IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 2021/26916

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

JUDGE KUNY 14 August 2023

In the matter between:

ARCELORMITTAL SOUTH AFRICA LIMITED Applicant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

KUNY J

1 This is an appeal in terms of section 47(9)(e) of the Customs and Excise Act, 91 of 1964 ("the Customs Act" [1]) and a review. The applicant claims the following relief:

1 The applicant's appeal against the determination dated 2 March 2021, contained in Annexure "FA6" to the founding affidavit, that

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[1] A reference to the Customs and Excise Act in this judgment includes the Schedules, Rules, items and notes to the said Act.

the applicant does not qualify for diesel refunds claimed by the applicant under rebate item 670.04, is upheld.

2 The determination by the Commissioner is set aside and substituted with a determination that the diesel refunds claimed by applicant qualify under rebate item 670.04.

3 The Commissioner's decision to cancel the applicant's registration for the diesel refund, in terms of section 60(2)(b)(bb) of the Act, be reviewed and set aside, in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

4 In the alternative to paragraph 3, that the decision that the applicant must cancel its registration for the diesel refund be reviewed and set aside in terms of PAJA.

5 An order declaring, in terms of s 21(1)(c) of the Superior Courts Act 10 of 2013, that the applicant's haulage of rail freight activities qualifies for purposes of registration for the diesel refund scheme.

6 Alternatively, if it is found that the applicant does not qualify to claim diesel refunds in terms of the Act, an order declaring, in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013, that a practice generally prevailing as envisaged in section 44(11A) existed, and that the Commissioner is prohibited from claiming the refunded the diesel rebates from the applicant.

7 Further alternatively, an order declaring that the Commissioner created a legitimate expectation that the applicant qualified to be registered for, and was entitled to claim diesel refunds in terms of the Act, and that the Commissioner is prohibited from claiming the rebates refunded from the applicant.

8 Costs of suit, including the costs of two counsel.

9 Further and/or alternative relief.

2 The essence of the dispute is whether the applicant, in terms of the relevant rebate item 670.04 read with Note 6, Schedule 6/Part 3 of the Customs Act ("Note 6"), was entitled to claim refunds on diesel purchased by it to power locomotives traveling on rails in its steel manufacturing plant. If not, the applicant has raised further defences to the respondent's claim for repayment of the refunded monies.

3 Sections 75(1A)(d) and 75(4A)(b)(i) of the Customs Act read with rebate item 670.04 and Note 6, permit claims for a refund of the fuel levy and road accident fund levy on distillate fuel (which includes diesel) purchased for certain uses and under certain circumstances.

4 In April 2008 the applicant submitted a VAT 101D form to register itself for refunds, stating that these were claimed in respect of "Rail & Harbour Services". One of the options on the form, under the section "Other information", was a check box indicating that the user was engaged in transport for reward. The applicant selected this option by ticking the box "rail" (the alternative was "road").

5 The applicant's registration was approved with effect from 30 July 2008. Once registered, the applicant proceeded to claim refunds by submitting VAT 201 declarations to SARS. Diesel refund claims are offset against VAT liability payable for the tax period concerned.

6 On 2 March 2021, after having conducted an audit, the respondent made demand upon the applicant for the repayment of an amount of R20 000 826,59. The basis of such claim was that the applicant did not comply with the requirements in rebate item 670.04 read with Note 6, for obtaining refunds in respect of locomotive rail transportation in its manufacturing plant.

7 There are no material disputes of fact. The court is required to interpret the relevant provisions of the Customs Act to ascertain whether, having regard to the specific activity and the manner in which locomotives are used, the applicant qualifies for diesel refunds.

8 The applicant contends in the alternative, that the respondent is precluded from claiming back the refunds because of a practice generally prevailing. Further alternatively, it is argued that the circumstances give rise to a legitimate expectation that entitles the applicant to the refunds. This, so it is argued, precludes the respondent from claiming back the refunds, even if the applicant did not qualify.

FACTS

9 The applicant is a steel manufacturer producing a variety of steel products. It has a network of internal rail tracks at its Vanderbijlpark and Newcastle plants. Diesel powered locomotives are used to haul material on rail tracks between the different manufacturing processes, all within the applicant's plant.

