


IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 07/2435

In the matter between:

DATE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/ NO	
(2) OF INTEREST TO OTHER JUDGES: YES/ NO	
(3) REVISED. ✓	
DATE 20/6/2008	SIGNATURE 

PAHAD SHIPPING CC

Applicant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE

Respondent

J U D G M E N T

TSOKA, J:

[1] This is an appeal in terms of section 65(6)(a) of the Customs and Excise Act 91 of 1964 (*the Act*) against the respondent's determination of the transaction value, for customs duty purposes, of certain goods imported by the applicant.

[2] Briefly stated, the facts in this matter are as follows. Prior to the applicant becoming a registered importer of goods, its primary activity was that of a clearing agent. As a clearing agent, the applicant was entitled to certain permits called "*DCC permits*". These are issued by the Department of Trade and Industry to exporters of goods. The permits entitled a lawful holder thereof to obtain credit, which credit the holder of such permits was able to offset against dutiable amounts payable in terms of the Act. The permits were freely transferable.

[3] The applicant would acquire the permits at a discount. It would then sell them to its clients who would be able to use the permits as payment for customs duties. However, during 2003/2004 the transferability of the permits was restricted with the result that the applicant was unable to sell them to its clients. The applicant decided to register and was registered as an importer of goods so that it may be entitled to use the permits.

[4] On 24 August 2004 the applicant and an entity called Al Ajwad International (L.L.C) ("*Al Ajwad*") entered into an agreement. In terms of this agreement, Al Ajwad would make "*a confirming/trade finance facility*" available to the applicant. The terms of the trade facility are set out in the agreement. In terms of the agreement, the applicant would be entitled to import goods and forty-five days after the goods had been cleared, would instruct Al Ajwad to pay the suppliers. The various charges inclusive of interest and 5% in respect of confirming commission on the total disbursements made on behalf of the applicant are set out in the agreement.

[5] On 14 February 2006 the respondent determined that the 5% represented a confirming commission which is in terms of section 66 read with section 67 of the Act forms part of the purchase price or the price payable for the imported goods. The determination resulted in the respondent making the additional amounts dutiable. This determination prompted the applicant to launch the present appeal.

[6] The crisp issue in this appeal is whether the 5% is a commission or interest incurred by the applicant in raising finance for the purchase price or the price payable. In resolving the issue, it is essential to determine what the transaction value of the imported goods is.

[7] Section 66 of the Act provides that the transaction value of any imported goods shall be the price actually paid or payable for the goods when sold for export to the Republic. The transaction value is to be adjusted in terms of section 67 of the Act. There are several provisos stated in this section. The provisos are irrelevant in the present matter.

[8] Section 65 of the Act provides that the value for customs duty purposes of any imported goods shall, at the time of entry for home consumption, be the transaction value thereof within the meaning of section 66.

[9] In terms of section 67(1) of the Act, in ascertaining the transaction value of any imported goods in terms of section 66 of the Act there shall be added to the price actually paid or payable for the goods, certain additions,

amongst others, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable, any commission other than a buying commission and brokerage.

[10] In terms of section 67(2) of the Act, in ascertaining the transaction value, certain deductions are permitted. However, these deductions are not relevant in the present matter.

[11] Section 74A of the Act provides that the interpretation of sections 65, 66 and 67 is to be subject to the agreement known as "*the agreement on implementation of Article 7 of the General Agreement of Tariffs of Trade*" ("GATT") ("the Valuation Agreement"), the interpretative notes thereto, the advisory opinions, commentaries and explanatory notes, case studies and studies issued under the agreement.

[12] To resolve the issue as to whether the 5% represent commission or finance costs, the court has regard to the provisions of section 67 of the Act, article 8 of the Valuation Agreement, the agreement entered into between the applicant and Al Ajwad in 2004 as well as the conduct of the applicant after Al Ajwad's invoices has been settled.

[13] I proceed to deal with the various headings raised in the preceding paragraph.

Section 67(1) of the Act

[14] In terms of section 67(1) of the Act, a buying commission which is incurred by the buyer is not included in the price actually paid or payable for the imported goods. A buying commission in terms of the Act is defined as "*in relation to imported goods, means any fee paid by an importer to his agent for representing him abroad in the purchase of and the payment for the goods*".

[15] In the present matter, the applicant described its relationship with Al Ajwad as follows: "*... Al Ajwad was not involved at all during the procurement of goods, the negotiation and communication with suppliers. In fact, the suppliers are unknown to Al Ajwad and payment is only made to them on the written instruction of Applicant*".

[16] It is clear that according to the applicant, Al Ajwad is not its agent. The 5% payable on the purchase price and all disbursement is therefore not a buying commission which in terms of section 67(1) of the Act must be excluded in ascertaining the transaction value of the imported goods. It is common cause that Al Ajwad is not a broker. The 5% commission, in the circumstances, is thus also not a brokerage fee.

Article 8 of the Valuation Agreement

[17] Article 8, paragraph 1(a)(i) of the Valuation Agreement provides for the addition of "commissions and brokerage, except buying commissions", in the determination of the transaction value. The provisions are similar to the

provisions of Section 67(1) of the Act. Article 8 of the Valuation Agreement, the explanatory notes and interpretive notes thereto serve only as a guide to the interpretation of sections 65, 66 and 67 of the Act. This is clear from the language of the provisions of section 74A of the Act. The Valuation Agreement is not peremptory. The Act and its provisions are. From the provisions of the sections of the Act, it is clear that the 5% does not represent a buying commission.

