IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 61072/2020
Date heard: 24 May 2024
Date of judgment: 22 July 2024

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

In the matter of:

DSV SOUTH AFRICA (PTY) LTD	**First Applicant**
GENERAL MOTORS SA (PTY) LTD	**Second Applicant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	**First Respondent**
THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION	**Second Respondent**

JUDGMENT

SWANEPOEL J:

[1] The applicants seek an order reviewing and setting aside a decision by the first respondent ("the Commissioner" or "SARS") to reject the refund application of

the applicants in respect of duties and levies paid in respect of 48 vehicles that were imported into the Republic, and then exported to Zimbabwe and Zambia. Furthermore, the applicants seek a refund from SARS of R 3 536 488. In the alternative to the prayer for repayment, the applicants seek the reinstatement of certain product rebate credit certificates ("PRCCs") that had been issued by the second respondent to second applicant, with a value of R 2 381 966, and payment by SARS of the balance of R 1 154 552. The alternative claim has become moot as it is common cause that the PRCCs cannot be reinstated. That leaves only the main claim for determination.

[2] The first applicant ("DSV") is a licensed clearing agent. It renders clearing and forwarding services domestically and internationally. The second applicant ("General Motors) is an automotive manufacturer and importer of fully built-up vehicles. In this particular transaction, it made use of DSV's services as a clearing agent in order to import the 48 vehicles into South Africa for exportation to Zimbabwe and Zambia. In such cases, where vehicles are imported into South Africa for direct exportation, no customs duties and charges are payable. However, customs duties and charges are payable if vehicles are imported into South Africa for local distribution and sale.

[3] SARS is responsible for the administration of the Customs and Excise Act, 91 of 1964 ("the Act"), and for the collection of duties and charges in accordance with the provisions of the Act. The second respondent ("ITAC") is an entity established in terms of the International Trade Administration Act, 71 of 2002. ITAC administers a product incentive scheme ("the APDP scheme") that is aimed at promoting the production of larger volumes in the motor vehicle industry. In terms of the APDP scheme ITAC issues PRCCs to automotive manufacturers as an incentive to encourage growth in the motor industry. A PRCC has no monetary value in itself, but may be used to offset duties that become payable by the manufacturer to SARS. The second respondent did not participate in the matter.

[4] Upon the 48 vehicles entering the country during April to July 2017 *they* were imported into General Motor's bonded warehouse. They were later transported to the Beitbridge border post from where one vehicle was exported to Zambia and the rest to Zimbabwe. Although SARS tentatively disputed that the vehicles were exported,

its own documents show that the vehicles were, as a matter of fact, exported to other countries, and were not used for local consumption.

[5] In the event that a vehicle is imported for local distribution, an XGR entry is made by the importer, signifying to SARS that the vehicle is to be imported for home consumption, and that it is subject to customs duties and charges. As the vehicles were to be transported by road to Beitbridge, DSV believed that XGR entries were required to be submitted. Simultaneously with the XGR entries, DSV submitted XE entries for the exportation of the vehicles out of South Africa. These are entries made in cases where the vehicles are to be exported to other countries, and are not intended for home consumption. The XGR and XE entries were submitted to SARS simultaneously, and it is not in dispute that in most cases the XGR and XE entries in respect of the same vehicles were processed by SARS on the same day, or at least on the day following submission.

[6] Once DSV had submitted the XGR entries to SARS, it was calculated that duties and levies in the sum of R 3 536 488 were payable. General Motors had been issued PRCCs to the value of R 2 381 966. The PRCCs were submitted to SARS as a partial rebate, and the balance of R 1 154 522 was paid to SARS in cash.

[7] DSV later established that the XGR entries had been entered in error, and that in the case of the vehicles being exported, only XE entries were required to be made. It also established that the duties and charges had been paid in error.

[8] Some four months after these transactions occurred DSV became aware of its mistake. It submitted various refund applications to SARS under cover of a D 66 form. Simultaneously, DSV submitted vouchers of correction ("VOCs") to cancel the XGR entries. It did so in terms of section 40 (3) (a) (i) of the Act. SARS took the view that the XGR entries had already been processed, and that the XGR entries could not be substituted by XE entries without SARS' consent.

[9] DSV sought reasons for the decision, and, in response, SARS referred to the rules applicable to the Customs and Excise Act, 91 of 1964 ("the Act"). In a letter dated 12 April 2018 SARS wrote that the substitution bill had to be delivered and

accepted by the Controller before the original (incorrect) bill was cancelled. The substitution application, SARS said, had to be made when the goods were no longer under customs control. On 10 May 2018 DSV met with SARS to attempt to understand the refusal to correct the entry. At the meeting SARS advised DSV to apply to the Port Elizabeth customs office for a substitution of entries in terms of section 40 (3) (a) (ii) (bb) of the Act, and it advised DSV to set out the mitigating factors in the application.

