was not precluded from claiming the duty. DE VILLIERS CJ was of

> the view that, while it might be considered an injustice that government should be permitted to enforce a right it had purported to abandon the 'rights of government exist for the public good and not for the personal advantage or convenience of members of the government'. BUCHANAN J, in a concurring judgment, made the further point that legislation should not be rendered nugatory in consequence of an illegal act on the part of an official. By parity of reasoning the same would apply to a mistake."

The estoppel argument raised by the applicant's counsel cannot be sustained. The first respondent has a duty to implement the provisions of the law. If an incorrect tariff determination was made at any stage first respondent is entitled to correct the said incorrect determination.

In his heads of argument counsel for second respondent, in my view correctly so, submitted that in order to be able to be entitled to any refund the first applicant must succeed in

its application for the setting aside of the determinations of the first respondent of 13 0ctober 2004 and thereafter lodge a claim with the first respondent.

Prior to that, the first applicant is not entitled to attack the constitutionality of section 76 of the Act.

In the light of my findings mentioned above it is not necessary for me to deal with constitutional issues raised by the first applicant.

11. CONCLUSION

The applicants have failed to make out a case for any of the prayers mentioned in the notice of motion. Both the first and second respondents are entitled to their costs. Therefore the Court makes the following order:

1. The application is dismissed.
2. Applicants are ordered to pay jointly and severally the costs of both first and second respondents on a party and party scale which costs are to include costs occasioned by the employment of two counsel by each of the respondents.

W L SERITI
JUDGE OF THE HIGH COURT

11883-2004

FOR THE APPLICANTS:
INSTRUCTED BY:
FOR THE RESPONDENTS:
INSTRUCTED BY:
HEARD ON: