REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 29690/14

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

DATE: 10 OCTOBER 2023
SIGNATURE OFJUDGE:

In the matter between:

JT INTERNATIONAL MANUFACTURING SOUTH AFRICA (PTY) LTD	**Applicant**
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**Respondent**

JUDGEMENT

FLATELA J

FLATELA J

Introduction

[1] This is an interlocutory application, it is a **"separated issue"** emanating from review application brought by JT International Manufacturing South Africa (PTY) LTD **("the Applicant" / JTIMSA)** against the Commissioner of the South African Revenue Service **("the Commissioner" / SARS)** for determination of a legal issue, which is whether section 75(10)(a)[1] of the Customs and Excise Act of 61 of 1964; alternatively, the common law empowers the Commissioner to *ex post facto*, with retrospective effect, exempt the Applicant from compliance with Rule 19A.09c[2] of the Rules to the Customs Act.

[2] By agreement between the parties' issues were separated in terms of Rule 33(4) of the Uniform Rules and an order to that effect was granted by Kubushi J on 26 April 2022. The issue, which falls to be determined before any other issues, calls for an interpretation exercise of the *vires* of the Commissioner's discretionary powers in terms of the said section.

[3] The Applicant seeks a declaratory order declaring that section 75(10)(a) of the Act authorises the Commissioner to *ex post facto* exempt the Applicant from non-

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[1] 75. Specific rebates, drawbacks and refunds of duty
(10) *(a)* No goods may be entered or acquired under rebate of duty until the person so entering or acquiring them has furnished such security as the Commissioner may require and has complied with such other conditions (including registration with the Commissioner of his premises and plant) as may be prescribed by rule or in the notes to Schedule 3, 4 or 6 in respect of any goods specified in any item of such Schedule: Provided that the Commissioner may, subject to such conditions as he may in each case impose, exempt with or without retrospective effect, any such person from the provisions of this subsection.

[2] 'Rule 19A.09 Liability for duty
(c) The liability for duty in terms of Section A of Part 2 of Schedule No. 1 cleared in terms of the provisions of the rebate item 460.24 by a licensed manufacturer or a licensed supplier (SOS warehouse licensed for the denaturing of spirits) on Form SAD 500 (GR) or (XGR) shall cease upon entering the goods into a licensed warehouse or locally manufactured goods on a form SAD 500 (ZRW) within 30 days from the entry on a Form SAD 500.

compliance with the conditions prescribed by Rule 19A.09(c) of the Rules to the Act. The Applicant also ask for an order of costs in relation to the separated issue.

[4] The Commissioner for SARS seeks a declaratory order that *"it is declared that neither the proviso of section 75(10)(a) nor the common law authorises the Respondent to exempt the Applicant from non-compliance with the conditions prescribed by the Rule 19A.09(c)."*

Parties

[5] The Applicant is JT International Manufacturing South Africa (PTY) LTD **("the Applicant" / JTIMSA)**, a private company incorporated in South Africa, with its registered office at 59 Nagington Road, Wadeville, Germiston. The Applicant is in the business of importing tobacco from abroad and manufacturing it into cigarettes for sale in South Africa.

[6] The Respondent is the Commissioner for the South African Revenue Service **(SARS)**. The Commissioner is charged with the administration of the Customs and Excise Act of 61 of 1964 **("the Act")** in terms of section 2(1) of the Act.

Background context

[7] During January 2011 to July 2011, the Applicant imported twelve tobacco consignments into South Africa as containerised cargo aboard merchant container ships from JT International SA (a company which is incorporated and effectively managed in Switzerland belonging to the same group as the Applicant) **"the manufacturer"**. It paid the due VAT in terms of section 13 of the Value Added Tax Act 89 of 1991 **("VAT Act")** and ordinary customs duty in terms of Part 1 of Schedule 1 to the Customs Act in respect of each consignment.

[8] Upon importation, the Applicant completed and submitted to SARS a SAD 500 (GR) form for each consignment. A SAD form is a customs declaration form which must be completed as prescribed for the clearance of goods for different purposes. In

terms of the SAD 500 (GR), the Applicant entered the imported goods under **Rebate Item 460.24.** To "enter" in this context means the act of declaring the consignments to be falling under a specific rebate item consonant with either the intended use of the consignment or it being applicable to the product itself. Rebate Item 460.24 relates to "specific" excise duty on cigarette tobacco which is payable in terms of Tariff Item 104.35.05 in Part 2A of Schedule 1 to the Customs Act. This Rebate Item provides that on certain conditions of it being met, and on the basis that the tobacco was to be used in the manufacture of cigarettes, the Applicant need not pay customs excise duties in respect of the tobacco.

[9] The Applicant contractually appointed a clearing agent, Kuehne & Nagel (PTY) LTD, to assist it to comply with its obligations under the customs clearance process. The Applicant cleared the consignments for home consumption with SARS Customs through the clearing agent and entered the imports into its manufacturing warehouse. Lest the meaning be lost to ambiguity, "Entered" in this context carries a double meaning. First, it is the act of declaring on prescribed forms the goods entered to the Applicant's warehouse and the second, the literal physical deposit of them at the warehouse.

[10] The Applicant proceeded to claim rebate on excise duty (over and above the ordinary customs duty on the tobacco imports) as conferred by section 75(1)(b) of the Customs Act read together with **Rebate Item 460.24** in Part of Schedule 2 of Schedule 4 to Act, in respect of all consignments. The claims were based upon the SAD 500 (GR) form which the Applicant completed during the process pertaining to every consignment.

[11] **Section 75(1)(b)** of the Act provides as follows:

> (1) Subject to the provisions of this Act and to any conditions which the Commissioner may impose –
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> (a) ...
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> (b) Any imported goods described in Schedule No.4 shall be admitted under rebate of any customs duties, excise duty, fuel levy or Road Accident Fund levy applicable in respect of such goods at the time

of entry for home consumption thereof, or if duly entered for export and exported in accordance with such entry, to the extent stated in, and subject to compliance with the provisions of the item of Schedule No.4 in which such goods are specified.

[12] **Rebate Item 460.24** provides as follows:

> **'Rebate of specific customs on excisable goods entered into the Republic**
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> **460.24.:**
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> Goods specified in Part 2A of Schedule No.1, imported into the Republic for further processing, blending, or mixing, or entered for use in the manufacture of excisable goods of another or same class or kind (excluding ethyl alcohol for industrial use or for use in the manufacture of other non-liquor products and specified aliphatic hydrocarbon solvents, as defined in Additional Note 1(ij) to Chapter 27) –
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> Provided that:
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> (a) the provisions of Rule 19A.09(c) are complied with;
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> (b) all other provisions of the Customs and Excise Act pertaining to locally manufactured excisable goods are complied with; and
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> (c) the goods are imported by a licensed manufacturer, into a storage (OS) or manufacturing warehouse; and
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> (d) the goods are removed by such licensed manufacturer, or a licensed remover as contemplated in Rule 64D.

[13] The **Rule 19A.09** encapsulated in the **Rebate Item 460.24** provides as follows:

> **'Rule 19A.09 Liability for duty**
>
> (a)...
>
> (b)...
>
> (c) The liability for duty in terms of Section A of Part 2 of Schedule No.1 cleared in terms of the provisions of the rebate item 460.24 by a licensed manufacturer or a

licensed supplier (SOS warehouse licensed for the denaturing of spirits) on Form SAD 500 (GR) or (XGR) shall cease upon entering the goods into a licensed warehouse or locally manufactured goods on a form **SAD 500 (ZRW)** within 30 days from the entry on a Form SAD 500.

[14] In the latter part of 2011, SARS conducted a post-clearance audit **("PCA")** to verify the Applicant's compliance with the provisions of the Act and with Rebate Item 460.24. SARS discovered the Applicant's failure to complete and process the ZRWs in respect of the said consignments on time. On 24 January 2012, SARS issued a Letter of Intent **("the Intent Letter")** drawing the error to the Applicant's attention. The letter notified the Applicant of SARS' intention to request the Part 2A duty, however, SARS afforded the Applicant time to furnish the ZRWs declarations supported by the relevant supporting documentation and to give reasons why the duty should not be demanded.

[15] The Applicant responded to SARS in a letter dated 10 February 2012 wherein it made submissions explaining the cause of the error and attributing it to Mr Vusumuzi Mahlalela **("Mahlalela")**, its former employee. According to the applicant Mahlalela, was responsible for administering the movement of the imported tobacco from the port of entry to the Warehouse. However, he failed to complete and process **SAD ZRW** in respect of the consignments which were entered into the Applicant's warehouse. In terms of Rule 19A.09(c), the completion and submission of these forms to SARS was supposed to have been done within 30 (thirty) days from the date of the goods being entered on a SAD 500 form.

[16] The Applicant alleges that its management was not aware of Mahlalela's error and/or omission, but assumed, and incorrectly so, that all necessary procedural and substantive steps in the customs and excise process were being properly carried out. It alleges further that the failure to complete and file the ZRW forms for the consignments when they entered the warehouse was not as result of any intentional conduct of any part of its employees, nor of the Applicant. Furthermore, the applicant

submitted that that it had nothing to gain from this administrative lapse, whether in relation to the payment of duties or otherwise. Moreover, the applicant avers that SARS was aware of the Applicant's business processes, that is, that specific consignments of tobacco had been imported and cleared under item 460.24; that ordinary customs duty and VAT were paid on those imports, but not Part 2A excise duty; and that the Applicant had a licensed manufacturing warehouse in which it manufactured excisable finished cigarettes of which were indeed manufactured and that excise duty was duly paid on the sale of those cigarettes.

[17] Apart from the erroneous non-completion of the ZRW forms within the 30 days period, the Applicant alleges that it complied openly with all other importation and customs clearance requirements pertaining to every consignment. The Applicant alleges further that it has in its possession all relevant records and can prove that it paid the excise duties in full on all cigarettes which it manufactured and sold using the tobacco imported under the consignments. SARS has therefore, suffered no loss of revenue tax as a result of the error. The Applicant avers that the *fiscus* is in the exact same position as it would have been had the ZRWs forms been timeously processed. To demonstrate this, the Applicant had in its response to SARS attached its excise accounts from the period January 2011 to December 2011.

