IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG

Case number: **5712/2008**

In the matter between:

3M SA (PTY) LIMITED APPLICANT

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE 1ST RESPONDENT

THE MINISTER OF FINANCE 2ND RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

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

(3) REVISED.

13/3/2009

DATE SIGNATURE

Handed down on: 16 March 2009

JUDGMENT

A A LOUW J

Introduction

[1] At all relevant times the applicant has been an importer of Interam

brand mats which are used to manufacture catalytic converters.

[2] Section 47(1) of the Customs and Excise Act 91 of 1964 ("the Act") provides that customs duty shall be paid for the benefit of the National Revenue Fund on all imported goods in accordance with the provisions of Schedule No. 1 to the Act. Part 1 of Schedule 1 to the Act is divided into numerous tariff headings and tariff subheadings. The tariff subheading within which imported goods fall, determines whether the importation attracts the payment of customs duties or not. (Many of the tariff subheadings provide that the goods therein specified may be imported free of duty.)

[3] Section 75(1)(a) and (b) of the Act provides that imported goods described in Schedules No. 3 and 4 to the Act shall be admitted under rebate of customs duties applicable in respect of such goods to the extent stated in the item of Schedule 3 or 4 in which the goods are specified.

[4] Section 76 of the Act provides that an importer who has paid customs duty upon the importation of goods, is in specified circumstances, entitled to a refund of the customs duty so paid.

[5] In 1990 and 1991 the relevant portions of section 47(9)(a) and (b) of the Act (which have subsequently been amended), read as follows:

> '47(9)(a)(i) The Commissioner may in writing determine the tariff headings, tariff subheadings or items of any schedule under which any imported goods ... shall be classified.
>
> ...
>
> (b) Any determination so made shall, subject to appeal to the Court, be deemed to be correct for the purposes of this Act, and any amount due in terms of any such determination shall remain payable as long as such determination remains in force.'

Relevant tariff determinations

[6] On 11 June 1990 the Commissioner, acting in terms of section 47(9)(a)(i), determined that the Interam mats imported by the applicant fell within tariff subheading 6806.90.90 in Part 1 of Schedule 1 to the Act.

[7] The effect of this tariff determination was that no customs duty was payable in respect of the imported mats. It is common cause on the papers that this determination was correct.

[8] On 9 April 1991 the Commissioner changed his mind and redetermined the Interam mats to fall within tariff subheading 6806.10. The effective date of this redetermination was 9 April 1991.

[9] At that time, the effect of this redetermination was that the applicant became obliged to pay customs duty at the rate of 20% on the imported mats. It is now common cause that this determination was incorrect. This determination remained in force for more than 16 years.

[10] On 21 November 2006, the Commissioner redetermined the imported mats to fall within tariff subheading 6806.90.90. In his letter of 21 November 2006, the Commissioner ruled that the effective date of the amended determination was 22 April 2003.

[11] The effect of this amended determination was again that no customs duty was payable on the importation of the mats.

[12] The correct classification of the mats as well as the effective date of such classification is of major importance to the applicant, as these decisions have consequences for the applicant running into many millions of Rand. As appears from the following summary of important events, during 1992, the applicant was registered to import mats under

rebate of duty in terms of Rebate Item 470.03. The effect thereof was that as long as the applicant complied with the rebate conditions, it paid no customs duty, *i.e.* the 20% duty in terms of the 1991 determination was not payable. However, during January 2003, SARS demanded R27 000 000 from the applicant on the basis that it did not qualify for the rebate. This amount was later, after further documentary proof was furnished by the applicant to SARS, reduced to approximately R16 000 000 during November 2005 and to R11.8 million during August 2007. In terms of prayer 7 of the notice of motion, the applicant wants a declaration that this latter amount is not payable by it to the first respondent.

