

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

Date: 2007-01-29

Case Number: 30459/02

In the matter between:

**DISCOVERY PROMOTIONS CLOSE CORPORATION**

Applicant

and

**COMMISSIONER FOR SOUTH AFRICAN REVENUE  
SERVICE**

Respondent

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**JUDGMENT**

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**SOUTHWOOD J**

[1] The applicant appeals in terms of section 47(9)(e) of the Customs and Excise Act, 91 of 1964 ('the Act') against the following tariff determinations made by the Commissioner –

- (1) the determination dated 24 June 2002 in terms of which certain sunglasses imported by the applicant were classified under subheading 9004.10 of Part 1 of Schedule 1 to the Act ('the Schedule');
- (2) the determination dated 24 June 2002 in terms of which certain 'Gladiator' bottle caps imported by the applicant were classified under subheading 3923.50.90 of Part 1 of the Schedule;
- (3) the determination dated 24 June 2002 in terms of which certain chalk imported by the applicant was classified under subheading 9609.90 of Part 1 of the Schedule;
- (4) the determination dated 12 June 2001 in terms of which certain 'monster eye' straws imported by the applicant were classified under heading 3926.90.90 of Part 1 of the Schedule.

[2] The applicant seeks the following relief:

- (1) that the sunglasses are classifiable under subheading 9503.90 of Part 1 of the Schedule;
- (2) that the 'Gladiator' bottle caps are classifiable under subheading 9502.99 of Part 1 of the Schedule;

- (3) that the chalk is classifiable under subheading 9503.90 of Part 1 of the Schedule;
- (4) that the 'monster eye' straws are classifiable under tariff heading 9503.90 of Part 1 of the Schedule.

Although the applicant initially sought a declarator in respect of the 'monster eye' straws the parties agree that the issue of the correct tariff for the 'monster eye' straws must be decided as part of the appeal. (The items which are the subject of the appeal will be referred to collectively as 'the goods'.)

- [3] The applicant carries on business as an importer. During 2001 the applicant imported the goods as promotional material for fast food outlets such as Wimpy to use at shows such as MTN Gladiators. The applicant contends that the goods are children's toys. If that is correct the goods will be duty free. The respondent disagrees and contends that save for the 'monster eye' straws each tariff determination is correct. The respondent contends that the 'monster eye' straws are classifiable under heading 3917.
- [4] In terms of section 47(9)(a)(i) of the Act the Commissioner may determine the tariff headings, tariff sub-headings or tariff items or other items of the schedule under which imported goods are classified. In

terms of section 49(7)(b), (e) and (f) of the Act this determination is subject to appeal to the High Court. The appeal takes the form of an application to a single judge and all the evidence is considered afresh in a hearing *de novo* – see ***Metmak (Pty) Ltd v Commissioner of Customs and Excise* 1984 (3) SA 892 (T)** and ***Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 (4) SA 318 (W)** at 320D-321C. If there are disputes of fact in the affidavits the principles set out in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)** at 634E-635C must be applied. In the present case the parties accept that the matter must be decided on the facts which are common cause together with the respondent's factual allegations. The applicant did not file a replying affidavit and accordingly none of the respondent's allegations is in dispute.

- [5] The Schedule systematically groups goods that are generally dealt with in international trade in sections, chapters and sub-chapters which are given titles indicating as concisely as possible the broad class of goods each covers. Within each chapter or subchapter various classes of goods are collected under what are referred to under headings and goods falling within that class are then itemised more specifically under subheadings which specify the rate at which duty is payable – see ***Secretary, Customs and Excise v Thomas Barlow & Sons* 1970 (2) SA 660 (A)** at 675D-E: ***The Heritage Collection (Pty) Ltd v Commissioner, SARS* 2002 (6) SA 15 (SCA)** at para 3. The Schedule itself and each section and chapter are headed by 'notes'

being rules for interpreting their provisions – see ***Secretary, Customs and Excise v Thomas Barlow & Sons supra*** at 675F.

- [6] In the unreported Supreme Court of Appeal judgment in ***Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd*** (SCA case no 448/05 delivered 26 September 2006) the court said in para 8 –

‘The legal principles applicable to tariff classification and the manner in which they should be interpreted and applied have been expounded in a number of cases. Nicholas AJA, in *International Business Machines*, set out the principles governing the process of classification as follows:

“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.”

It is clear from the authorities that the decisive criterion for the customs classification of goods is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance. This is an internationally recognised principle of tariff classification. The subjective intention of the designer or what the importer does with the goods after importation are, generally, irrelevant considerations. But they need not be because they may, in a given situation be relevant in determining the nature, characteristics and properties of the goods.’