[18] As invited, the applicant also sought to file the ZRWs for the consignments of the period January to July 2011. The applicant created the forms manually, they did not bear the designation "ZRW".

[19] In a letter of demand **("the Demand letter")** dated 9 March 2012, SARS refused to accept the Applicant's manually created ZRWs. On review of the declarations submitted, SARS stated that *the field 1 "Declaration" section, the purpose code reflected in this field was recorded as "ZRW". However, on verification, SARS discovered that the MRN number, which is the Bill of Entry (BoE) number purpose code of the declaration is "GR" and not "ZRW". This finding applied to all declarations provided.* SARS viewed this as "false declarations" because the original customs clearance had been made under a "GR" code for rebate purposes, but now they were "altered / amended to reflect *'ZRW'* in an attempt to prove compliance with Rule 19A.09c. Furthermore, the ZRW declarations could not be processed at that stage as

the processing of such declaration indicates that the goods were entered into a warehouse whereas such did not take place in this instance.

[20] In addition, even if the goods did go into the Applicant's licensed warehouse, it could have only been entered (read: declared) into such warehouse on processing of the relevant "ZRW" declaration. SARS furthermore held that the goods should not have been entered into the Applicant's warehouse as the prescribed SAD 500 declaration had not been processed.

[21] The Applicant was informed that section 75(1)(b) of the Act states that imported goods described in Schedule No.4 shall be admitted under rebate of customs duty, to the extent stated in, and subject to compliance with the provisions of the item in Schedule No.4 in which such goods are specified. It is therefore clear that if there is no compliance, the rebate of customs duties cannot be permitted under the relevant item to Schedule No.4.

[22] SARS indicated that it had no records of the Applicant pertaining to the processing of the "ZRW" SAD 500 declaration form. SARS, therefore, held that the Applicant's liability duty in terms of Schedule 1 Part 2A has not ceased.

[23] In a letter dated 16 April 2012, the Applicant through its attorneys, Webber Wentzel **("Wentzel")** requested the Commissioner to provide adequate reasons for his decision and levy of additional penalties including a notice of a search and seizure and failing the goods being found, a 100% forfeiture penalty. The letter made several submissions. Not all of these submissions are relevant in determinable issue, save for the few I extract below.

[24] In brief, the applicant's representations dealt with the Applicant's bona fides and cause of the error. Wentzel argued that whilst the non-compliance was a repeated error during a specific period of time linked to a misunderstanding of compliance with the Rules of Schedules to the Act by a specific employee, the financial impact on the fiscus was not severe because the technical but accidental omission of non-compliance with the Rule by the Applicant did not result in a loss of revenue as

payment of the full excise duties that would have been ordinarily paid by the Applicant had the relevant SAD 500 (ZRW) forms been timeously completed was in any event correctly paid.

[25] Furthermore, the Applicant should not be held to have had the same intention or shared negligence with its agents or employees whose action caused the technical non-compliance. On tax law precedent, intent, and moral blameworthiness of the taxpayer in committing the offence is a relevant consideration in meting out punishment. But in the case of the Applicant, the offence was because of an accidental omission; there were no *mala fides* present. Therefore, the Applicant should be entitled to a fair and equitable consideration of the extent to which it should be punished and deterred for its accidental omission based on the specific circumstances of its case, and in a clear and transparent manner treating all taxpayers equally. An appropriate sanction would be an administrative penalty.

[26] On the same day, the 16th of April 2012 applicant's attorneys penned a separate letter **("the exemption application")** to SARS. The Applicant advised SARS that upon its own self-assessment, it identified that the periods which it was noncompliant with the Rules to be 1 April to December 2010, and August 2011 to February 2012. In other words, the applicant was noncompliant for the periods immediately before and post the SARS audit. Accordingly, it applied for the Commissioner to exercise his discretion in terms of section 75(6) and/or 75(10) in favour of the Applicant in relation to both the period audited by SARS and also the period it identified upon its own self-assessment. The Applicant submitted that the exercise of this discretion would be to condone the Applicant's use and/or disposal of the goods entered under rebate item 460.24 for the period 1 April 2010 to February 2012 and its failure to complete the SAD 500 (ZRW) form within 30 days from the entry on the SAD 500 (GR).

[27] The letter argued that the Commissioner was empowered to grant such condonation and exemption for the procedural non-compliance of the Applicant by provisions of 75(6) and/or 75(10)(a) of the Act which give him discretionary power to exempt the Applicant from compliance with part of the provisions of Rule 19A.09(c) specifically the requirement to complete the ZRWs within 30 days from the entry of the consignments on the form SAD 500 GR).

[28] **Section 75(6)(a) of the Act** states that:

> *'**Sec 76(6)(a)** The Commissioner may, on such conditions as he may impose, permit any person who has entered any goods under rebate of duty under this section to use or dispose of any such goods otherwise than in accordance with the provisions of this section and of the item under which such goods were so entered, or to use or dispose of any such goods in accordance with the provisions of any other item to which this section relates, and such person shall thereupon be liable for duty on such goods as if such rebate of duty did not apply or as if they were entered under such other item to which this section relates, as the case may be, and such person shall pay such duty on demand by the Commissioner: Provided that, in respect of any such goods which are specified in any item of Schedule 3, 4 or 6 the Commissioner may, subject to the provisions of or the notes applicable to the item in which such goods are specified and to any conditions which he may impose in each case, exempt any such goods from the whole or any portion of the duty payable thereon under this subsection on the ground of the period or the extent of use in accordance with the provisions of the item under which such goods were entered, or on any other ground which he considers reasonable.'*

[29] Relying on the provision that the Commissioner may exempt goods from the whole or any portion of the duty payable, on the ground of the period, extent of use under a specific item, or *'on any other ground which he considers reasonable'*, the Applicant submitted that in this context, reasonableness means that the Commissioner must be guided by rational and sound judgment in accordance with the practical realities of the relevant case.

[30] **Section 75(10)(a) of the Act** states that

> *'**Sec 75(10)(a)** No goods may be entered or acquired under rebate of duty until the person so entering or acquiring them has furnished such security as the Commissioner may require and has complied with such other conditions (including registration with the Commissioner of his premises and plant) as may be prescribed by rule or in the notes to Schedule 3, 4 or 6 in respect of any goods specified in any item of such Schedule: Provided that the Commissioner may, subject to such conditions as he may in each case impose, exempt with or without retrospective effect, any such person from the provisions of this subsection.'*

[31] Relying on this provision which states that '*the Commissioner may, subject to such conditions as he may in each case impose, exempt with or without retrospective effect, any such person from the provisions of this subsection*', the Applicant submitted that this discretionary power forms the basis of an exception to or exemption from the rigorous conditions of the Rules.

[32] It was also submitted that the section 75(1)(a) provision also allowed for the Commissioner to exercise his discretion in favour of the Applicant *ex post facto.* To support its argument, the Applicant relied on commentary made by Cronje in *Customs Service* (Issue 26, Chapter X, page 10 – 26). The commentary reads,

> *'The Commission may thus exempt a person from prior compliance with the stated requirements and may, for example, allow registration with retrospective effect in respect of any goods entered or acquired by the person which are intended for purposes or use under rebate of duty".*

[33] On the Applicant's analysis, the subsection should be read and be understood in an unlimited sense meaning that the Commissioner shall have the discretionary power to at any time permit exceptions and exemptions from the requirements of the Act.

[34] In support of this submission the Applicant referred me to the Supreme Court of Appeal decision (then Appellate Division) in ***BP SA (PTY) v Secretary for Customs and Excise* 1985 1 SA 725** as supporting its argument. The Applicant pointed out that SARS' argument that a rebate to a taxpayer was dependent on actual compliance with the Act and regulations was rejected by the Court in that it held as follows:

> *'The above submission ...unjustifiably equates "subject to the provisions of this Act' with "subject to compliance with" such provisions... had it been the Legislature intention to make a rebate dependent on actual compliance with all other sections of the Act and also the regulations, it would no doubt have said so. Consequently, [there is] little doubt that it could not have been the intention to grant a rebate subject to compliance with each and every provision of the Act and the regulations or at any rate such provisions have a bearing on the entry or disposal of goods under rebate duty"*[3] **(Applicant's emphasis).**

[35] Relying on the strength of this dictum and Cronje's commentary, the Applicant submitted that the discretion afforded to the Commissioner is not subject to the taxpayer compliance with each and every section and regulation bearing on the entry under the rebate. If this were to be the case, then there would be in fact no discretion at all exercisable by the Commissioner.

[36] The Applicant then contended that SARS as an organ of State had a legal duty to be guided by principles of fairness and reasonableness in order to come to a rational decision of sound judgment. This necessarily meant that substance has to take precedence over form. The Applicant reminded SARS that the purpose of the rebate item was to avoid a situation of double taxation on the same goods imported (subject to customs duty) and then manufactured into excisable products (subject to specific excise duty). This is the substance purpose of the rebate.

[37] The applicant submitted further that the completion of specific documentation was an administrative function designed to facilitate record keeping. This is form. On

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[3] Page 10 at para 9.

this basis, the Applicant contended that where it appears that the administrative form of the rebate would defeat the substance of it, or as the Applicant put it, "are in conflict", the substantive elements of the law must take precedence. Read into context of the Applicant's circumstances, there is no other option but for the Commissioner to exercise his discretion in favour of the Applicant as not doing so would defeat the substantive purpose of the rebate item which is to avoid double taxation.

[38] On 12 October 2012 SARS provided the reasons of its decision and advised the Applicant that the Commissioner has refused the Applicant's exemption application lodged under section 75(10). However, SARS conceded incorrectness of some of its levy calculations. It therefore provided a revised schedule in which SARS demanded payment of excise duty in terms of tariff item 104.35.10 (subheading 2403.10.30) of Part 2A of Schedule 1 to the Act into the amount of R53, 461, 449.02, and further VAT in terms of section 13 of the VAT Act to the amount of R7, 484, 602.32), totalling R60, 946, 051.34.

[39] In response to the requested reasons, the Commissioner started off by pointing out the applicable provisions of the Act. These were, as already put above, section 75(1)(b), Rebate Item 460.24, Rule 19A.09(c). SARS explained that Rebate Item 460.24 was introduced with effect from 1 December 2006 to even the playing the field for all role-players and to eliminate double taxation whilst ensuring that SARS would be able to properly control the movement of imported tobacco and the manufacturing of cigarettes.

[40] In contradistinction to other rebate items which simply suspend payment of duty on entry of the goods into the manufacturing warehouse subject to completion of the prescribed manufacturing process and removal of the final product (on one the bases listed in Rule 19A.09(a), SARS referred to the four distinct requirements of Rebate Item 460.24, of which it argued are peremptory under the rebate item. In practice, SARS stated that compliance with this rebate item is established at, or during three separate stages. The first is at the time of importation where there must be compliance with Rule 19A.09(c); the second is following all the provisions of the Customs Act pertaining to the manufacturing process; and the third is complying with all the

requirements of the Customs Act relating to the removal of cigarettes from the manufacturing warehouse.

[41] SARS contended Rule 19A.09(c) is in peremptory terms, the requirement introduced by the Rule for ceasing of liability of duty is an absolute requirement of which is to be adjudged independently of compliance with any of the other requirements. In other words, the importer / manufacturer would not be entitled to a rebate if there was no compliance with the Rule even if there was full compliance with all other requirements. SARS, therefore contended that neither Rebate Item 460.24 nor Rule 19A.09(c) provides for condonation for non-compliance with the Rule; and neither was there any "general" empowering provision in the Act in terms of which non-compliance with this Rebate Item could be condoned. As such, logic follows that where there has been no proper compliance with Rule 19A.09(c), then duty would remain payable, and since the Applicant conceded that it had failed to comply with Rule 19A.09(c), the Commissioner was thus enjoined to hold the Applicant liable for payment of the duties payable to SARS in respect of the tobacco in issue.

[42] SARS also argued that even if the Commissioner had the power to condone the non-compliance, of which it is contended that he does not, the Commissioner would not have exercised his discretion in favour of the Applicant for the following reasons: the Applicant conceded that it failed to comply with Rule 19A.09(c) but on 10 February 2012 the Applicant furnished the Commissioner with bills of entry which sought to prove that the required "ZRW" entries had been passed. But on further inspection, SARS found this not to be the case. Therefore, in SARS' view, the Applicant attempted to defraud the Commissioner. The Applicant was therefore in contravention of section 38, 39, 40 and had committed an offence in terms of section 84 of the Act.

[43] The tobacco in issue was also no longer in existence.

[44] With regards to the Applicant's reliance on sections 75(6)(a) and 75(10) of the Act, SARS contended that they do not find application in the matter. According to SARS, section 75(5) prescribes the Commissioner's powers to a scenario where goods that were imported "in full compliance" with a rebate item which are for whatever reason, cannot or no longer need to be used in terms of that rebate item. However, in

the present case, the problem arose because the tobacco was not imported and dealt with in accordance with the requirements of the rebate item.

[45] Section 75(10) on the other hand prescribes the Commissioner's power "to exempt" (as opposed to "condone") a person from having to comply with the provisions of the said section. Read in context, SARS contended that the provision essentially deals with the position where goods that were "duly" imported, either duty paid or under rebate of duty, subsequently came to be used in a process that allows for the importation under rebate of duty, or in terms of a different rebate item. Thus, the provisions to both subsections, 6(a) and (10) of section 75 of the Act prescribe the Commissioner's powers to where the intended use of duly imported goods have changed after importation. The difference here is that the former deals with the duty aspect and the latter with compliance to the statutory provisions relating to the (new) rebate item to be employed.

[46] On 22 November 2012, the Applicant lodged an internal administrative appeal to SARS National Appeals Committee **("the Committee")** against both the decision to impose duty and VAT and the Commissioner's refusal to exercise his discretion under 75(10)(a).

[47] The Appeal addressed the Commissioner's allegation that it had falsified the ZRWs which it sought to submit in February 2012. The Applicant submits that even though the ZRWs were submitted outside of the requisite 30-day period, it dated them February 2012 with view to substantially comply with Rule 19A.09(c), albeit this was outside of the 30-day period. These forms were manually created by the Applicant in good faith and related to the period under consideration but were dated February 2012 under a covering letter to SARS, dated 10 February 2012, explaining that the Applicant had not completed the SAD ZRWs previously and regrets the error. There was thus no attempt to defraud the Commissioner or to suggest that these forms had been completed in the original 30-day period. Furthermore, there was no attempt by the Applicant to suggest that when the tobacco was originally imported, it had been cleared under code "ZRW".

[48] The Appeal further contended that the submission and processing of the required SAD ZRW 500 after the tobacco had been removed from the factory does not constitute an unlawful action as it was not contrary to the Rule or common law or the statute. The Appeal also contended that there no law which specifically prohibits the completion of the ZRWs after the 30-day period. In the Applicant's case, the SAD 500 ZRWs were passed outside of the 30-day period, but this in and of itself does not mean that their processing would have been unlawful.

[49] The Appeal also disputed SARS interpretation of Rule 19A.09(c). Here the Applicant stated that the Rule clearly does not say nor imply that *"the liability for duty shall not cease unless the goods are entered on a ZRW within 30 days"*. According to the Applicant, the Rule merely says that once the goods are entered on a ZRW within 30 days, the duty "must" or "shall cease". Therefore, the Rule is only peremptory in the sense that the liability for duty must cease on entry into the warehouse on a SAD 500 ZRW within 30 days. Thus, there is no suggestion that compliance with the requirement to submit a SAD 500 ZRW within 30 days is the only possible way in which liability for the duty can cease.

[50] Furthermore, the applicant contends that ARS' interpretation of section 75(10) was itself also flawed. According to the Applicant, section 75(10) simply states that goods cannot be entered under rebate of duty unless there has been compliance with the Rules and Notes in Schedule 4. However, the *proviso that 'the Commissioner may, subject to such conditions as he may in each case impose, exempt with or without retrospective effect any such person from the provisions of this subsection'* make it clear that the Commissioner may exempt any person from compliance with the conditions in the Rules or the Notes. This includes empowering the Commissioner to accept the SAD ZRWs after expiry of the 30-day period prescribed by Rule 19A.09(c) by exempting the Applicant from this time requirement.

[51] The Applicant then proceeded to support its view by directing the Committee to Cronje's commentary in *Customs and Excise Service* (Issue 32, updated on 23 March 2012, page 08-10) where the passage reads:

'Where certain conditions or procedures are prerequisites for entering or acquiring rebate of duty, they must be complied with before entry or acquisition having regard to the peremptory provisions of [section 75(10)]. It appears that non-compliance administrative requirements after entry will not disentitle a registrant to the rebate in respect of the goods entered under rebate of duty if the goods have been disposed of in accordance with the rebate provision concerned."

[52] The Applicant then contended that Supreme Court of Appeal ***BP SA (PTY) v Secretary for Customs and Excise* 1985 1 SA 725** at 734B-D and 736I to 737A supports this statement. Therefore, SARS contention that the goods must have first been duly entered (i.e., the Applicant must have complied with the Rules) before the *proviso* can apply does not make sense in this context because had the Applicant complied with the Rules, there would be no reason necessitating the Commissioner to exempt the Applicant from compliance with the Rules.

[53] Concluding its Appeal, the Applicant stated further factors and considerations which should militate against the Commissioner not exercising his discretion of which the Applicant argues he has a legal duty to do in its favour. Not doing so the Applicant contended would defeat the purpose of Rebate Item 460.24.

[54] SARS notified the Applicant in a letter dated 10 September 2013 **("the NAC Refusal letter")**, that the Applicant's appeal had been refused. In the Refusal letter, SARS National Appeals Committee **("NAC")** supported the Commissioner's view that he was simply not empowered by the section, nor the Act to grant the requested exemption.

[55] In brief, the Appeals Committee held that the Applicant was in essence prescribing to the Commissioner how to exercise his discretion. But be that as it may, the Committee held that the starting point with regards to section 75(10) is that the goods must be entered, acquired under a rebate and security must be provided. Thereon, the Commissioner may upon application exempt a person from prior compliance.

[56] The Committee also rebutted the Applicant's analysis of Cronje's commentary as legally flawed. On its own analysis, the Committee held that Cronje's commentary in terms of section 75(10) on page 24-26 is applicable to the matter. The passage reads,

> *'The requirements specified in subsection 10 are peremptory and must be complied with before the goods in the relevant item of Schedule 3, 4, or 6 may be entered or acquired under rebate of duty. These requirements include furnishing of security as the Commissioner may require and other conditions as registration of premises and plant, and so forth as may be prescribed by the rules for section 75 or the notes to any such [page 10 – 25] Schedules and are applicable, for example, to Schedule 3, item 470.03 of Schedule 4 and certain items of Schedule 6. Furthermore, certain items also require approval by the Commissioner, for instance item 412.21 and 480.25, or approval of a formula (item 607.04), in which case such approval or permit must be obtained before the goods are entered or acquired under rebate of duty. "Acquired" could include entry on forms DA 32 and 33, DA 510, DA 600 and DA 610.*
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> *In term of the proviso of subsection 75(10(a), "the Commissioner may, subject to such conditions as he may impose, exempt with or without retrospective effect any such person from the provisions of this subsection". The Commissioner may thus exempt a person from the prior compliance with the stated requirements and may, for example, allow registration with retrospective effect in respect of any goods entered or acquired by the person concerned which are intended for purposes or use under rebate of duty.*
>
> *When the exemption involves an application for refund, application for exemption must be made within six months of the date specified in the 75(14)(a)(i)(ii).*[4] *If no refund is involved, for instance only registration*

[4] 75 Specific rebates, drawbacks and refunds of duty

under another rebate item, this is prescriptive is not applicable. Having regard to section 40(3)(b)(i) and (iii)[5], application or for exemption may result from an entry passes in error (section 40(3)(a)(ii)[6], amendment of the determination, under section 47(9)(d)[7] with retrospective effect

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(14) No refund or drawback of duty shall be paid by the Commissioner under the provisions of this section unless an application therefor, duly completed and supported by the necessary documents and other evidence to prove that such refund or drawback is due under this section is received by the department-

(a) in the case of goods exported-

(i) where the goods were exported by post, within a period of six months from the date on which such goods were posted; or

(ii) where the goods were exported in any other manner, within a period of six months from the date of entry of such goods for export;

[5] 40 Validity of entries

(b) No application for such substitution as is referred to in paragraph *(a)* (ii) 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, within a period of six months-

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

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

[6] 40(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 –

(ii) if 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 or use under rebate of duty under section 75, 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 acceptance of such voucher or fresh bill of entry shall not indemnify such importer or exporter or manufacturer against any fine or penalty provided for in this Act.

[7] 47 Payment of duty and rate of duty applicable

9(d) The Commissioner may whenever he deems it expedient amend any such determination or withdraw it and make a new determination with effect from-

(i) the date of first entry of the goods in question;

(ii) the date of the notice referred to in paragraph *(c)*;

(iii) the date of the determination made under paragraph *(a)*;

(iv) the date of such new determination; or

(v) the date of such amendment.

(section 40(3)(aA)(aa) or (bb)[8] or a Schedule amended with retrospective effect (section 40(3)(aA)(cc)[9] and subsection (15).

For the purposes of section 40(3) (adjustment by means of substitution of a bill of entry) subsection 10(c) provides in subparagraph (i) that any bill of entry passed in relation to goods in respect of which exemption is granted is deemed to have been passed in error by reason of duty having been paid on goods intended for purposes of use under rebate of duty under section 75, while paragraph (ii) provides that goods concerned are deemed to have qualified at the time duty was paid on such goods in all respects for rebate".

[57] Reading from the above, the Committee stated that it is apparent that the starting point with regards to section 75(10) is that goods must be entered, acquired under a rebate and security must be provided. The Commissioner may then on application exempt a person from prior compliance. But distinction should be made between an application for exemption and an application for condonation for non-compliance after importation.

[58] In the present matter, the Committee held that it was evident that the Applicant was seeking *post-facto* exemption, triggered by the post-clearance audit. The

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[8] 40 Validity of entries

3(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

[9] *(cc)* any Schedule is amended with such retrospective effect.

Committee supported the Commissioner's stance that there is no legal basis for him to exempt the Applicant from non-compliance after the fact of (the PCA audit) as it would be contrary to section 75(10). Thus, the Applicant's mainstay submission that the Commissioner could and should exercise his discretion for the Applicant, was without merit and founded on legally flawed interpretations of the relevant prescripts of the Act.

[59] The Committee concluded that section 75(10) does not allow for condonation of an applicant for non-compliance. It read the crux of the dispute as a request, refused, for condonation for non-compliance with the Rule, rather than an application for exemption from prior compliance as envisaged by sections 75(10).

[60] The Committee also took some commentary from Cronje, "Customs and Excise Service. It viewed the Applicant's explanation for the error and the negligence of Mahlalela to be of immaterial relevance for it remained vicariously liable of the actions and omissions of its employees. This is *"Because the administration of customs and excise duty is mainly a system of self-accounting and self-assessment, it appears to require for its efficient and effective functioning that those participating in activities regulated by the Act should exercise the necessary care in ensuring that they are conversant with and duly comply with the relevant provisions."*[10] The Committee also adopted the stance that the error of the Applicant's employee does not give legal basis for condonation as "ignorance of the law is no excuse"

[61] As a result, the Appeal was consequently dismissed.

Grounds of review

[62] The Applicant submits that, in the first instance, its failure to complete and process the ZRWs forms within the 30-days period is not fatal to its right to claim the rebate, especially when all of the tobacco imported under the consignments was in fact entered into a licensed manufacturing warehouse within the 30-day period and was thereafter used to manufacture cigarettes for which excise duty was paid in full.

[10] Cronje, "Customs and Excise Service", page 24.

And on a proper construction of the Act, its schedules and rules, the requirement to complete and process a ZRW form within the 30-day deadline is directory, and not peremptory. Also, the consignments were entered into the warehouse (licensed for locally manufactured goods) within 30-days of entry on the SAD 500 (GR) form. Thus, there was substantial compliance with the requirements of the Rule. It was only the administrative process relating to the completion of the ZRWs that was lacking. Furthermore, by denying it the excise rebate and refusing it the exemption claimed, SARS would be claiming double duty on the same tobacco, once on the bulk cigarette tobacco and again on the completed cigarettes.

[63] The Applicant contends if the Commissioner says that he cannot grant the Applicant exemption, even under the circumstances of the explained default and especially when there has been no loss to the fiscus, then such an attitude would render the Commissioner's discretionary power under section 75(10) nugatory. This discretion, the Applicant submits, is granted to the Commissioner for him to exercise on a case-by-case basis. Furthermore, he may impose any conditions as he sees fit to militate against any perceived prejudice to SARS.

[64] The Applicant accepts that full compliance with the requirements of the Rebate Item will always entitle the taxpayer to the Rebate. However, where an aspect thereof is directory, or where substantial compliance suffices, or where an exemption is granted, the Rebate will still apply even where there has not been full or strict compliance with the Rebate Item. And even if one were to accept that the terms of Rule 19A.09(c) are peremptory – of which the Applicant contends that they are not – there is no closed list of reasons for non-compliance upon which an importer or manufacturer may rely upon when asking of the Commissioner to exercise his discretion explicitly afforded to him by section 75(10). The empowering provision necessarily presupposes that there has not been full or strict compliance with the Rebate Item.

[65] The Applicant also submits that where goods are not entered in a rebate or storage warehouse but instead directly imported by the manufacturer to a manufacturing warehouse, the role of the ZRW form is, with respect, peripheral. In any event, during the period in issue, the Applicant did not have a "rebate / storage store".

The tobacco was removed from the port of entry directly to the Applicant's Warehouse by the licensed remover. Furthermore, it is not necessary to have to make use of a separate rebate store for purposes of the Rebate Item. It only matters that the tobacco was imported to a manufacturing warehouse.

[66] Also, the tobacco was entered directly under rebate duty (by submission of the SAD 500 (GR) forms) into the Warehouse of which it is where it was ultimately used in the manufacturing of cigarettes.

[67] The Applicant also denies that the Commissioner "lost control over the tobacco product" because the consignments were duly entered upon importation on the SAD 500 form. This means that SARS did in fact have control over the tobacco in the sense that it was fully aware that it had been imported, and by whom, and for what purpose. Moreover, the consignments were expressly entered under rebate of duty with reference to Rebate Item 460.24. Thus, SARS knew that the tobacco was intended for the manufacturing of cigarettes. Therefore, so the Applicant contends, the Commissioner was aware or should have been reasonably aware that the imported tobacco was to enter the excise environment and to be used in processes governed by the excise provisions of the Act. And as to any other contentions and disputes of fact that the Commissioner may have about the manufacturing of the cigarettes and whether due excise was paid, the Applicant has all relevant documents to answer to whatever contentions of fact the Commissioner may have and invites him to inspect the same.

[68] The Applicant also submits that the Commissioner is confusing the **"effect"** of the relevant provisions (namely to allow the importer of tobacco to a rebate of duty subject to compliance with the rebate item) with their clearly stated **"purpose"**, namely, to avoid double taxation on imported product that is ultimately used in the manufacturing of excisable products.

[69] The Applicant submits that the *proviso* in section 75(10)(a) can only mean that SARS may exempt taxpayers, under the second part, being the provision itself, from whatever obligations imposed on them by the first part, being the conditions imposed

by the section preceding the provision about when an item may be entered under rebate. The provision allows for this to be done on a case-by-case bases.

[70] The literal definition *"to exempt"* is *"to free from an obligation or liability imposed on others"*. Thus, the ordinary meaning of the word "exempt" is to remove an obligation or restriction that may otherwise apply to a person. The Applicant contends that the phrasing, *"the provisions of this subsection"* plainly permits the Commissioner to decide that anyone (or more) requirements need not be complied with. Importantly, he may do so before the entry in question or after it has already occurred – otherwise, the words *"with or without retrospective effect"* would have no application.

[71] On the plain language of the proviso, the Commissioner is empowered to permit a rebate even where the entry is complete but has not met the detailed requirements of the relevant rule or rebate item. The Applicant contends that this interpretation, i.e., that the Commissioner's powers are in principle as wide as the rebate items themselves, is plainly businesslike. It recognizes that events may occur, or have occurred, which may justify a less rigid approach than the Rules or the Schedules to the Customs may otherwise impose. This gives the Commissioner a degree of flexibility to avoid unwarranted outcomes.

[72] The Applicant contends that the Commissioner has drawn an arbitrary juxtaposition between the word "to condone" and "to exempt". It appears that SARS reliance on the distinction goes to whether the Commissioner's discretion can be exercised to regularize something that has already happened in the past. This the Applicant says the definition "to exempt" is wide enough to permit this. And the fact that the proviso allows for the discretion to be exercised *"with or without retrospective effect"* makes the contrary unarguable.

[73] Whereas SARS contends that the proviso *"deal[s] with the Commissioner's powers where the intended use of duly imported goods have changed after importation"*, the Applicant contends that there is no basis in the wide language to justify such a restrictive approach.

[74] The Applicant also attacks the conclusion from SARS Appeals Committee which it contends that it misread from Cronje's commentary. The Applicant submits that it appears that the only reason why SARS contends that the Commissioner does not have the power to exempt the Applicant retrospectively is on the sole distinction between "condonation" and "exemption". The Committee in this regard fixated itself to the phrase, *"exempt a person from prior compliance"* to mean that it is relating to an exemption that must precede the entry itself. This does not appear to have been based on the language of the statute itself but on the Committee's analysis of the quoted commentary. The Applicant submits that this is an incorrect understanding of both the Customs Act and the commentary in question.

[75] On the contrary, the Applicant submits that Cronje's commentary was not attempting to draw a distinction between prospective and retrospective exemption, let alone suggest that the discretion to exempt cannot be applied retrospectively. If anything, in using the words, *"exempt a person from prior compliance"*, he was making the point that a prior (earlier failure) to comply can be remedied by the Commissioner through an exemption. This is what the Applicant is asking for from SARS.

[76] The Applicant submits the fact that section 75(10)(a) grants the Commissioner a power to exempt a person retrospectively from compliance with a regulatory requirement makes it completely unnecessary to consider whether the Commissioner would otherwise be permitted to overlook the non-compliance with Rule 19A.09 in terms of the common law. In our law, the Applicant submits, an administrative authority is entitled to waive compliance with a regulatory requirement that is made for its sole benefit, rather than the public benefit. The ZRW rule is an example of this. It was instituted for the sole benefit of SARS as an administrative requirement in its implementation of the Customs Act. No third party has any interest in whether that requirement is strictly complied with or not. Therefore, even if the proviso to section 75(1)(a) were to be interpreted restrictively, SARS would still have the power at common law to condone the Applicant's non-compliance with the ZRW rule.

[77] In the alternative, the Applicant submits that if it is held that the requirement to complete the ZRW forms on time is peremptory, to "exempt" means to free from an

obligation or liability imposed on others".[11] The word does not only connote a prospective or forward-looking exemption but includes an *ex post facto* exemption as well in relation to past non-compliance.

[78] In contrast, the Refusal letter draws a distinction between granting an exemption ahead of importation, of which the Commissioner accepts that he is empowered to do, and condoning non-compliance after importation, of which the Commissioner contends that he is not empowered to do. The Applicant submits that this restrictive interpretation is untenable.

[79] Furthermore, in refusing the exemption, the Commissioner failed to take relevant circumstances into account, namely that, (i), the non-compliance was limited in scope and, (ii), caused by a *bona fide* error of a single employee which did not reflect any intention on the part of the Applicant to comply with the Act; (iii), there was no loss to the fiscus or whatsoever; (iv), there was no intention on the part of the Applicant to act dishonestly or to achieve an illegitimate purpose; (v), paying additional duty on the consignments on top of the excise duty paid on the sale of the cigarettes would be double taxation; and (vi), the amount of duty and VAT payable if the discretion is not exercised would be grossly disproportionate to the nature of the error and the prejudice caused thereby.

[80] Finally, the Applicant further submits that the Commissioner's decision is not rationally connected to the purpose of rebate item 460.24 which is to avoid double taxation; nor is it rationaliy connected to the information before him.

SARS / the Commissioner's submissions

[81] SARS submits that customs and excise legislation serves several purposes and functions. They include generation and collection of duties, control over imports and certain manufacturing activities for the protection of local industries. Insofar the Commissioner is concerned, prejudices to him not only be limited non-payment of duties but would also include any conduct causing him actual or potential harm or

[11] Definition taken from the Oxford Concise Dictionary

frustrating him in the execution of his responsibilities in terms of the Act which would cause the system to be vulnerable to abuse. The Commissioner would lose all control of over the industry of which would increase the extent of the illicit tobacco smuggling exponentially.

[82] In order to counter illicit tobacco smuggling, of which has been estimated to cost the fiscus a revenue loss in the region of four billion rands per year, there must be strict legislation in place, and additionally, compliance with both the letter and the spirit of the legislation must be ensured by firm application and tough enforcement thereof.

Concept of rebate of duties

[83] SARS submits that if duty, either import or excise, is payable on a product, it is payable irrespective of the use to which it will be put after importation or manufacture. This inevitably means that if a dutiable product is used in the manufacture of an excisable product, the so-called "double tax" will be payable. The submission goes on to say that although the payment of more than one duty is loosely referred to as "double tax/duty", this is technically incorrect because in truth, two types of duties are payable in respect of different products. It is pointed out that what is at issue here is the different types of duties. In principle, there is nothing wrong with levying of more than one duty ("double duty"), and in practice that is not uncommon.

[84] The introduction of the rebate is essentially an indulgence afforded to the importer or manufacturer by the Commissioner: this indulgence is the payment of duty payable on the component being suspended until the occurrence of a result or process prescribed by the rebate item and subject to full compliance by the importer or manufacturer with the formal, procedural, and other prescripts thereof. In practice, this means that the payment of a duty that can be rebated in terms of the item is in the hands of the rebate user; if the rebate item is used in full compliance with the terms thereof, only one duty will be payable, and if not, double duty will be payable.

[85] And in deciding whether to make use of a rebate item, specific consideration would have to be given to the unique requirements of the rebate item in issue, the

ability to comply with those requirements vis-à-vis the consequences of not doing so. It is therefore not open to an importer or manufacturer to rely on ignorance of departments or individuals responsible for compliance with a critical requirement of the rebate item.

Practical implementation of Rebate Item 460.24

[86] In the importation of tobacco under rebate for use in the manufacturing of cigarettes, two fundamentally distinct environments exist, one being customs, and the other being excise. The first relates to compliance with the customs process of the Act, and the second, with the excise requirements. As to the customs process, the party responsible for compliance with all the relevant prescripts of the Act and liable for payment of the import and other duties is the importer. But once the tobacco has been transferred to the excise environment, the manufacturer would be responsible for compliance with the prescripts of the Act and also be liable for payment of duties.

[87] Unless and until the tobacco is duly transferred from the customs environment, i.e., the rebate warehouse, to the excise environment, i.e., the manufacturing warehouse, the importer remains liable for payment of duties. Put differently, and in customs parlance, by transferring the tobacco to the excise environment, i.e., the manufacturing warehouse, only then does the liability of the importer cease and becomes substituted by the responsibility and liability of the manufacturer.

[88] In practice, even though the same party can be responsible for compliance with the Act and payment of custom and/or excise duties, the liability is founded on different footings and as far as the administration of the two processes are concerned, they are independently administered by different departments of SARS. The handover of responsibility from one to the other is done by means of submission of the SAD 500 (ZRW).

[89] In the present instance, the practical effect of the conduct of the Applicant is that the Commissioner never had control and/or lost control over the tobacco. On the Applicant's own version, the Commissioner contends that the according to the information furnished by the Applicant, the tobacco was at all relevant times in the

customs environment, whereas in fact, it had entered the excise environment and was being used in processes governed by the excise provisions of the Act without SARS excise department being aware thereof. The Commissioner therefore had no control over the tobacco and the system was exposed to exploitation. In this instance, the Commissioner cannot be sure that those consignment of tobaccos were in fact delivered to the manufacturing warehouse and used in the manufacturing of cigarettes. And without proper compliance with the prescribed procedures by importers and manufacturers alike, the Commissioner cannot detect and prevent illicit tobacco smuggling.

[90] As both the importer of tobacco and manufacturer of cigarettes, the Applicant is registered with SARS as an importer and is the licensee of the customs and excise manufacturing warehouse in where the cigarettes purportedly manufactured from the imported tobacco. The Applicant is also a registered rebate user. Therefore, the process that had to be followed by the Applicant when importing the tobacco and manufacturing of cigarettes was the following:

a. On importation, the tobacco would have had to be entered for storage in the Applicant's rebate store. This would be done by completing the SAD 500 form with purpose code GR ("SAD 500 "GR").

b. Once entered, the tobacco would have had to be removed in bond from the port of entry to the Applicant's rebate facility. Such removal would have had to be undertaken either by the Applicant or by a licensed remover contracted by it. In either instance, a SAD 505 form would have had to be completed and submitted to SARS together with the SAD 500 (GR) form.

c. Thereafter, to remove the tobacco to the manufacturing warehouse, the Applicant would have had to complete and submit a SAD 500 with purpose code ZRW ("SAD 500 (ZRW)"). This is needed to be done within 30 days from entry of the tobacco on the SAD 500(GR).

d. Once notified (electronically) by SARS that the removal has been approved, the tobacco would have had to be removed from the rebate store to the manufacturing warehouse.

[91] To SARS, the submission of the SAD 500 (GR) and SAD 500 (ZRW) forms respectively, to SARS and in customs parlance, constitute "due entry".

[92] In contrast to the above process, SARS contends that the process followed by the Applicant was the following:

a. The tobacco was entered onto a SAD 500 (GR) i.e., for entry into the Applicant's rebate store.

b. Notwithstanding having been entered as such, the tobacco was not taken there but taken directly to its manufacturing warehouse. The effect of this is that even though the tobacco, according to information furnished by the Applicant to the Commissioner, the tobacco was in the customs parlance it was also in the excise environment and was being used in processes governed by the excise provisions of the Act without SARS excise department being aware thereof.

c. No SAD 505 was ever submitted to SARS, nor any other evidence proving, or purporting to prove that the tobacco was removed in compliance with the rebate item.

[93] The tobacco was therefore, never "duly entered" into the Applicant's manufacturing warehouse. In terms of the requirements of the Act, despite delivery of the goods to the manufacturing warehouse, there was no *"due entry"* as prescribed by the Act. The only step taken by the Applicant in relation to the entering of the tobacco into the manufacturing warehouse was in its response to SARS Letter of Intent, furnishing the Commissioner with unprocessed backdated SAD 500 (ZRW).

[94] By reason of the above conduct, SARS contends the tobacco was not dealt with in accordance with the documentation submitted to SARS. This means that it was diverted, i.e., dealt with in contravention of provisions of section 75(19)[12] of the Act.

[95] Furthermore, had the Commissioner taken at face value the Applicant's submitted SAD documents – of which were not ZRWs but rather SAD 500 (GR) forms with changed purpose code from GR to ZRW, the Commissioner would have finalized the investigation on basis that there was proper compliance with the Rebate Item. This conduct is tantamount to fraud. However, except to demonstrate why the Commissioner must insist and enforce strict compliance with the Rebate Item and the Act in general, the decision by the Commissioner to refuse the condonation was not founded on the aforesaid allegation.

[96] The rebate user becomes entitled to the rebate (in the sense that it does not immediately need to pay the duty as it normally would) once the requirements thereof have been met. Therefore, payment in the event of non-compliance is what is clearly envisaged by the Rule. As such, it is denied that the Commissioner is not prejudiced in any way should the Applicant be entitled to claim a rebate despite its non-compliance. SARS submits that the prejudice is to be found in the fact that the system and the Commissioner's control over the process was materially compromised.