Summary of important events

11 June 1990	Mats determind to fall under tariff subheading 6806.90.90: no customs duty payable (annexe 'FA4', p 77)
9 April 1991	Mats determined to fall within tariff subheading 6806.10: 20% customs duty payable (annexe 'FA5', p 78)
4 July 1992	Rebate store registered (p 461, para 6.4)

	3M imports mats under rebate of duty (*i.e.* pays no customs duty)
January 2003	SARS demands R27 million alleging that 3M does not qualify for the rebate (annexe 'FA9', p 84)
22 April 2003	SARS confirms that mats fall within tariff subheading 6806.10: duty remains payable (annexe 'FA11', p 113)
September 2003	3M applies to ITAC for a reduction of the rate of customs duty on the importation of the mats, to free
21 July 2004	ITAC report 66 made available (annexe 'FA12', p 115)
16 September 2004	Rebate on item 316.01 inserted in Schedule 3 to the Act (p 464, para 6.14)
22 September 2005	SARS confirms that the mats fall within tariff

subheading 6806.10 (annexe 'FA15', p 126)

22 November 2005 — SARS reduces demand to R16 million in view of proof of goods having been exported (p 472, para 6.36)

January 2006 — Parties agree that determination be referred to the WCO (p 472, para 6.39)

21 November 2006 — Mats again determined to fall under tariff subheading 6806.90.90 (annexe 'FA22', p 348)

10 August 2007 — SARS reduces claim to R11.8 million (annexe 'FA27', p 373)

The contentious and the uncontentious refunds

[13] On his interpretation of section 76B(1)(a)(i), the first respondent agrees that the applicant is entitled to refunds in respect of importations of the imported mats for the two-year period immediately preceding the written tariff determination of 21 November 2006, *i.e.* for the period 21 November 2004 to 20 November 2006. This amount has been agreed between the parties in the amount of R4 497 017.70. As this amount is

not in dispute, an order for payment of this amount by the first respondent to the applicant will follow.

[14] What is however described as the 'contentious refunds' is a refund claimed on a similar basis in the amount of R8 845 299.46 covering the period preceding the period of the 'uncontentious refunds', *i.e.* 1 March 2002 to 20 November 2004.

[15] Whether this amount is payable to the applicant depends on an interpretation of the Act, specifically section 47(9)(d) and section 76B(1)(a)(i) thereof. The interpretation of these sections will also determine whether the amount of R11.8 million claimed by the first respondent during August 2007 is payable.

Section 47(9)(d) of the Act

[16] This subsection reads as follows:

> '(d)(i) The Commissioner shall –
>
> (aa) amend any determination or withdraw it and make a new determination with effect from the date it is no longer in force as provided in paragraph (b) (ii) (aa) or (bb);

(bb) except where a determination is being dealt with in terms of any procedure contemplated in Chapter XA, 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 on any other good cause shown including any relevant ground for review contemplated in section 6 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

(ii) Any such amendment or new determination contemplated in paragraph (i) (bb) may be made with effect from –

(aa) subject to the provisions of section 44 (11) (c), the date of first entry of the goods in question in circumstances where a false declaration is made for the purposes of this Act;

(bb) the date of first entry, if the determination was made –

(A) by an officer who was biased or reasonably suspected of bias; or

(B) for an ulterior purpose or motive, arbitrarily or capriciously or in bad faith;

(cc) subject to subsection (12), the date of the determination made under paragraph (a) in circumstances where such determination was made in bona fide error of law or of fact; or

(dd) the date of the amendment of the previous

determination or the date of the new determination:

Provided that whenever any amendment of a determination or a new determination is effective from a date resulting in the person to whom the determination was issued –

(a) being entitled to a refund of duty, such refund shall be subject to the provisions of section 76B;

(b) retrospectively incurring an increased liability for duty, such liability shall, subject to the provisions of section 44(11)(c), be limited to goods entered for home consumption during a period of two years immediately preceding the date of such amendment or new determination.'

[17] Paraphrased, it means that where the first respondent's classification in terms of section 47(9)(a) was made in error, he *shall* amend any such determination or withdraw it and make a new determination.[1] Section 47(9)(d)(ii) proceeds to provide that any such amendment or new determination *may be made with effect from* the date of the determination made in terms of section 47(9)(a) where such determination was made in *bona fide* error of law or fact.

[18] As it is now common cause that section 47(9)(d)(ii)(cc) of the Act applies and that the effective date of the tariff determination dated 21

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1 See s 47(9)(d)(i)(bb)

November 2006 should therefore be changed from 22 April 2003 to an effective date of 9 April 1991, I intend to so order. Both parties have provided draft orders to me providing for *inter alia* an order in this regard. It is convenient to at this stage annexe hereto both draft orders. The draft order proposed by the applicant is annexe 'A' hereto, whilst the draft order proposed by the first respondent is marked annexe 'B'.