The Agreement of 24 August 2004 between applicant and Al Ajwad

[18] Initially the applicant alleged that Al Ajwad is a bank and that the 5% represent finance charges, and not a commission. It is now common cause that Al Ajwad is not a bank but an entity that purportedly granted the applicant finance facilities to settle its suppliers of goods imported from China. It is therefore imperative and crucial to look at the language of the agreement.

[19] Clause 2.5 of the agreement states that:

"2.5 The buyer will pay to Al Ajwad a confirming commission calculated at a rate of 5% of the total disbursement made on behalf of the Buyer."

[20] The applicant disavow the terms of the agreement and in particular clause 2.5 of the Agreement. In paragraph 41 of its founding the applicant affidavit states that –

"44. Similarly, and significantly, the provision in clause 2.5 that the Applicant will 'pay to Al Ajwad a confirming commission calculated at the rate of 5% of the total disbursements made on behalf of the buyer' is inaccurate and does not reflect the true intention of Al Ajwad and Applicant nor does it reflect the factual relationship between the Applicant and Al Ajwad. The payments made by Applicant to Al Ajwad comprise finance charges and interest, both of which components are set out in Al Ajwad's invoices sent to Applicant."

[21] The applicant's denial of the unambiguous terms of the agreement and in particular clause 2.5 is disingenuous. During 2005 when the respondent requested all the documentation upon which the transaction value of the goods was ascertained, amongst the documents submitted to the respondent, was this agreement. It was only on 14 February 2006 when the Valuation Section of the respondent wrote to the applicant pointing out that "*On all the invoices from your suppliers the following was agreed upon that the postage & petties are dutiable in terms of Section 67(1) of the said Act and that the finance charges represent a confirming commission of 5% charged by the finance house which is also a dutiable element*" that the applicant distanced itself from the agreement.

[22] The applicant further contends that Al Ajwad has nothing to do with its imported goods from China and that Al Ajwad has neither contact nor is known to applicant's suppliers. However, from the invoice dated April 2005 from one of its suppliers, namely, Kingsurg Export Limited, the name of Al Ajwad appears on the invoice. The applicant is unable to explain how Kingsurg Export Limited, who according to the applicant has no dealings with Al Ajwad, would have the name and address of Al Ajwad on its invoice.

[23] From the agreement, the finance charges and interest charged for the facility granted to the applicant are clearly spelt out. The interest charged, as is customary, is related to the use of money and the period involved in granting the use of money to the applicant. The maximum repayment term from the date Al Ajwad pays the applicant's suppliers, is 180 days. Interest on all amounts outstanding will be payable at the rate of 2% over US prime rate. Any amounts remaining unpaid are subject to default interest at the rate of 2% over US prime rate. There is nothing in the agreement where the 5% is linked to any period of payment or default. The 5% relates to the "*total disbursements made on behalf of the buyer*".

[24] The 5% is incurred by the applicant within the meaning of the provisions of section 67 of the Act. It is not a buying commission which is excluded in determining the actual price paid or payable for the imported goods. It is a commission in the ordinary sense of the word and within the meaning of section 67 of the Act. It therefore forms part of the transaction value of the imported goods. It is dutiable.

[25] The above view is fortified by the following –

25.1 It is common cause that the purchase price paid by applicant's customers is always more than the purchase price disbursed by Al Ajwad on behalf of the applicant;

25.2 Although Al Ajwad is domiciled in the United Arab Emirates, it is undisputed that it is a South African company based in Dubai. Its relationship to the applicant is murky;

25.3 The invoice from Kingsburg Export Limited suggests that in some unexplained capacity, Al Ajwad deals with applicant's suppliers and for its service is paid 5% commission other than interest, other finance charges and disbursements.

[26] In the result I find that the 5% is a commission other than a buying commission, which as is incurred by the applicant, must, in terms of section 67(1) of the Act, be added to the price actually paid or payable for the goods.

[27] Counsel for the applicant argued that in terms of article 8 of the Valuation Agreement, if the 5% is not for the benefit of the seller it should not be taken into account in ascertaining the transaction value of the imported goods. As already pointed out above, article 8 and the explanatory notes thereto are tools necessary to assist in the interpretation of sections 65, 66 and 67 of the Act. The Valuation Agreement is, in this context, persuasive. It is not peremptory. The Act is peremptory. The language used by section 67 is clear and unambiguous. It states only that the commission, *to the extent that is incurred by the buyer (emphasis added)* but not included in the price actually paid or payable, shall be added to the price actually paid or payable in ascertaining the transaction value of the imported goods. In terms of section 67(1) of the Act, the 5% commission need not be for the benefit of the

seller. It must, however, be incurred by the buyer. In the present matter, the 5% is incurred by the buyer.

[28] The respondent seeks an order for costs occasioned by engaging the services of two counsel. The respondent contends that this matter does not warrant the engagement of two counsel. This matter is complex. It necessitated the engagement of two counsel.

[29] In the result the application is dismissed with costs which costs shall include the costs of engaging the services of two counsel.



M P TSOKA
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	ADV F STRYDOM
INSTRUCTED BY	DOCKRAT INCORPORATED
COUNSEL FOR RESPONDENT	ADV J R PETER ADV T MOTAU
INSTRUCTED BY	THE STATE ATTORNEY
DATE OF HEARING	30 MAY 2008
DATE OF JUDGMENT	20 JUNE 2008