[97] SARS contends that to the extent that the Applicant is to pay duties which would have been otherwise rebated, it only has itself to blame. The audit spanned a period of six months, and the final decision covered twelve consignments. This means that for a period of at least six months the management of the Applicant was totally oblivious to the fact that first, its employees were not properly trained and secondly, that it was operating in blatant disregard of the provisions of the Act. SARS submits that the ignorance of the Applicant's employees of one of the key requirements to the Rebate Item is of no excuse. And if the Commissioner were to accept the excuse

[12] 75 (19) No person shall, without the permission of the Commissioner, divert any goods entered under rebate of duty under any item of Schedule 3, 4 or 6 for export for the purpose of claiming a drawback or refund of duty under any item in Schedule 5 or 6 to a destination other than the destination declared on such entry or deliver such goods or cause such goods to be delivered in the Republic otherwise than in accordance with the provisions of this Act and, in the case of goods entered under rebate of duty, otherwise than to the person who entered the goods or on whose behalf the goods were entered.

proffered by the Applicant and say for argument's sake, he had the discretion to do so – of which he does not – it would then be virtually impossible for the Commissioner not to condone any other non-compliance with the Rebate Item. In such a situation, the consequences to the fiscus cannot be overstated.

[98] Furthermore, it is to be borne in mind that customs and excise, similarly to income and value added tax, is a self-assessment process where the onus is on the importer, manufacturer, taxpayer, or vendor to properly comply with the Act. And where the actions of the importer and manufacturer are accepted by SARS, the Commissioner deems this assessment as having been correct and honest. Therefore, the presence of intent is irrelevant for the present purposes, the question to be answered is whether there was compliance with the terms of the Rebate Item or not.

[99] SARS further denies that it "invited" the Applicant to prepare and file the ZRWs. Instead, it gave the Applicant the benefit of the doubt and assumed that it could be for whatever reason of its system that the ZRWs could not be found. The Applicant was therefore provided an opportunity to furnish the Commissioner with proof that it had timeously and properly lodged the ZRWs. Therefore, it is incorrect to state that, *'the Commissioner refused to accept the ZRWs'*. They could not be accepted due to them not being properly completed and timeously lodged.

[100] SARS submits that the legislative provisions of section 75 are to grant a rebate to an applicant who has strictly complied with the requirements of section 75 and the rebate item, including Rule 19A.09(c). These requirements, especially of section 75(10(a) are peremptory.

[101] Only once the substantive and procedural prescripts of the relevant item have been met does the client become entitled to repayment of the duties and levies paid by it. This is an indulgence afforded to the importer / manufacturer, and it remains their prerogative to make use of it or not. Subject to full compliance with the formal, procedural, and substantive requirements and other prescripts of the rebate item, only one duty will be payable. If not, double duty will be payable (this means once on the bulk cigarette tobacco and the sale of the completed cigarettes).

[102] SARS submits that section 75(1) of the Act, read with the terms of the Rebate Items (and Notes thereto), prescribe substantive requirements that need to be met for one to qualify for the rebate. This position is also affirmed in case law; therefore, compliance therewith is imperative. In addition to the substantive requirements, many of the rebate items have preconditions of their own that need to be complied with before the goods forming the subject thereof can be entered under rebate of duty.

[103] Contrary to what the Applicant's contention that section 75(10)(a) speaks to the substantive requirements pertaining to the rebate item, i.e., meaning that the taxpayer needs to comply with the terms of the rebate item for it to be entitled to the rebate, but that the section with its own antidote also empowers the Commissioner to grant exemption from such compliance; SARS contends that the section does not at all deal with the substantive requirements of a rebate item(s). Put differently, compliance with the governing rebate item will always be determined with reference to the period starting from when the goods were entered under rebate of duty, and whether, pursuant thereto, they were dealt with in compliance with the terms of the relevant rebate item.

[104] SARS further avers that what the section deals with are the security requirements and conditions that need to be met before entry under rebate of duty can be made. In this regard, it is important to note that the section applies to Schedules 3, 4, and 6. However, not all rebate items in these schedules contain pre(conditions) that need to be met. This is clear from the section and the provisions of the Notes to the various schedules and the terms of the individual items.

[105] Rule 19A.09(c) pertains only to rebate Item 460.24; therefore, it needs to be interpreted against the background of the provisions of the rebate item. This contemplates a two-staged process: first, the importation of goods into South Africa under Rebate Item 460.24 for use in the manufacturing of excisable goods. On importation of the goods, specific custom duty in terms of Section A of Part 2 of Schedule No.1 to the Act becomes payable. Second, the entering under Rebate Item 460.24 of those goods into the manufacturing warehouse and manufacturing of them into excisable goods.

[106] Rule 19A.09(c) prescribes that liability for payment of import duty shall cease upon it being entered into the manufacturing warehouse. This, by its terms, only pertains to the first stage. That is, the liability incurred on importation would cease upon the goods entering the manufacturing warehouse. The Rule therefore does not constitute a condition that needs to be met "before entry" can be made as contemplated by section 75(10(a); instead, it deals with the "entry" itself and prescribes that it will cause the liability to cease.

[107] In conclusion, SARS submits that Rule 19A.09(c) deals with the acquittal of customs duty and provides that such liability ceases upon entry of the goods into the manufacturing warehouse. Section 75(10(a) on the other hand pertains to the conditions that are to be met before goods are allowed under of rebate of duty as contemplated by Rule 19A.09(c). As such, the proviso only allows for exemption from prior compliance with those conditions of subsection 75(10(a) only, for example, the security condition. It therefore follows that section 75(10)(a) has no bearing on Rule 19A.09(c) – as the proviso only applies to the subsection conditions – because Rule 19A.09(c) is not a (pre)condition as contemplated by section 75(10)(a). In other words, it is not a precondition of subsection 75(10)(a) but rather a condition of its own, i.e., the Rule itself. Therefore, exemption from compliance thereof is not authorised by section 75(10)(a).

The determinable issue

[108] The legal issue I am called to decide upon was agreed between the parties. However, in his answering affidavit which preceded the separation application, the Commissioner formulated the crux of the dispute between the parties as being around the following questions:

a. Whether the provisions of rebate item 460.24, read with rule 19A are peremptory, particularly insofar as timeous compliance with the provisions of the rule is concerned; and

b. Whether the Commissioner has a discretion under section 75(10)(a) of the Act to exempt the Applicant from compliance with the conditions prescribed by the rule.

[109] Save to say that in *(b) (supra)*, the Commissioner should have inserted the words, *"alternatively, or at the common law"* just before the words, *'to exempt...'*, I agree with this formulation of the issue especially because of its logical sequence from *(a)*. In any event, the Commissioner's formulation of the parties' dispute in this separation application are one and the same. The difference, if any, is a matter of semantics and addition of context.

Legal Framework

[110] It is long recognised in our case law that the aim of statutory interpretation is to give effect to the object or purpose of the legislation in question.[13] Thus, in ***Standard Bank Investment Corporation Ltd v Competition Commission & Others; Liberty Life Association of Africa Ltd v Competition Commission & Others***,[14] Schutz JA, writing for the majority of the Court stated that:

> *'Our Courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of Innes CJ in Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 543. But the passage also reflects that it is not the function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be.'*

[111] The learned judge proceeded to refer to Public ***Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others***[15] as illustrative of the

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[13] *Bastian Financial Services v General Hendrik Schoeman Primary School* (207/2007) [2008] ZSCA 70, para 19.
[14] *Standard Bank Investment Corporation Ltd v Competition Commission & Others; Liberty Life Association of Africa Ltd v Competition Commission & Others* 2000 (2) SA 797 (SCA) para 16
[15] *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A)

proposition that **"our law is an enthusiastic supporter of "purposive construction"'** in the sense stated by Smalberger JA' which is that:[16]

> 'The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. It is now well-established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it . . . Subject to this proviso, no problem would normally arise where the words in question are only susceptible to one meaning: effect must be given to such meaning. In the present instance the words [which fell to be interpreted by the court] are not linguistically limited to a single ordinary grammatical meaning. They are, in their context, on a literal interpretation, capable of bearing the different meanings ascribed to them by the applicants, on the one hand, and the respondents, on the other. Both interpretations being linguistically feasible, the question is how to resolve the resultant ambiguity. As there would not seem to be any presumptions or other recognised aids to interpretation which can assist to resolve the ambiguity, it is in my view appropriate to have regard to the purpose of [the statutory provision in question] in order to determine the Legislature's intention.
>
> Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity ...
>
> Be that as it may, it must be accepted that the literal interpretation principle is firmly entrenched in our law, and I do not seek to challenge it. But where its application results in ambiguity and one seeks to determine which of more than one meaning was intended by the

[16] Ibid, at 942I-944A.

Legislature, one may in my view properly have regard to the purpose of the provision under consideration to achieve such objective.'

[112] In ***Cool Ideas 1186 CC v Hubbard and Another***[17] Majiedt J stated that

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively.
(b) the relevant statutory provision must be properly contextualised;
(c) and all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).' [18] (footnotes omitted)

[113] And finally, in the guiding authority of statutory interpretation, Wallis JA in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[19] said:

'... 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.

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[17] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16
[18] Ibid, para 28.
[19] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012)

> 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[20] (internal footnotes omitted).

Discussion

[114] The Applicant is of the view that timeous compliance with rule 19A is not peremptory, and that section 75(10)(a) grants the Commissioner power to *"exempt"* the applicant with the rebate item. The Commissioner on the other hand contends that the provisions of the rebate item are peremptory and must be complied with timeously. The Commissioner further contends that the Applicant is seeking condonation for non-compliance with rule 19A and not exemption from compliance therewith. To this the Commissioner says that section 75(10)(a) does not grant him a discretion to condone non-compliance with the rule in circumstances such as of the Applicant.

[115] The Applicant finds the distinction drawn by the Commissioner between the effect of "to condone" and "to exempt" especially insofar as the latter provides "to exempt with or without retrospective effect" arbitrary and founded in bad law.

[116] For ease of convenience, I reiterate the sections to be interpreted below.

[117] Starting with section 75, the relevant subsections to take note of are:

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[20] Ibid, para 18.

'75. Specific rebates, drawbacks and refunds of duty

(1) Subject to the provisions of this Act and to any conditions which the Commissioner may impose –

(a) any imported goods described in Schedule 3 shall be admitted under rebate of any customs duties applicable in respect of such goods at the time of entry for home consumption thereof, to the extent and for the purpose or use stated in the item of Schedule 3 in which they are specified;

(b) Any imported goods described in Schedule No.4 shall be admitted under rebate of any customs duties, excise duty, fuel levy or Road Accident Fund levy applicable in respect of such goods at the time of entry for home consumption thereof, or if duly entered for export and exported in accordance with such entry, to the extent stated in, and subject to compliance with the provisions of the item of Schedule No.4 in which such goods are specified.