[19] In regard to the applicant's draft order, it has to be pointed out firstly that it differs somewhat from the relief as asked for in the notice of motion due to developments during the course of this application, and secondly the applicant's view is that in its draft order, it is only necessary to grant an order in terms of paragraph 4.1 thereof, and not also 4.2. I received this draft order subsequent to the hearing under cover from a letter from the applicant's attorney dated 15 September 2008. This letter further states that the first respondent's view is different, namely that the first respondent must also be *ordered* to amend the effective date. This is for instance reflected in the first respondent's draft order (annexe 'B' hereto) in paragraph 3.2 thereof.

[20] I am of the view that it entails an exercise of the first respondent's discretion to decide which of the various dates provided for in section 47(9)(d)(ii) finds application. It is further so that the first respondent has

not exercised this discretion subsequent to admitting in these papers that the effective date of 22 April 2003 is wrong. As the first respondent has now clearly made up his mind and I am in fact requested by the first respondent's counsel to make the order as per paragraph 3.2 of the first respondent's draft, I intend to do so. I therefore do this without having to decide this issue, which I do not do.[2]

Section 76B

[21] In interpreting this section, I regard it as important to note that the proviso to section 47(9)(d) follows *immediately after* the four paragraphs that provide for the various possible effective dates. Immediately after providing for the various possible dates that may be determined, the proviso then states –

> 'that whenever any amendment of a determination or a new determination is effective from a date resulting in the person to whom the determination was issued –
>
> (a) being entitled to a refund of duty, such refund shall be subject to the provisions of section 76B'.

[22] It was at the forefront of the legislature's mind that there could be

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2 It is arguable that the first respondent could also have applied the provisions of s 47(9)(d)(ii)(dd). However, (cc) seems to be more appropriate.

effective dates going back many years, and it immediately made the right of recovery subject to section 76B, which imposes a limit of two years. Secondly, whereas the terms 'with effect from' and 'effective from a date' have just been used, and the concept of effective date is being dealt with, it is striking to note that there is no reference to *effective date* or the word *effective* in the relevant part of section 76B to which the proviso refers.

[23] The relevant part of section 76B reads as follows:

> **'Limitation on the period for which refund and drawback claims will be considered and the period within which applications therefor must be received by the Controller**
>
> (1) Notwithstanding any other provision of this Act, but subject to any provision for a set-off of duty in any Schedule in respect of goods to which section 19A relates or any refund as contemplated in section 75(4A), where any person becomes entitled to any refund or drawback of duty –
>
> (a) in the case of any determination, new determination or amendment of any such determination in terms of section 47 (9), 65 or 69, such refund shall be limited to –
>
> (i) a refund 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, whichever date occurs last: Provided that where any such determination, new determination or amendment has been appealed against, such two year period shall be calculated from such last date, notwithstanding the fact that a court may amend any determination of the Commissioner, or the Commissioner may, as a result of the finding of such court, amend such determination.' [My emphasis.]

[24] The phrase highlighted above, namely 'the date of such determination' is clear and has to be given its usual meaning. The date of the relevant determination is 21 November 2006. I find it obvious that the legislature would have used the concept of effective date in section 76B(1)(a)(i) if that was intended. If the Act was intended to limit the right of refund not to the period of two years preceding the date on which the determination was made, but to a period of two years preceding the effective date thereof, it would have stated so.

[25] The applicant protests that this construction leads to unjust, even absurd, consequences. Pointing to various letters and memos exchanged between the parties and their legal representatives during

the process of having the determination amended, it is argued that the first respondent now profits by its own delay, *i.e.* by not having made the correct determination much earlier, *i.e.* at a stage when the applicant first protested that the classification was wrong. The process of arriving at the redetermination of 21 November 2006 included a detailed submission on behalf of the applicant by South African Customs & Trade Specialists CC dated 10 August 2005 and an eventual referral of the issue to the World Customs Organisation (WCO) by agreement between the parties during about January 2006. It was after the WCO's 'determination' that the first respondent amended the tariff determination during November 2006.

[26] The short answer to these arguments of the applicant is that it was at all times open to the applicant to appeal the wrong determination and so limit its loss. The proviso to section 76B(1)(a)(i) (quoted above) makes it clear that in the case of any appeal against a determination, the two-year period shall be calculated from the date of such appeal, *i.e.* the two years preceding the date of the appeal. The applicant did not appeal any of the wrong determinations, namely: 9 April 1991, 22 April 2003 and 22 September 2005.