[10] Despite harbouring certain misgivings regarding SARS' advice, DSV submitted the substitution applications on 31 May 2018. Seven months later SARS rejected the applications on the basis that the applications had been brought out of time. DSV then launched an internal appeal against the rejection of the applications. In dismissing the appeal, SARS said that the applications for a substitution had to be made within one month, and that the applications were thus time barred. In SARS' opinion the erroneous entry could not be corrected by means of a VOC.

[11] DSV then referred the matter to alternative dispute resolution. The ADR proceedings were terminated by SARS on 28 January 2920, resulting in this application.

[12] By the time that the matter came before me, SARS' defence had morphed from an application of the Rules to the Act, to an interpretation of sections 39 and 40 of the Act itself. The relevant portions of these sections read as follows:

> **"39 Importer and exporter to produce documents and pay duties**
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> (1) (a) The person entering any imported goods for any purpose in terms of the provisions of this Act shall deliver, during the hours of any day prescribed by rule, to the Controller a bill of entry in the prescribed form, setting forth the full particulars as indicated on the form as required by the Controller, and according to the purpose (to be specified on such bill of entry) for which the goods are being entered, and shall make and subscribe to a declaration in the prescribed form, as to the correctness of the particulars and purpose shown on such bill of entry.

40 Validity of entries

(1) No entry shall be valid unless –

(a) in the case of imported of exported goods, the description and particulars of the goods and the marks and particulars of the packages declared in that entry correspond with the description and particulars of the goods and the marks and particulars of the packages as reported in terms of section seven or twelve or in any certificate, permit or other document, by which the importation or exportation of those goods is authorized;

(b) the goods have been properly described in the entry by the denomination and with the characters, tariff heading and item numbers and circumstances according to which they are charged with duty or are admitted under any provision of this Act or are permitted to be imported or exported;

(c) .....

(d) .....

(e) The correct duty due has been paid.....

(2).....

(3) (a) Subject to the provisions of sections 76 and 77 and on such conditions as the Commissioner *may* impose and on payment of such fees as he may prescribe by rule-

(i) an importer or exporter or a manufacturer of goods shall on discovering that a bill of entry delivered by him or her-

(aa) does not in every respect comply with section 39; or

(bb) is invalid in terms of subsection (1) of this section, adjust that bill of entry without delay by means of-

(A) a voucher of correction; or

(C) in such other manner as the Commissioner may prescribe; or

(ii) if-

(aa) a bill of entry has been passed in. error by reason of duty having been paid on goods intended for storage or manufacture in a customs and excise warehouse under section 20 or for purposes of use under rebate of duty under section 75; or

(bb) an importer, exporter or manufacturer on good cause shown, requests substitution thereof by another bill of entry in circumstances other than those contemplated in item (aa),

the Commissioner may allow the importer, exporter or manufacturer concerned to adjust that bill of entry by substitution of a fresh bill of entry and cancellation of the original bill of entry, provided such goods, where a rebate of duty is being claimed, qualified at the time the duty was paid in all respects for that rebate."

Provided that where the purpose for which the goods are entered as specified on a bill of entry is not correct, such bill of entry must be adjusted in terms of subparagraph (ii),

and provided further that acceptance of such voucher or fresh bill of entry shall not indemnify such imparter or exporter or manufacturer against any fine or penalty provided for in this Act.

(aA) The provisions of paragraph (a) (ii) shall apply *mutatis mutandis* in respect of a bill of entry in which goods have according to the tariff heading, tariff subheading, item or circumstances according to which such goods are charged with duty, been described in error as goods other than goods intended for-

(i) storage or manufacture in a customs and excise warehouse under section 20; or

(ii) purposes or use under rebate of duty under section 75, in consequence of the fact that-

(aa) a determination of any such tariff heading, tariff subheading or item is, under section 47 (9) (d), amended with retrospective effect as from a date before or on the date on which the goods described in such bill of entry have been entered for home consumption;

(bb) any such determination is, under the said section 47 (9) (d), withdrawn with such retrospective effect, and a new determination is thereunder made with effect from such withdrawal; or

(cc) any Schedule is amended with such retrospective effect,

and in which such goods, if such amendment or new determination had been in operation on the date on which such goods were so entered, would have been described as goods intended for the said storage or manufacture or the said purposes or use.