(6) Subject to the provisions of this Act and to any conditions which the Commissioner may impose –

(a) The Commissioner may, on such conditions as he may impose, permit any person who has entered any goods under rebate of duty under this section to use or dispose of any such goods otherwise than in accordance with the provisions of this section and of the item under which such goods were so entered, or to use or dispose of any such goods in accordance with the provisions of any other item to which this section relates, and such person shall thereupon be liable for duty on such goods as if such rebate of duty did not apply or as if they were entered under such other item to which this section relates, as the case may be, and such person shall pay such duty on demand by the Commissioner: Provided that, in respect of any such goods which are specified in any item of Schedule 3, 4 or 6 the Commissioner

may, subject to the provisions of or the notes applicable to the item in which such goods are specified and to any conditions which he may impose in each case, exempt any such goods from the whole or any portion of the duty payable thereon under this subsection on the ground of the period or the extent of use in accordance with the provisions of the item under which such goods were entered, or on any other ground which he considers reasonable.

(b) Any duty paid on any such goods on first entry thereof under rebate of duty shall be deemed to have been paid in respect of any duty payable in accordance with the provisions of paragraph *(a)* in respect of such goods.

(10) Subject to the provisions of this Act and to any conditions which the Commissioner may impose –

(a) No goods may be entered or acquired under rebate of duty until the person so entering or acquiring them has furnished such security as the Commissioner may require and has complied with such other conditions (including registration with the Commissioner of his premises and plant) as may be prescribed by rule or in the notes to Schedule 3, 4 or 6 in respect of any goods specified in any item of such Schedule: Provided that the Commissioner may, subject to such conditions as he may in each case impose, exempt with or without retrospective effect, any such person from the provisions of this subsection.

(b) Application for such exemption for the purpose of applying for a refund of duty shall be made to the Commissioner within six months from any date specified in section 40 (3) *(b)* (i), (ii) or (iii), as the circumstances may require.

[118] And now for the Rebate Item(s):

'<u>Rule 19A.09 Liability for duty</u>

(c) The liability for duty in terms of Section A of Part 2 of Schedule No 1 cleared in terms of the provisions of the rebate item 460.24 by a licensed manufacturer or a licensed supplier (SOS warehouse licensed for the denaturing of spirits) on Form SAD 500 (GR) or (XGR) shall cease upon entering the goods into a licensed warehouse or locally manufactured goods on a form **SAD 500 (ZRW)** within 30 days from the entry on a Form SAD 500.

'Rebate of specific customs on excisable goods entered into the Republic

460.24./00.00/01.00/05:

Goods specified in Part 2A of Schedule No.1, imported into the Republic for further processing, blending, or mixing, or entered for use in the manufacture of excisable goods of another or same class or kind (excluding ethyl alcohol for industrial use or for use in the manufacture of other non-liquor products and specified aliphatic hydrocarbon solvents, as defined in Additional Note 1(ij) to Chapter 27) –

Provided that:

(a) the provisions of Rule 19A.09(c) are complied with;

(b) all other provisions of the Customs and Excise Act pertaining to locally manufactured excisable goods are complied with; and

(c) the goods are imported by a licensed manufacturer, into a storage (OS) or manufacturing warehouse; and

(d) the goods are removed by such licensed manufacturer, or a licensed remover as contemplated in Rule 64D.

[119] The Applicant has placed much emphasis to what it contends to be the proper construction and meaning of the provision to *"exempt with or without retrospective effect"* provided by section 75(10)(a). Before linguistically investigating its

submissions, it bears to reflect on ***Commissioner SARS v Bosch***[21] where the following appears:

> 'The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as 'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene'.[22]

[120] Definitions must be read in context as held by the Master of the Rolls in *The* ***Cleveland Graphite Bronze Company and Vandervell Products Ld v The Glacier Metal Coy Ltd***[23]

> *'The vice of the Respondents' contention appears to me to lie in the fact that for the purpose of having recourse to the legitimate use of the body of the specification as a dictionary they have seized upon a definition therein contained and read it out of its context ... It is not right to seize upon one passage in the body of the specification and treat it as though it were an interpretation section in an Act of Parliament. In order to make proper use of the body of a specification for dictionary purposes the whole document must be considered: and even where a passage describes itself as a definition it must be read in its context.'*[24]

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[21] Commissioner SARS v Bosch (394/2013) [2014] ZASCA 171
[22] Ibid, para 9.
[23] *The Cleveland Graphite Bronze Company and Vandervell Products Ld v The Glacier Metal Coy Ld* [1949] RPC
[24] lines 31- 41

[121] The same is supported by Collin J in ***Graspan Colliery SA (Pty) Ltd v Commissioner for the South African Revenue Service***[25] where she expressed herself as follows:

> *'As regards the argument for placing reliance on ordinary dictionary meaning of individual words, this could find applicability where the individual words used were not defined in the statute. In the present instance, it is not the individual words used in the phrase which calls for interpretation, but indeed, interpretation should be given to the phrase itself.'*[26]

[122] The last line of the aforementioned dictum which says that *'it is not the individual words used in the phrase which calls for interpretation, but indeed, interpretation should be given to the phrase itself'* finds apt application here.

[123] I must admit, at first blush, the Applicant's submission that the proviso in section 75(10)(a) fortified by the words *'with or without retrospective effect"* do seem to permit the Commissioner to condone the Applicant's non-compliance with Rule 19A.09(c). In rebuttal, the Commissioner hinges his case on specific construction and understanding of the word "condonation" and its operation in contradistinction to "exemption". The same goes for the Applicant, except that its case rests on a much generous interpretation of the meaning to *'exempt with or without retrospective effect'*.

[124] If one is to veer into the linguistic differences between *"to condone"* – of which the Commissioner submits is in essence the Applicant's application, i.e., for him to forgive its non-compliance with Rule 19A.09(c) – contrasted with *"to exempt"*, it immediately becomes apparent that on any linguistic definition of which one comes across, to "condone" is in its broad sense, or at least in the context of this application, is to "overlook a past" and/or "forgive" an action or behaviour that should not have been the case. Simply put, the operation of the exercise of the Commissioner's

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[25] Graspan Colliery SA (Pty) Ltd v Commissioner for the South African Revenue Service (8420/18) [2020] ZAGPPHC 560
[26] Ibid, ara 50.

discretion under section 75(10)(a) would be in effect of overlooking and forgiving the Applicant's non-compliance with Rule 19A.09(c). This is an indulgence granted by an administrator to an applicant but not at the mere asking.

[125] Contrasted with to "exempt", on a broad scope of dictionary readings, it becomes immediately apparent that to exempt is to grant special permission or privilege(s) that relieves someone or something from a particular rule, requirement, or obligation. This relief can be in the form of having the rule, requirement or performance obligation be not applicable to the person so exempted, and/or them being released from the obligation of having to comply with said rule, policy, or law. The literature says that the exempted party is not subject to the same conditions as applicable to others, and in typical legal, regulatory, or procedural contexts, is not required to comply with a particular law, rule, tax, or duty due to a specific status of the party or circumstance unique to them. If operated with retrospective effect, this means the exemption is backdated to a particular point in time. The treatment therefore would be to treat as if the application of the rule did not apply to the exempted party as from the historical point in time for whatever reason giving rise to the exemption.

[126] Now moving on from the linguistic differences and social practise between condonation and exemption and their language understanding when applied in any context, its only logical that how they applied in real time carries different affect. The Applicant insists that the Commissioner has discretion to exempt its non-compliance with Rule 19A.09(c) by virtue of the proviso saying that the *Commissioner may, subject to such conditions as he may in each case impose, exempt with or without retrospective effect, any such person from the provisions of the subsection.* The practical effect of this discretion would be to treat the Rule as if it did not apply to the Applicant historically because of its circumstances. If the Commissioner were to be sympathetic to this, what would prevent floodgates of other applications on whatever other "sufficient" grounds? In my view, there is none. This is a slippery slope.

[127] The Applicant has been noncompliant with the Rule not only from the time it was alerted to its omission by the SARS audit, but on its own version, the period before and after the audit. An exemption of this kind would not be in nature an exemption retrospective effect because even though an exemption with retrospective effect frees

one's obligations, passive or otherwise from an application of a rule, regulation or law, the application or relaxation of the rule is put at a specifically fixed past date. In the Applicant's case, there is no specific date to apply the exemption. Instead of being an exemption from date X in the past, the exemption sought is condonation of conduct that spanned an entire certain period of time.

[128] On the Applicant's version, there are several instances upon which the ZRWs were due to SARS but were never submitted to the Commissioner. For argument's sake, let's assume discretionary power for the Commissioner under section 75(10(a) and lets further assume that the Commissioner is amenable to "exempting" the Applicant with retrospective effect because of its pleaded circumstances. This indulgence would not be by any stretch of the imagination be an exemption. As I said, an exemption is upliftment of a rule as if it did not apply previously if done with retrospective effect. In the Applicant's situation, the rule always applied and even it is not seeking to have the rule be considered as if it did not apply for the period of its non-compliance. If the Commissioner were to exempt the client under these circumstances, what he would be effectively doing would be condoning the Applicant's conduct **retroactively.**

[129] The difference between a retrospective exemption with retrospective effect is upliftment of the rule from a specific past date or relieving a party from compliance with that rule as from that specific past date. The reason why it is called with retrospective effect is because the exemption would run backwards from present date to certain past tense date. An exemption with **retroactive** effect however is not the same as an exemption with retrospective effect even though it is often confused as such. To exempt retroactively is to exempt from point negative infinity to present date. In easy language, this simply means that the exemption applies backwards indefinitely.

[130] One should recall that in the Applicant circumstances, what is sought is not an exemption even though the Applicant contends that it is, but rather a condonation for non-compliance. If this were for the taking, the effect of it would be to forgive the Applicant not from a specific past date of its non-compliance but rather pardon its conduct since occurrence. This contrary to what an exemption is, would be to retroactively condone the Applicant's non-compliance with the Rule from inception of

the error. If this were to be done, an untenable situation would arise in the administration of the Act. The floodgates would open to other condonation applications of "good cause". The purpose and purports of the Act would be thwarted and tested at every turn.