[27] The applicant further relies on the following guidelines in the

Interpretation of Statutes:

1. Where an Act is capable of two interpretations, the interpretation should be preferred which does not take away existing rights, unless it is plain that such was the intention of the legislature;

2. the rule that in cases of doubt, the most beneficial or less arduous interpretation is to be preferred;

3. the presumption that legislation was not meant to be absurd or anomalous;

4. the presumption that statute law does not alter the existing law more than necessary.

[28] Neither of these rules of statutory construction assist the applicant, as I find that the plain meaning of the relevant part of section 76B is clear and that no absurd consequences follow. This is not a case such as *Venter v R*[3], where the plain meaning of a statute has to be altered in order to avoid an absurdity. The applicant in effect contends that the word 'effective' has to be inserted before 'date of such determination'.

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[3] 1907 TS 910

In *Venter v R*, the following was stated:

> '... [W]here the language of a statute is unambiguous, and its meaning is clear, the court may only depart from such a meaning if it leads to an absurdity so glaring that it could never have been contemplated by the legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context or by such other circumstances as the Court is justified in taking into account.'[4]

Conclusion

[29] In the result, the applicant's arguments cannot succeed and I intend making an order substantially in conformance with the first respondent's draft order, which is annexe 'B' hereto. I comment as follows on annexe 'B' and have made a few alterations thereto:

1. Paragraph 3.1 of the draft does not provide for interest to the applicant. The applicant in its notice of motion asked for interest as from 27 June 2007. During argument it was pointed out that that was a mistake and should read 27 July 2007. This is a month after delivery of the applicant's letter of demand dated 26 June 2007, which is annexe 'FA26' to the papers.

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4 At 915.

2. Paragraph 3.3 of the draft wrongly refers in the first sentence thereof to the applicant instead of the first respondent.

3. Paragraph 3.4 regarding the applicant's costs should refer to the costs of the applicant in respect of the relief in paragraphs 3.1, 3.2 and 3.3 of the order.

Order

I therefore order as follows:

1. It is declared that on a proper interpretation of section 76B(1)(a)(i) (read with section 47(9)(d)(ii)(cc)) of the Customs and Excise Act, 91 of 1964, the Applicant is entitled to refunds in respect of importations of the imported mats as more fully described in the founding affidavit, for the two year period immediately preceding the written tariff determination dated 21 November 2006, *i.e.* for the period 21 November 2004 to 20 November 2006.

2. Prayers 3.2 and 7 of the notice of motion are dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

3. The first respondent is ordered to –

3.1 pay to the applicant refund claims in the amount of R4 497 017.70, covering the period 21 November 2004 to 20 November 2006, made up as more fully set out in annexe 'FA2' to the founding affidavit plus interest on this amount at the rate of 15.5% per annum from 27 July 2007 to date of payment;

3.2 amend the effective date of the tariff determination dated 21 November 2006 (annexe 'FA22' to the founding affidavit) from 22 April 2003 to 9 April 1991;

3.3 consider remitting the interest on the first respondent's VAT claim, being an amount of R2 206 119.50 as per First Respondent's letter of demand dated 10 August 2007 (annexure 'FA27' to the founding affidavit) in terms of section 39(7)(a)(i)(ii) of the Value Added Tax Act, 89 of 1991;

3.4 pay the applicant's costs in respect of the relief set out in paragraphs 3.1, 3.2 and 3.3 above, such costs to include the costs consequent upon the employment of two counsel.

4. The applicant is ordered to pay the costs incurred by the respondents in opposing the relief sought in prayer 2 of the notice of motion dated 5 February 2008, such costs to include –

4.1 the costs pertaining to the drafting of the first respondent's answering affidavit as well as the preparation of the heads of argument (to the extent that they deal with the relevant relief sought);

4.2 the costs pertaining to the drafting of the second respondent's answering affidavit and the costs of briefing counsel to attend to the hearing of this application, such costs to be taxed as at 3 September 2008.

A A LOUW
JUDGE OF THE HIGH COURT

ANNEXURE "A"

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

CASE NO: 5712/08

In the matter between:

3M SOUTH AFRICA (PTY) LTD — Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — First Respondent

THE MINISTER OF FINANCE — Second Respondent

APPLICANT'S DRAFT ORDER

HAVING heard counsel and considered the papers, the following order is made:

1. It is declared that on a proper interpretation of Section 47(9)(d)(ii)(cc) and Section 76B of the Customs and Excise Act 91 of 1964, the Applicant is entitled to refunds in respect of importations of the imported mats as more fully defined in the founding affidavit for the period 1

March 2002 to 20 November 2004.