(b) No application for such substitution as is referred to in paragraph (a) or in that paragraph as read with paragraph (aA) shall be considered by the Commissioner unless it is received by the Controller, supported by the necessary documents and other evidence to prove that such substitution is justified where the application relates to-

(i) a substitution contemplated in paragraph (a) (ii) (aa), within a period of

six months –

(aa) from the date of entry for home consumption as provided in section 45 (2), of the goods to which the application relates; or

(bb) in the case of any amendment of a determination referred to in item (aa) of paragraph (aA) or of a new determination referred to in item (bb) of the said paragraph (aA), from the date on which such amendment is effected or such new determination is published by notice in the *Gazette,* the date on which such amendment or new determination is so published; or

(cc) in the case of an amendment referred to in item (cc) of the said paragraph (aA), from the date on which such amendment is published by notice in the *Gazette;* and

(ii) a substitution contemplated in paragraph (a) (ii) (bb), within a period of one month from the date the goods were entered on the bill of entry for which substitution is required or within such longer period as the Commissioner may prescribe by rule or determine in a specific instance." (emphasis added)

[13] The applicants' case is premised simply on the contention that SARS has collected monies to which it is not entitled, and that it has an obligation as an organ of state to refund the money. It argued that SARS' defence is of a highly technical and artificial nature and that its reading of sections 39 and 40 of the Act is incorrect.

[14] SARS admitted that DSV had submitted both XGR and XE entries. It submitted that both entries were valid. It says that the SARS system does not allow for the use of the same warehouse numbers in respect of the same goods for import and export simultaneously. It says that DSV adopted the incorrect approach by submitting vouchers of correction together with its application for substitution. SARS says that it rejected the refund application and the vouchers of correction on the basis that the XGR entries had been processed, and that SARS had not given consent for a substitution of entries.

[15] SARS also says that the appeal against the rejection of the substitution application failed as the appeals committee found that the provisions of section 40 (3) (a) (ii) (bb) applied to the matter. If that were so, SARS says, then the substitution application should have been brought within one month from the date on which the goods were entered on the bill of entry, or within such longer period that the Commissioner may determine in a specific instance[1]. In this case the Commissioner did not determine a longer period than the one month period prescribed by the Act, and the applications were time barred.

[16] I have been referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] as guidance in regard to the interpretation of the Act. In that judgment Wallis JA explained as follows[3]:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

[17] In my view the Act must be interpreted in such a manner as to reflect its purpose, which is, broadly speaking, to ensure that the proper duties and charges are paid on goods imported into the Republic, and not a cent more nor a cent less. It

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[1] Section 40 (3) (b) (ii)
[2] 2012 (4) SA 593 (SCA); [2012] 2 ALL SA 262 (SCA)
[3] At para 18

is not the purpose of the Act to allow for SARS to collect money that is not due to it.

[18] Section 39 (1) (a) of the Act requires an importer or exporter to deliver a bill of entry to the Controller that states for what purpose the goods are being entered; in this case, whether the goods are destined for home consumption or for exportation. It must also state, correctly, the circumstances under which the duties are levied. The person making the entry must then subscribe to a declaration as to the correctness of the particulars of the goods and the purpose shown on the bill of entry. In terms of section 40 (1) (b) a bill of entry is invalid should it not properly describe the circumstances under which the goods have been charged with duty[4]. It is clear that the correctness of the details provided on the entry is paramount, so as to ensure that SARS is able to collect all duties and charges that may be due to it.

[19] If that is the case, then the XGR entries were invalid in that they not only incorrectly described the circumstances under which duty was allegedly payable, but it is also undoubtedly so that the incorrect duties were paid[5]. SARS' approach, that two valid but opposing entries were submitted to the Controller is also incorrect. If an entry is incorrect in the sense that it declares that the vehicles are intended for importation, when that is in fact not the case, the entry is invalid by virtue of the provisions of section 40 (1) (b) of the Act.

[20] Section 40 (3) (a) (i) allows an importer or exporter who discovers that a bill of entry either does not comply with section 39, or is invalid in terms of section *40* (1), to adjust the bill of entry by way of a voucher of correction. In my view DSV was correct to adjust the bill of entry by means of a voucher of correction.