10 On 26 August 2019 SARS issued a letter of engagement advising the applicant of its intention to conduct a diesel refund assessment for the period October 2017 to June 2019. The scope of assessment was subsequently extended up to December 2020. The respondent undertook an inspection at the Vanderbijlpark plant on 28 October 2019. The applicant, as it was required to do, made information and documents available to the respondent's audit team.

11 The basis for the respondent's claim set out in its letter of 2 March 2021 was the following:

11.1 Manufacturing is not a primary production industry envisaged in Note 6.

11.2 The applicant does not operate in the rail freight sector or carry on

business as a rail freight haulier. The scope of the rail freight refund is limited to public rail freight that competes with public road freight for the haulage of cargo.

11.3 Rail transport by locomotive in the manufacturing sector is a secondary activity. It does not meet the objective expressed in the Diesel Fuel Policy announcement.

11.4 In Note 6, the primary sectors that are entitled to participate in the diesel refund scheme (mining, farming and forestry), provide for the use of locomotives for rail transport as qualifying activities in these sectors.[2]

11.5 The applicant was incorrectly registered as a user for purposes of the diesel refund scheme, because manufacturing is not a primary industry in respect of which the diesel fuel refunds are granted. The applicant was therefore not a "user" for diesel refund purposes as envisaged Note 6(a)(vii).

INTERPRETATION OF NOTE 6(b)(iv)

12 In *Purveyors South Africa Mine Services (Pty) Ltd v Commissioner for the South African Revenue Services* 2022 (3) SA 139 (SCA), in relation to the interpretation of tax legislation, the court held:

> [18] ..... There are dicta in many judgments which are open to the construction that, construing tax legislation should be regarded as a respectable contest between the fiscus and the taxpayer concerned. At the same time, careful consideration should be given to the language of the section to ascertain its purpose and avoid a superficial assessment of the facts. One must read the words used in the section in their context, with regard to the apparent purpose of the section.

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2 see Mining, Note 6 (f)(iii)(pp), Forestry, Note 6 (g)(ii)(kk), and Farming, Note 6 (h)(ii)(cc)(B)(CCC)

13 In *Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd* [3] in relation to questions of interpretation the court said:

> [37] Accordingly, the crucial question in relation to this aspect of the case is whether the list of activities set out in Note 6(f)(iii) is exhaustive as the Commissioner contended. The answer depends on the language of the relevant note, the context and the purpose to which it was directed. As to the context, it is as well to remember the caveat sounded by Schreiner JA in *Jaga v Dönges N O and Another, Bhana v Dönges N O and Another* [1950] 4 All SA 414 (A); 1950 (4) SA 653 at 664H that the interpretative process ought not to be constrained by **'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'**. Moreover, it is by now established that the legislative history may provide helpful indicators to context. And another significant factor is that the factual background to the statute and the purpose to which it is directed also provide the legislative context.[4] [emphasis added]

14 Refunds on fuel and road accident fund levies are provided for in section 75(1A)(d) read with section 75(4A)(b)(i) of the Customs Act. The respondent is empowered to grant a refund of the above levies upon receipt of a duly completed return by a user who has purchased and used the fuel (in this case diesel), as contemplated in item 670.04 read with Note 6.

15 It is not in dispute that a person who claims a refund must comply with all the conditions set out in Note 6. The note is structured as follows:

15.1 Paragraph (b) sets out the activities that are eligible to claim refunds as follows:

15.1.1 On Land - farming, forestry and mining.

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[3] (Case no 462/2020) [2021] ZASCA 111 (10 August 2021)

[4] The court cited Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 17 and the authorities therein cited

15.1.2 Offshore.

15.1.3 Harbour vessels.

15.1.4 Rail - locomotives used for rail freight other than those used in farming, forestry or mining.

15.1.5 Electricity generation plants.

15.2 Paragraph (c) deals with applications for registration and the claiming of refunds. Paragraph (d) deals with tax invoices. Paragraph (e) deals with the general conditions and procedures relating to purchases and refunds.

15.3 Paragraphs (f) to (p) deals separately with each activity. It specifies who may claim refunds, the processes and activities pertaining to such claims and the circumstances and procedures under which refunds may be granted.

16 Manufacturing, either as a primary or secondary activity, is conspicuously not specified as being eligible for the claiming of refunds on the purchase and use of distillate fuel.

17 The dispute between the parties is confined to whether the purchase by the applicant of diesel for use in locomotives that run on its internal rail network qualifies for a refund under the category “Rail” in Note 6(b)(iv).