- [7] In the present case the emphasis falls on a consideration of the nature and characteristics of the goods. The reason for this is that the notes to each of the chapters which the respondent contends are applicable exclude from the operation of that chapter goods falling under Chapter 95, being the Chapter under which the applicant contends all four items fall to be classified. The parties agree that if the goods are properly classified as toys in terms of Chapter 95 they will be excluded from the chapters which the respondent contends are applicable and that will determine the outcome of the appeal. See ***Heritage Collection (Pty) Ltd v Minister of Finance 1981 (1) SA 437 (C)*** at 443E-444F.
- [8] The applicant contends that the 'Gladiator' bottle caps are classifiable under tariff sub-heading 9502.99 ('other') and that the sunglasses, chalk and 'monster eye' straws are classifiable under tariff sub-heading 9503.90 ('other'). Chapter 95 covers 'Toys, Games and Sports Requisites; Parts and Accessories Thereof'. Sub-heading 9501.00 covers 'Wheeled Toys Designed to be Ridden by Children (For example Tricycles, Scooters, Pedal Cars): Dolls Carriages'. Sub-heading 9502 covers "Dolls Representing only Human Beings", 9502.10 – Dolls, whether or not dressed; 9502.9 Parts and Accessories; 9502.91 Garments and accessories therefor, footwear and headgear and 9592.99 other. Sub-heading 9503 covers 'Other Toys; Reduced-Size ('Scale') Models and Similar Recreational Models, Working or not; Puzzles of All Kinds'. These include 9503.10

Electric Trains, including tracks, signals and accessories therefor:  
9503.20 Reduced-size ('Scale') model assembly kits, whether or not  
working models, excluding those of sub-heading no 9503.10; 9503.30  
Other construction sets and constructional toys – Toys Representing  
animals or non-human creatures; 9503.41 Stuffed 9503.49 Other  
9503.50 Toy musical instruments and apparatus and 9503.90 other.  
The note to heading 9502 states that dolls are usually made of rubber,  
plastics, textile materials, wax, ceramics, wood, paperboard, paper  
maché or combinations of these materials. They may be jointed and  
contain mechanisms which permit limb, head or eye movements as  
well as reproductions of the human voice etc. They may also be  
dressed. The note to sub-heading 9503 states that it covers 'toys  
intended essentially for the amusement of persons (children or adults)'  
and includes all toys not included in headings 9501 and 9502 and *inter  
alia* toy spectacles.

- [9] The respondent contends that the Gladiator bottle caps are classifiable under sub-heading 3923.50.90, i.e. other stoppers, lid caps and other closures under heading 39.23 'Articles for The Conveyance of or Packing of Goods, of Plastics; Stoppers, Lids, Caps and other Closures of Plastics'. The respondent contends that the sunglasses are classifiable under sub-heading 9004.10 'Sunglasses'; the chalk is classifiable under sub-heading 9609.90 'other' under heading Pencils (excluding pencils of heading number 96.08), Crayons, Pencil Leads, Pastels, Drawing Charcoals, Writing or Drawing Chalks and Tailors

Chalks' and that the 'monster eye' straws are classifiable under heading number 3917 as tubes, pipes and hoses.

[10] The items will be considered in turn.

#### Sunglasses

[11] The sunglasses consist of brightly coloured plastic frames made of hardened plastic and coloured lenses made of a softer plastic. They are small and will be worn only by children. The sunglasses are depicted in the photograph annexed as JT13. According to the evidence of Natasha van Tonder, who tested the sunglasses to establish whether they complied with the South African Bureau of Standards' specification for 'lenses for sunglasses and fashion spectacles – safety requirements, it was found that the sunglasses met the requirements for 'general purpose sunglasses' i.e. 'sunglasses that are intended to reduce sun glare in ordinary circumstances'.

[12] This finding disposes of the applicant's factual contentions in its founding affidavit that the sunglasses do not afford any real protection against the sun; that they are not durable and are of no significant optical value; and that they clearly are designed and intended for use as toys by children.

- [13] Accordingly it is found that when presented for customs clearance the most appropriate classification for the sunglasses was sub-heading 9004.10 'Sunglasses'.

Gladiator Bottle Caps

- [14] The Gladiator heads are approximately 80 mm in diameter, approximately 60 mm tall and represent the heads of MTN Gladiators. The heads are made of plastic and incorporate a drinking device which enables it to be used to drink liquid from a plastic bottle. Examination of the heads which are depicted in a photograph annexed as JT20, shows that each item is a bottle cap with a Gladiator head attached to it and properly described as a Gladiator Head bottle closure.
- [15] The applicant contends that the Gladiator bottle caps are classifiable under sub-heading 9502.99 as parts of dolls. However, it is clear that the dolls referred to in sub-heading 9502 must represent an entire human being and that sub-heading 9502.99 provides for other parts and accessories of such dolls. The Gladiator heads clearly do not fit under this specification. The heads do not represent complete human beings and they are not intended to be parts of a complete human being. Each stands alone simply as a head. Accordingly it is found that the most appropriate classification is sub-heading 3923.50.90.