2. The First Respondent is ordered to pay the following refund claims which have been submitted to the First Respondent:

2.1 Refund claims in the amount of R4,497,017.70, covering the period 21 November 2004 to 21 November 2006 as is more fully set out in Annexure "FA2" to the founding affidavit.

2.2 Refund claims in the amount of R8,845,299.46, covering the period 1 March 2002 to 20 November 2004 as is more fully set out in Annexure "FA3A" to the Applicant's supplementary affidavit dated 5 September 2008.

3. The First Respondent is ordered to pay interest at the rate of 15,5% per annum on the amount in prayer 2.2 above calculated from 27 July 2007 to date of payment.

4. 4.1 It is declared that the effective date of the tariff determination dated 21 November 2006 (Annexure "FA22" to the founding affidavit) is 9 April 1991.

4.2 The First Respondent is ordered to amend the effective date of the said tariff determination from 22 April 2003, to 9 April 1991.

5. It is declared that the amount of customs duty (R3 598 971,70) and interest thereon (R1 890 959,72) thereon which has been demanded from the Applicant in the First Respondent's letter of demand dated 10 August 2007 (Annexure "FA27" to the founding affidavit), is not payable by the Applicant to the First Respondent.

6. The First Respondent is ordered to consider remitting the interest on his VAT claim, being an amount of R2 206 119,50 as per First Respondent's letter of demand dated 10 August 2007 (Annexure "FA27" to the founding affidavit), in terms of Section 39(7)(a)(i) and (ii) of the Value-Added Tax Act, No. 89 of 1991.

7. The First Respondent is ordered to pay the costs of this application, including the costs consequent upon the employment of two counsel, but subject to prayer 8 below.

8. The Applicant is ordered to pay the costs incurred by the Second Respondent in opposing the relief sought in prayer 2 of the notice of motion dated 5 February 2008, such costs to include the costs attendant upon the drafting of the Second Respondent's answering affidavit and the costs of briefing counsel to attend to the hearing of this application, such costs to be taxed as at 3 September 2008.

BY THE COURT

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REGISTRAR

ANNEXURE "B"

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

Case number: 5712/08

In the matter between:

3M SA (PTY) LIMITED — Applicant

and

THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — First Respondent

THE MINISTER OF FINANCE — Second Respondent

FIRST RESPONDENT'S DRAFT ORDER

Having read the papers filed of record and having heard counsel, the following order is made:

1. It is declared that on a proper interpretation of a section 76B(1)(a)(i) (read with section 47(9)(d)(ii)(cc)) of the Customs and Excise Act, 91 of 1964, the Applicant is entitled to refunds in respect of importations of the imported mats as more fully described in the founding affidavit, for the two year period immediately preceding the written tariff determination dated 21 November 2006, i.e. for the period 21 November 2004 to 20 November 2006.

2. Prayers 3.2 and 7 of the notice of motion are dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

3. The First Respondent is ordered to:

3.1 pay to the Applicant refund claims in the amount of R4, 497 017.70, covering the period 21 November 2004 to 20 November 2006, made up as more fully set out in **annexure "FA2"** to the founding affidavit;

3.2 amend the effective date of the tariff determination dated 21 November 2006 (**annexure "FA22"** to the founding affidavit) from 22 April 2003 to 9 April 1991;

3.3 consider remitting the interest on the Applicant's VAT claim, being an amount of R2,206 119.50 as per First Respondent's letter of demand dated 10 August 2007 (**annexure "FA27"** to the founding affidavit) in terms of section 39(7)(a)(i)(ii) of the Value Added Tax Act, 89 of 1991;

3.4 pay the Applicant's costs in respect of the relief set out in paragraphs 3.3 above, such costs to include the costs consequent upon the employment of two counsel.

4. The Applicant is ordered to pay the costs incurred by the Respondents in opposing the leave sought in prayer 2 of the notice of motion dated 5 February 2008, such costs to include:

4.1 the costs pertaining to the drafting of the First Respondent's answering affidavit as well as the preparation of the heads of argument (to the extent that they deal with the relevant relief sought);

4.2 the costs pertaining to the drafting of the Second Respondent's answering affidavit and the costs of briefing counsel to attend to the hearing of this application, such costs to be taxed as at 3 September 2008.

BY COURT

REGISTRAR