[21] However, even if I am wrong in this approach, and it is in fact section 40 (3) (a) (ii) (bb) that applies to this matter, then the Commissioner was entitled to determine a longer period than one month for the delivery of a substitution application. The question is why, when it is patently obvious that no duties and charges were payable to SARS, did the Commissioner not extend the time periods? SARS knew under what circumstances the duties had been paid, and that payment

[4] Section 40 (1) (b)
[5] Section 40 (1) (e)

had been made in error. It knew that the money was not due to SARS. SARS had recommended to DSV to file substitution applications, only then to refuse the applications on time-bar grounds. In my view the Commissioner's failure to extend the period within which the application could be brought is irrational in these circumstances, and should be reviewed and set aside in terms of section 6 (2) (f) (ii) (bb) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

[22] As I have held above, the purpose of the Act is to collect duties and charges that are due to SARS in terms of the Act, and not a cent more. The Act does not empower SARS to collect more than is due to it, and the retention of the money in this case is not authorised by the Act. The decision not to refund the money is therefore reviewable in terms of section 6 (2) (e) (i) and 6 (2) (f) (ii) (bb) of PAJA. In my view SARS' retention of monies that are not due to it offends against the rights enshrined in the Constitution[6], and, as an organ of state, SARS is obliged to promote these rights. In the words of the Constitutional Court (per Rodgers J)[7]:

> "SARS as an organ of state should not seek to exact tax which is not due and payable."

[23] For that reason I find that SARS' retention of the money is also unconstitutional and thus reviewable under section 6 (2) (i) of PAJA.

[24] SARS' counsel referred me to a number of matters[8] in which the principle was laid down that a person seeking a refund of tax should comply strictly with the Act. None of these matters deals with the situation at hand in this case, where tax was paid in error. The matters to which counsel for **SARS** referred all concerned the rebate of taxes that were otherwise due by the tax payer. In each of those cases the applicant was seeking a privilege in the form of a reduction of taxes owed by it. In the

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[6] Particularly section 25 of the Constitution that proscribes the arbitrary deprivation of property

[7] Capitec Bank Ltd v Commissioner for the South African Revenue Service [2024] ZACC 1 (12 April 2024) at para 94

[8] Graspan Colliery SA (Pty) Ltd v The commissioner for the South African Revenue Service unreported Gauteng Division (Pretoria High Court) case number 8420/2018; Umbhaba Estates (Pty) Ltd v The Commissioner of South African Revenue Service Unreported Gauteng Division (Pretoria High Court) case number 66454/2017; JT International Manufacturing South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service unreported judgment Gauteng Division (Pretoria High Court) case number 29690/2014

instant case the applicant is not seeking to enforce a privilege, but is seeking to recover monies to which SARS was not entitled in the first place. It is not then for SARS to raise all manner of technical objections. Having discovered that the vehicles were exported and that no duties were payable, SARS should have immediately taken steps to refund the monies to the applicants.

[25] I now tum to consider what amount is due to the applicants. SARS has argued that, in the event that I find that monies are to be repaid, then only the cash portion is repayable. SARS' counsel argued that SARS is not obliged to refund the value of the PRCCs.

[26] I enquired from applicants' counsel during argument as to the basis for applicants' claim to be refunded the value of the PRCCs. Counsel submitted that it is industry policy worldwide that tax that was paid in error must be repaid. This bald submission is not helpful in understanding the basis for the claim for re-imbursement of the value of the PRCCs.

[27] The PRCCs have no monetary value in themselves. They do not, upon being submitted to SARS, strengthen SARS' coffers. They only serve to reduce the amount of duties payable to SARS by the tax payer. It is so that once PRCCs are submitted to SARS incorrectly, and are not later reinstated, General Motors loses the advantage of receiving a rebate equal to the value of those PRGGs, and, in that sense, General Motors suffers monetary loss if the PRCCs are submitted but are not applied towards a rebate.

[28] What, then, is the basis for the claim for payment of the value of the PRCCs? The applicants do not say what the basis is, save to say that SARS has received monetary advantage to the value of the PRCCs. That is not so. SARS has gained no monetary advantage by the submission of the PRCCs. It seems to me that the only basis for the claim could conceivably be a delictual one, for pure economic loss, but that has not been pleaded.

[29] I therefore find that the Commissioner's decision to reject the applicants' refund applications stands to be reviewed and set aside, and that the cash portion of

the duties paid by applicants must be repaid. Costs should follow the result. The applicants have argued for punitive costs. Such an order is only appropriate in extraordinary cases, where there is malice, fraud or the like present. That is not the case here. I do not believe that a punitive costs order is appropriate in these circumstances.

[30] I make the following order:

[30.1] The decisions of the first respondent to reject the refund applications made by the applicants Is reviewed and set aside.

[30.2] The first respondent is ordered to refund the sum of R 1 154 552 (one million one hundred and fifty four thousand five hundred and fifty two rand) to the first applicant.

[30.3] The first respondent shall pay the costs of the application on Scale C.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

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Date heard:	24May2024
Date of judgment:	22 July 2024