Chalk

- [16] These items consist of moulds of different shapes and with varying diameters. The shapes resemble bottles, sea shells, ice creams and so on and are made of solid chalk. The diameters of the chinks are not consistent and are far larger than those of the usual writing or drawing chinks. The chinks are also of various colours. The chinks are depicted in the photograph annexed as JT17. The chinks can be used for writing and drawing.
- [17] The applicant contends that the chinks fall under heading 9503.90 'other'. The notes to the heading states that the heading covers toys intended essentially for the amusement of persons (children or adults); that the heading includes all toys not included in headings 9501 and 9502 and lists a number of such toys and that certain toys (eg. electric irons, sewing machines, musical instruments, etc) may be capable of limited 'use'; but they are generally distinguishable by their size and limited capacity from real sewing machines, etc. The respondent contends that the chalk is classifiable under 96.09.90 'other' under the heading 'Pencils (Excluding Pencils of Heading No 96.08), Crayons, Pencil Leads, Pastels, Drawing Charcoals, Writing or Drawing Chinks and Tailors Chinks'. The note to chapter 96 states that the chapter does not cover *inter alia* Articles of Chapter 95 (toys, games, sports requisites). It is significant that the immediately preceding heading 9608, covers writing implements that would be in ordinary use and the

heading 9609 covers such chalks: i.e. writing or drawing chalks and tailors chalks.

- [18] The respondent emphasises that the applicant concedes that the item is capable of being used for writing or drawing and that the tests conducted by the South African Bureau of Standards established that the chalk complies with the relevant SABS specifications: i.e. it has an acceptably smooth finish; it is free from grit, flint or sandy particles; it can produce uniform lines without scratching or damaging the blackboard and the lines can be easily erased by using a suitable dry duster. While this is correct, these points do not deal with the size or shape of the chalk and whether the chalks are properly described as toys. It is clear from the notes to the heading that an item can still be a toy even if capable of limited use. The chalk can be used to write or draw but its size and shape makes it uncomfortable and unmanageable to use. The chalk would not ordinarily be used for writing or drawing and would be used essentially for the amusement of children. Therefore, when presented for customs clearance the chalk was classifiable under sub-heading 9503.90.

Monster eye straws

- [19] The item consists of a plastic tube (or drinking straw) bent in such a way that a holder containing a transparent plastic ball in which a large coloured eye floats in a clear liquid, fits into the bend. The tube or

straw can obviously be used for drinking. Equally obvious is the fact that it will not be disposed of after use.

- [20] The applicant contends that the item should fall under sub-heading 9503.90 (i.e. as a toy) and the respondent contends that it falls under tariff heading 3917, tubes, pipes and hoses. Once again the question is whether the item is more properly classified as a toy than as a tube, pipe or a hose.
- [22] The straw is clearly capable of performing the function of a drinking straw but the eye performs no other function than that of amusing children (and even adults). The word 'toy' is not defined in the Schedule. The appropriate meaning of 'toy' in the Shorter Oxford Dictionary is 'a plaything for children or others; also, something contrived for amusement rather than for practical use'. The nature and appearance of the 'monster eye' straw fall within that definition and the item is properly classifiable as a toy under sub-heading 9503.90.
- [23] In any event, upon a consideration of the item, the more appropriate sub-heading is 9503.90 rather than 3917. The Chapter is entitled 'Plastics and Articles Thereof' and the relevant heading is 'tubes, pipes and hoses, and fittings therefor (for example, joints, elbows, flanges) of plastics'. Furthermore note 8 provides that for the purpose of the heading 'tubes, pipes and hoses' mean hollow products, whether semi-manufactured or finished products, of a kind generally used for

conveying, conducting or distributing gasses or liquids (for example ribbed gasoline hose, perforated tubes). If there is doubt, Rules 3(b) and 3(c) of the General Rules of Interpretation would determine the issue in favour of the applicant.

Order

[24] The following order is made:

- (1) The tariff determinations made by the respondent in respect of the chalk items (9609.90) and the 'monster eye' straws (3917) are set aside and both items are determined to be classifiable under tariff sub-heading 9503.90.
- (2) The respondent is ordered to pay the costs of these proceedings.

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**B.R. SOUTHWOOD  
JUDGE OF THE HIGH COURT**

CASE NO: 30459/2002

HEARD ON: 26 October 2006

FOR THE APPLICANT: ADV. A. DE KOK

INSTRUCTED BY: M. Anderson of Buitendags Attorneys

FOR THE RESPONDENT: ADV. A. MEYER

INSTRUCTED BY: State Attorney

DATE OF JUDGMENT: 29 January 2007