REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.

CASE NO: 7215/2018
14/4/2020

In the matter between:

H M T PROJECTS (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Coram: Davis J

Revenue – Customs and excise – Classification of articles under tariff headings for customs duty – General rule that goods are characterised by their objective characteristics and not by intention with which made or use to which it is put – Despite importer putting line pipes of carbon steel to high temperature use, such use still conveyance of petroleum product by way of a pipeline – tariff heading 7304.19 applicable – tariff appeal refused – Customs and Excise Act 91 of 1964, section 47(1**)** and Schedule 1 thereof.

J U D G M E N T

DAVIS, J

Introduction and parties

[1] This is a tariff appeal in terms of section 47(9)(*e*) of the Customs and Excise Act 91 of 1964 ("the Act") against a determination of the Respondent, the Commissioner for the South African Revenue Service ("CSARS"), launched by the Applicant, a private company and importer of the goods in question. The dispute is under which tariff heading ("TH") the imported goods should be classified.

[2] The background

2.1 The Applicant imported seamless carbon steel pipes ("the goods") from a supplier in Taiwan on 14 August 2015. The Applicant entered the goods under TH 7304.39.35.

2.2 The goods were stopped for inspection at the time of importation thereof. The relevant customs office determined that the goods fell to be classified under TH 7304.19. This determination was confirmed and a letter of demand for payment of customs duty was issued on 2 March 2016. The matter was, at the instance of the Applicant, referred to the Customs Head Office. On 24 August 2016 the tariff determination was confirmed by CSARS.

2.3 The Applicant unsuccessfully pursued an internal administrative appeal against the CSARS' determination. In February 2018 the Applicant launched the present tariff appeal which came before me on 24 February 2020.

[3] The Tariff Headings

3.1 The nature of Tariff Headings have sufficiently been explained by our courts[1]. Simply put, it is the designation of a specified tariff at which customs duty is to be paid on imported goods. The classification is in terms of Schedule 1 of the Act and provides for classification under various Tariff Headings and Subheadings. Section 47(8)(*a*) of the Act provides that the interpretation of any Tariff Heading or Subheading in Part I of the Schedule, including section and chapter notes, shall be in conformity of the explanatory notes to the

[1] See for example: *IBM SA (Pty) Ltd v CSARS* 1985 (4) SA 852 (A) and *Durban North Turf (Pty) Ltd v CSARS* 2011 (2) SA 347 (KZP).

Harmonized System issued by the Customs Co- operation Council, Brussels (now known as the World Customs Organisation) and the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983.

3.2 The Tariff Heading contended for by the Applicant in the tariff appeal is now TH 7304.59.45. This heading is for tubes, pipes and hollow profiles, seamless and of a wall thickness exceeding 25mm or an outside cross- sectional dimension exceeding 170mm, with further sub-heading "other alloy steel".

3.3 The Tariff Heading determined by CSARS is TH 7304.19. being "line pipe of a kind used for oil or gas pipelines, other". The word "other" denotes line pipe of the kind in question but not manufactured from stainless steel.

3.4 The determination of the appropriate Tariff Heading involves a three-step analysis:[2]

- First, the interpretation of the meaning of the words used in the Tariff Headings, Sub-headings and relative section and chapter notes and explanatory notes.
- Second, the consideration of the nature and characteristics of the goods.
- Third, the selection of the most appropriate Tariff Heading and Sub-heading.

3.5 In following the above process, the Supreme Court of Appeal added the following:[3]

"The court also had regard, as one must, to the General Rules for the Interpretation of the Harmonised System (the Brussels Notes), Rule 1 of which states that 'for legal purposes, classification shall be determined according to the terms of the headings and any relative chapter or chapter notes *...'.* The explanatory notes are not, however, peremptory injunctions. In *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd*[4] Trollip JA said that 'they are not worded with the linguistic precision usually characteristics of statutory precepts, on the contrary, they consist mainly of comment and illustrations.[5]' "

3.6 Another internationally recognized principle of tariff classification is that the decisive criterion is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance.[6]

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2 *IBM SA (Pty) Ltd v CSARS* (supra) at 863 G – H.
3 *CSARS v The Bakin Tin* 2007 (6) SA 545 (SCA) at [5] and [6].
4 1970 (2) SA 660 (A) at 676 C – D.
5 See also: *Lewis Stores v Minister of Finance* 2002 (3) JTLK 111 (C).
6 *CSARS v Komatsu* 2007 (2) SA 157 (SCA) at para [8].

[4] Interpreting the meaning of the Tariff Headings

4.1 TH 73.04 pertains to “tubes pipes and hollow profiles, seamless of iron ... or steel”. The meaning of these words are clear and unambiguous and the parties are *ad idem* that the goods fall under this Tariff Heading.