18 Note 6(b)(iv) provides for a refund in respect of Rail as follows:

> Locomotives used for **rail freight** other than those used in farming, forestry or mining, as provided in these Notes is 218,0 cents per litre Road Accident Fund levy. [emphasis added]

19 Paragraph 6(o) provides:

> **Rail freight**: Refund of levy on eligible purchases of distillate fuel for locomotives used for **hauling rail freight** as specified in paragraph (b)(iv) to this Note. Only distillate fuel purchased for use and used in locomotives when **hauling rail freight in the Republic** qualifies for such a refund. [emphasis added]

20 The Shorter Oxford dictionary defines the relevant words as follows:

20.1 "Freight" is defined as:

> Load (a ship) with cargo; hire or let out (a ship) for the transport of goods and passengers, *fig.* Load, burden 2. Carry or transport (goods) as freight.

20.2 "Haul" is defined inter alia as:

> "to pull or draw with force ... transport by cart or other conveyance

20.3 "Haulage" is defined *inter alia* as:

> The action or process of hauling; the conveyance of a load in a vehicle; the practice of conveying loads as a business; The expense or charge for the transportation of goods.

21 The following contextual factors are relevant to the meaning ascribed to "rail freight" in Note 6:

21.1 The word "freight" and the expression "rail freight" is exclusive to Note 6(b)(iv) and 6(o).

21.2 Where the use of locomotives and carriage by rail are permitted in

mining,[5] forestry [6] and farming[7], these activities are deemed to be primary activities.

21.3 The activities involving the use of locomotives in the industry that qualifies for a refund are specified: in mining it is the carriage of minerals or equipment. In farming and forestry locomotives are to be used for the carriage of goods by rail on farm property and in a forest or plantation.

22 In my view the expression "rail freight" in Note 6(b)(iv) is intended to apply to the transportation of goods by rail as a primary activity. It follows that the expression "rail freight" pertains to the use of locomotives for the transport of freight by rail, as opposed to by road. Similarly, the phrase "hauling rail freight in South Africa" applies to the transportation of freight by rail in the Republic, as an independent activity, in most instances for pecuniary reward. It is not intended to apply to the use of locomotives in the applicant's plant, on its private rail network, for the conveyance of materials between production processes.

23 Had the legislature intended to grant manufacturers a refund in respect of fuel use in locomotive rail transportation in manufacturing processes, it would undoubtedly have done so in specific terms, as it did in respect of mining, forestry and farming.

24 The respondent refers to the rationale for the extension, from April 2002, of the diesel fuel concession to rail freight. It is expressed in the National Treasury Budget Review of 2001 as follows:

> " ... Spoornet and other rail freight hauliers rely on diesel. As the rail freight sector competes directly against its road counterparts, the payment of (road-related fuel levies (i.e. the RAF levy) implies

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5 f(iii)(pp) and (f)(ii)(uu)(I)

6 (g)(ii)(dd)(kk)

7 (h)(ii)(cc)(CCC)

an indirect subsidy to its competitors."

25 In my view, on a proper interpretation of the expression “rail freight”, particularly having regard to the context in which the words are used, it is clear that the legislation does not contemplate granting manufacturers refunds in respect diesel used for locomotive rail transport within their production plants. An interpretation to the contrary would result in an excessive peering at the words, without regard to the context in which they are used. Accordingly in my view, it is not necessary to have regard to the legislative history to interpret the relevant legislation.

26 However, the explanations for the introduction of the refunds on distillate fuel clearly support the above interpretation and if dealt with, would confirm the conclusions I have come to.

ALTERNATIVE DEFENCES TO RESPONDENT’S CLAIM FOR REPAYMENT

27 The applicant contends in the alternative, that SARS created a legitimate expectation by approving the applicant’s registration for the diesel refund. This, so it is contended, prohibits the Commissioner from claiming back the refunds paid by SARS to the applicant in respect of the purchase of diesel.