4.2 The CSARS’ determination is that the pipes fall under the Sub-heading TH 7304.19 being “line pipe of a kind used for oil and gas pipelines”.

4.3 There is no dispute between the parties relating to the fact that the pipes are used to convey petroleum (an oil based product) or gas.

4.4 The dispute between the parties is as to the meaning of “pipeline”. The Applicant contends in its written heads of argument that the *“definition of a pipeline excludes pipes designed for and used in operations such as transferring products between storage tanks and processing equipment or forming part of distillation colourless inside refineries ... and that a “pipeline” has a specific and narrow definition and pipe intended/or this purpose must conform to the specific requirements of applications”.*

4.5 One must therefore determine what is meant in the Tariff Heading when reference is made to a “pipeline”. Once that is determined, one can examine whether line pipe used for pipelines as such are of a specific type, distinguishable from line pipe not used in pipelines.

4.6 In this regard, the Applicant relies heavily on the contention that “pipeline” is defined in the Shorter Oxford English Dictionary as *“a long pipe, typically underground, for conveying of oil, gas etc over long distances”.*

4.7 In the Applicant's submissions to the CSARS during the prior appeal process the Applicant stated that the *“piping is for the use of piping supplied into the mining and petrochemical industry”.*

4.8 The **CSARS** referred to other dictionary definitions: In Webster's Third New International Dictionary a “pipeline” is defined as *“a line of pipes connected to pumps, values and control devices for conveying of liquids, gases or finely divided solids”.* The McGraw-Hill Dictionary of Scientific and Technical Terms (5th Edition) also defines a “pipeline” to be *“a line of pipe connected to valves and other control devices, for conducting fluids, gases or finely divided solids”.* The Oxford English Dictionary (Oxford University Press) defines a “pipeline” as *“a continuous line of pipes; a conduct of iron pipes few conveying petroleum from the oil-wells to the market or refinery or for supplying water to a town or district”.*

4.9 It appears from the various definitions that the distance of a pipeline is not determinative of the definition. Reverting to the words in Tariff Heading 7304.19, a "pipeline" appears to be a continuous line of pipes, constructed to form a pipeline for the conveyance of gas or petroleum. This may be from a refinery to storage tanks, from either of those to "a market" or from oil fields to a refinery. As these various elements may be close to each other or some distance apart, on the same premises or connected to the same plant or not, the distance appears to be immaterial. Where it is notionally possible that a pipeline may be constructed anywhere within the petrochemical or mining industry (to use the Applicant's words) one would not know the length (or distance) of the actual pipeline prior to its construction when one examines sections of line pipe upon importation. Whether the pipeline would be of a short or long distance would be of no consequence. To import a "long" distance into the meaning of the word "pipeline" does therefore not appear to be justified.

4.10 As to the "kind" of line pipes to be so used, the Applicant points out that the pipes need to meet industry minimum standards. In this regard the Applicant points out that the imported pipes satisfy the API 5L standard. This is an American standard of the American Petroleum Industry for steel pipes used in pipeline transportation systems in the petroleum and natural gas industry, specifying the minimum requirements and composition to be met to be suitable for "pipeline use".

4.11 So, to sum up, the words in Tariff Heading 7304.1 refer to line pipe meeting the minimum standards for pipe used in pipelines whereby oil or gas can be conveyed. This interpretation, in my view, properly takes into account the language used in the Tariff Heading in context and gives meaning thereto in a sensible manner.[7]

4.12 Having reached this conclusion, the Applicant's contention that the definition of a "pipeline" *"excludes pipes designed for and used in operations such as transferring products between storage tanks and processing equipment or forming part of distillation columns inside refineries and petrochemical plants"* and that it only has a "narrow" definition, cannot be upheld.

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[5] The nature and characteristics of the pipes in question

5.1 According to the Applicant's description of the goods, the pipes in question have been designed to convey petroleum or gas. The mill certificates issued by the supplier record that the pipes have been certified to be compliant with the API 5 L, ASME SA – 106/ ASTM

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7 *CSARS v South African Breweries (Pty) Ltd* 2018 JDR 0900 para [8] and *Distell Ltd v CSARS* 2012 (5) SA 450 (SCA) at [15].

A- 106 standards.

5.2 The certification is therefore a “dual certification”, where API 5 L is the standard for steel pipes used in pipeline transportation systems (according to the American certification standard referred to in paragraph 4.10 above).

5.3 Not only does it therefore appear from the Applicant's and the manufacturer's descriptions that the pipes are indeed of a “kind used for oil or gas pipelines”, but both the experts employed by the parties agree hereon. The expert employed by the Applicant, Mr Godsell, agrees that pipes certifiable as API 5 L should typically be classified under TH 7304.19. The expert employed by CSARS, Mr Morgan agrees with this and states that, on his assessment of the pipes in question, they fall in the category of pipes used for pipelines, under TH 7304.19.