28 Section 75(1A)(e) makes the provisional nature of refunds clear:

> (e) any such payment or set-off by the Commissioner shall be deemed to be a **provisional refund** for the purpose of this section and the said item of Schedule 6 **subject to the production of proof** by the user referred to in subsection (1C)(b) at such time and in such form as the Commissioner may determine that the distillate fuel has been -
>
> (i) purchased as claimed on the application for a diesel refund; and
>
> (ii) used in accordance with the provisions of this section and the said item of Schedule 6. [emphasis added]

29 Section (1C) of the Customs Act provides:

(a) Notwithstanding the provision of subsection (1A), the Commissioner may investigate any application for a refund of such levies on distillate fuel to establish whether the fuel has been-

(i) duly entered or is deemed to have been duly entered in terms of this Act;

(ii) purchased in the quantities stated in such return;

(iii) delivered to the premises of the user and is being stored and used or **has been used in accordance with the purpose declared on the application for registration and the said item of Schedule 6**.

(b) - (d) .....

(e)(i) If the amount of the provisional refund paid to the user concerned **was not duly refundable or exceeds the amount refundable** in terms of the said item of Schedule 6, any such amount or the excess shall be paid by that user upon demand by the Commissioner. [emphasis added]

30 In its VAT 101D form, the applicant represented that it was an enterprise engaged in the transport of goods by rail for reward. This was the basis on which the respondent registered the applicant for refunds on diesel purchased for and used by its locomotives. The information provided by the applicant was not correct.

31 In my view, it is not necessary to consider the scope of the doctrine of legitimate expectation. It has been held that a refund of this nature is a privilege and that it is necessary to strictly observe the conditions attaching to such privilege in order to obtain its benefits.[8] Having regard to the above and the fact that the applicant has not used the fuel for its declared purpose, the defence of legitimate expectation does not merit further consideration.

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[8] BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another 1984 (3) SA 367 (C) at p376, and see City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA 1 (SCA) where it was held that estoppel cannot be used in such a way as to give effect to that which is not permitted or recognised by law

32 A further alternative contention is advanced that the refunds were granted by SARS in terms of a practice generally prevailing. It is argued that this precludes SARS from re-claiming the refunds. Section 44(11A) of the Customs Act provides:

> (11A) Notwithstanding anything to the contrary contained in this Act, there shall be no liability for any underpayment on any goods if the duty which should have been paid was, in accordance with the practice generally prevailing at the time of entry for home consumption, not paid or the full amount of duty which should have been paid at the time of entry for home consumption was, in accordance with such practice, not paid, unless the Commissioner is satisfied that the amount of duty which should have been paid was not paid, or that the full amount of duty was not paid due to fraud or misrepresentation or non-disclosure of material facts or any false declaration for purposes of this Act.

33 Section 44(11A) relates to a liability for any underpayment of goods if the duty that should have been paid was not paid because of a practice generally prevailing at the time the goods were entered for home consumption.

34 I agree with the respondent's submission that this section is not applicable. In any event, the applicant did not demonstrate that the refunds were granted in terms of a practice generally prevailing. This defence also does not merit further consideration.

35 In *Petroleum Oil & Gas Corporation of South Africa (Soc) Limited v The Commissioner for the South African Revenue Service* 2018 JDR 2076 (GP) it was held:

> [36] This self-regulating system is structured in such a way that it compels the taxpayer whether he likes it or not to comply with its requirements. It achieves that goal by having in place certain consequences that will flow automatically from any failure to comply.
>
> .....

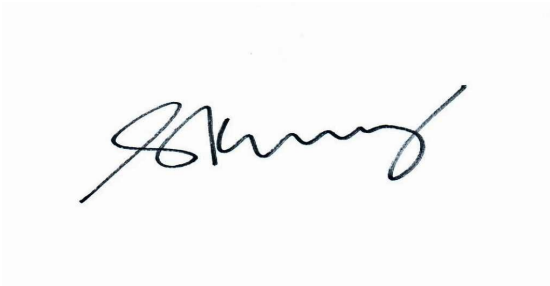
[37.2] only once both the substantive and procedural prescripts and requirements of the relevant rebate item and the provisions governing the payment of refunds have been complied with does the participant become entitled to the refund of duty.

36 In my judgment the applicant was not entitled to the refunds on diesel in terms of rebate item 670.04. It follows that there is no basis for any of the relief sought by the applicant.

37 In the circumstances, I make the following order:

1 The application is dismissed.

2 The applicant is ordered to pay the respondent's costs, including the costs of two counsel.



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JUDGE S KUNY

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 31 January 2023

Date of Judgment: 14 August 2023

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