5.4 There is some dispute between the experts as to the exact nature of the alloy used to manufacture the pipes but it appears to me that the real dispute is the Applicant's contention that, because the pipes are also certified to satisfy the ASME criteria, that is the criteria of the American Society of Mechanical Engineers for pipes conveying fluids or gas (and not just petroleum) at high temperatures or pressures, that fact exclude them from the “kind” of pipes used for pipelines.

5.5 In my view, the “dual certification” of the pipes does not take away from their objective characteristics as being of the “kind” to be used for pipelines. That the pipes may have additional applications or specifications, so the CSARS expert says, should make no difference to their Tariff Heading classification for customs purposes.

5.6 In reply the expert employed by the Applicant makes the following concession: *“I agree that AMSE SA - I 06 and ASTMA could be of a kind used for oil or gas pipelines”.* His distinction or qualification to this concession is the following: *“However, my assessment is that they (these specifications) are not defined as “line pipe” which is the Tariff Heading description ... .Therefore I believe that ASME SA 106 and ASTMA 106 should not be classified under TH7304. 19 as they are not defined as “line pipe”.*

5.7 Whilst the expert may be correct that the higher specifications do not specify “line pipe”, that argument as a basis for disqualification falls away in the present instance where the pipes have been certified as compliant with API 5L standards. The pipes in question have therefore per definition been certified as being “line pipe”. This the expert also agrees with.

5.8 I therefore conclude that the pipes in question are, objectively line pipe of the kind used for oil and gas pipelines. The fact that they have, despite being "line pipes" also been certified to convey t1uids and gas at high temperature or pressure does not detract from this.

[6] The applicable Tariff Heading:

6.1 After having gone through the first two of the three steps in the process mentioned in paragraph 3.4 above, the third step is often, as in this case, relatively simple.

6.2 The two experts employed by the respective parties have each given their opinions but, it is trite that while experts can assist the court and their opinions can be, by virtue of their expertise in a specific field, admissible, their opinions as to the meaning of the Tariff Headings and whether "pipeline" should be given a narrow or exclusionary meaning or not, are inadmissible. "Pipeline" is not, in the context of this case such a technical term that only an expert in the field would be able to explain or interpret its meaning.[8]

6.3 ln particular, the expert employed by the Applicant did not follow the three-step process referred to in paragraph 3.4 above. Instead, he approached the matter from the starting point of classifying the various standards and then he used the General Rules of Interpretation ("GRI") to choose the most appropriate Tariff Heading without evaluating the pipes themselves. Not only is this approach flawed ·when viewed against the principles set out earlier, but it appears that he applied the rules incorrectly. GRI 3(a) provides that the most specific description is to be preferred to headings providing a more general description. TH 7304.19 is very specific whilst the heading contended for by Mr Godsell is of a more general or "unless otherwise provided for" heading. Furthermore, and this is where the expertise of the experts assisted the court, if one compares the maximum base metals values listed in the applicable Chapter notes to the base metal values of the pipes in question as listed in the mill certificates, the pipes have not been manufactured of "other alloy steel" as contended for under TH 7304.5.

6.4 A last comment on the choice of Tariff Headings: it is trite that the use for which the importer intends using the imported product is not determinative but the objective characteristics of the product are.[9] It is therefore legally irrelevant if the Applicant intends using the pipes in question for applications other than pipelines, once the pipes have

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8 Grown Chickens (Pty) Ltd v Minister of Finance 1996 (4) SA 389 (E) quoting *Kommisarisom Deane & Aksyns v Mincer Motors BPK* 1959 (1) SA 114 (A).

9 *Autoware (Pty) Ltd v Secretary for Customs & Excise* 1975 (4) SA 318 (W) and *African Oxygen Ltd v Secretary for Customs & Excise* 1969 (3) SA 391 (T).

objectively been found to be “line pipes of a kind used for oil or gas pipelines”.

6.5 The pipes m question have the characteristics of line pipes used for pipelines and satisfied the specifications generally applicable to such pipes. The Applicant's attempt at downplaying this fact in favour of an ancillary application due to a “dual certification” in respect of other specifications cannot trump the essential character of the pipes in question.[10]

6.6 In conclusion, I find that Tariff Heading TH 7304.19 is the appropriate heading. Consequently the appeal must fail.

[5] Costs

I find no cogent reason why cost should not follow the event.

[6] Order

The application is dismissed with costs, including the cost of two counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 24 February 2020
Judgment delivered: 14 April 2020 (electronically)

APPEARANCES:

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[10] *CSARS v Komatsu Southern Africa (Pty) Ltd* 2007 (2) SA 157 (SCA) at [13] and [14].