[131] The Commissioner is correct to say that the Applicant's application is an ask for him to overlook the Applicant's non-compliance with the Rule and also to admit its rebate application. The difference between an exemption application versus a condonation application should have not been a controversial understanding as passionately argued by the parties' counsel because even in the Applicant's letter to the SARS Commissioner and submissions tendered for it by Webber Wentzel, the Applicant expressly asked that it be condoned for failing to submit the ZRWs in time, and be further condoned its use and disposal of the goods in issue for the lengths of the identified periods that it was noncompliant with the Rule. The Applicant is effectively asking the Commissioner to condone its non-compliance with Rule 19A.09(c). But can he do so?

[132] Both parties agree that the point of departure in interpreting the Commissioner's *vires* under the Act is by first pronouncing whether Rule 19A.09(c) is peremptory or directory. The Commissioner argues that it is the former whereas the Applicant asserts that it is the latter.

[133] In the opening general provisions of the Rules to the Act, the first statement which appears states that, *'[i]n these rules "the Act" means the Customs and Excise Act, 1964, and any definition in that Act shall, unless the context otherwise indicates, apply to these rules.'*

[134] If the definitions Act applies to the Rules, then the Rules are equally part of the Act, it stands to reason that the Rules are of such force of the Act. The rules are not regulations that are ancillary to the Act but are instead part and parcel with it. Therefore, if a particular section of the Act or a relevant rule does not give a waiver to its application then it must be taken to be peremptory. I thus find no merit in the Applicant's submissions that the rules are directory and not peremptory. Without suggesting nor implying that ministerial regulations are by their nature not peremptory,

it can perhaps be reckoned in favour of the Applicant that had the Rules been just ministerial regulations, it could have had a leg to stand on. But they are not. The Rules are incorporated to the Act and are peremptory unless a rule or its context expressly indicates that it is not.

[135] Pre-emptively, the Applicant submitted that even if Rule 19A.09(c) is peremptory of which the Applicant contends that it is not there is no closed list of reasons for non-compliance upon which an importer or manufacturer may rely upon when asking of the Commissioner to exercise his discretion afforded to him by section 75(10)(a). This submission reinforces exactly my point. If the Commissioner were to grant a concession now, allegedly afforded to him by section 75(10)(a), the floodgates are open for all and sundry.

[136] The Applicant contends that if the Commissioner does not grant the exemption, even under the circumstances of the explained default and especially when there has been no loss to the fiscus, then such an attitude would render the Commissioner's discretionary power under section 75(10) nugatory. I disagree. The Commissioner's discretionary powers under section 75(10)(a) or any section of the Act for the matter are defined and limited in scope. The Act has some guiding principles. I shall revert to this later when I discuss the Commissioner's submissions and his understandings of the section and interpretation of his powers therein.

[137] The Applicant also submitted that if it is held that the requirement to complete the ZRW forms on time is peremptory, to "exempt" means to free from an obligation or liability imposed on others".[27] Furthermore, the word does not only connote a prospective or forward-looking exemption but includes an *ex post facto* exemption as well in relation to past non-compliance. I have already disposed of this argument above. It does not withstand linguistic logic nor is its construction as submitted by the Applicant encapsulated in the Act. It is trite that language is ever evolving, and definitions change over time per consumption and use of the words rather than their dictionary definitions by society. In our current language consumption use and

[27] Definition taken from the Oxford Concise Dictionary.

understanding of the word exemption, the Applicant's submission does not hold water. If it did, violence would be done to its meaning and operational application.

[138] As another string to its bow, the Applicant submits that the rule is for the administrative benefit of SARS only and not for the public benefit. If so, the administrator, being the Commissioner in this instance shall always have the discretion to waive strict compliance with it. Furthermore, in common law, an administrative authority is entitled to waive compliance with a regulatory requirement that has been crafted for its own benefit, rather than the public benefit. The Applicant contends that the ZRWs are for the sole benefit of SARS as an administrative requirement in its implementation of the Customs Act. There is no public benefit to its implementation. This is a meritless submission. The fundamental flaw is the ignorance, if not denial, of the public policy element underlying the ZRWs which are patent in implementation.

[139] In ***SA Eagle Insurance Co Ltd v Bavuma***[28] Vivier AJA held that:

> "It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms. This rule is expressed by the maxim: *quilibetpotest renuntiare juri pro se introducto* anyone may renounce a law made for his special benefit. See *Ritch and Bhyat* v *Union Government* 1912 AD 719 where INNES ACJ said at p 734:
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> > "The maxim of the Civil Law (C.2.3.29), that every man is able to renounce a right conferred by law for his own benefit, was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit

[28] SA Eagle Insurance Co Ltd v Bavuma [1985] 2 All SA 190 (A)

but in the interests of the public as well. (*Grot.*, 3.24.6; n. 16; *Schorer* n. 423; *Schrassert*. 1,.c 1.n.3 etc.)"

See also Craies on *Statute Law* 7th ed at p 269. This rule has frequently been applied by our Courts in holding that statutory protection (often in the form of limitation of actions) afforded local authorities and Government departments is capable of waiver when the protection is not intended for the benefit of the public but for the benefit of the local authority or Government department itself. So, for example, it was held in *Steenkamp* v *PeriUrban Areas Health Committee* 1946 TPD 424 at 429 that the protection afforded by sec 172 of Ord 17 of 1939, which provided that all actions against a local authority shall be brought within six months of the time when the cause of action arose, was not intended for the benefit of the public or the ratepayers but for the protection of the local authority itself, and could therefore be waived.'[29]

[140] In his submissions, the Commissioner stressed the woes of the tobacco industry. Illegal tobacco smuggling is a pandemic costing the fiscus loss in the billions of rands. The introduction of the Rebate Item operated in this way and in terms of the ZRWs has to be read against this backdrop. The time duty imposed by the Rule is not for the mere convenience of the Commissioner, but rather for the effect of the Act and the fiscus interests. That is the public policy override.

[141] The Applicant accepts that full compliance with the requirements of the Rebate Item will always entitle the taxpayer to the Rebate but however argues that where an aspect thereof is directory, or where substantial compliance suffices, or where an exemption is granted, the Rebate will still apply even where there has been no full or strict compliance with the Rebate Item. There is thus no law that specifically prohibits the completion of the ZRWs after the 30-day period. The Applicants cited ***BP SA (PTY) v Secretary for Customs and Excise* 1985 1 SA 725** in the submissions to the Nationals Appeals Committee in support of this argument.

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[29] Page 192

[142] Save for the fact that the product in issue in ***BP SA (PTY)*** was distillate diesel, the circumstances of the Applicant and that of the applicants in ***BP SA (PTY)*** are comparable. In ***BP SA (PTY)*** the applicants would have been entitled to a rebate of distillate fuel use had it not been for their failure to comply with an administrative requirement prescribed by a newly introduced regulation and amendment to the Act. The Applicants were alerted to their non-compliance with the administrative requirement of the regulation by the Secretary of Customs and Excise. Reference to Secretary is reference to Commissioner of the Act at the time. The Secretary then demanded full payment of customs and excise duties applicable to the supply of oil. Likewise, the applicants sought to comply with the administrative requirements of the regulation after the fact. They also approached the Secretary for condonation of their non-compliance and asked for a waiver of the demanded duties. The Secretary held that it was not empowered by the Act to grant the condonation. The Applicants instituted Court action which led up to the matter being heard by the Appellate Division. Writing for the Court, Van Heerden JA found that in his reading and analysis of the regulation and the Act, lack of compliance with regulation did not seem to disentitle an applicant to the rebate nor was there any general scheme in the Act disentitling an applicant from claiming a rebate if they failed to comply with the provisions of the regulation.

[143] I would have considered myself bound by the case had it not been for subsequent case law from both the High Courts and the Supreme Court of Appeal going the opposite direction. In ***BP SA (PTY)*** it may very well be that the phraseology of the regulation and the general scheme of the Act did not preclude an applicant from being entitled to a rebate by mere failure of compliance with the regulation, I however do not believe the same can be said here. Having considered the entire Act and its Rules and Schedules, the dictum in ***BP SA (PTY)*** does not apply. To consider it as binding me would be an injustice to the Act.

[144] In ***Ernst v Commissioner for Inland Revenue***[30] Centlivres CJ endorsed Craies on *Statute Law*, p. 109, where it says:

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[30] Ernst v Commissioner for Inland Revenue 19 SATC 1

> *'The Courts, in dealing with taxing Acts, will not presume in favour of any special privilege of exemption from taxation. Said Lord Young in Hogg v Parochial Board of Auchtermuchty, 7 Rettie 986: "I think it proper to say that, in dubio, I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation."*[31]

[145] Likewise, I am of the view that in absence of a redeeming provision to an applicant's failure of complying with either the Rule or Rebate item or any provision of the Act, the default position applies: the applicant becomes disentitled from claiming a rebate unless some other provision admits to another manner in which an applicant can become entitled to the rebate item despite its non-compliance with relevant administrative requirements.

[146] I have already found that compliance with the Rule is in peremptory terms. No where in the Act does it read that an applicant could still be entitled to a Rebate Item in the absence of strict compliance with its letter. Substantial compliance, much like partial compliance, is simply no compliance at all.

[147] In ***Canyon Resources v SARS Commissioner***[32] the Applicant's books were not in good order and without sufficient particularity for SARS and the Commissioner to be satisfied that the Applicant was entitled to a refund in respect of its diesel usage. The Applicant argued that SARS stringent record keeping requirements were directory and not peremptory and that substantial compliance therewith sufficed for the purposes of claiming the diesel use refunds. Davis J rejected this argument. From his judgment the following is apposite to this matter:

> 'The Applicant argues that substantial compliance with these requirements is sufficient and that they are merely directory and not peremptory. Having regard to the particularity required in Note (*q*), it is

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[31] Ibid, page 8.
[32] Canyon Resources (PTY) ltd v the Commissioner for the South African Revenue Service 82 satc 315 t

immediately apparent that, in order to qualify for a refund in respect of any litre of diesel, the prescribed particulars must be furnished in respect of every such litre so that the Commissioner can discern between eligible and non-eligible usage.[33]

Counsel for the Commissioner referred me to the approach of the Appellate Division (as it then was) stated in ***Maharaj & others v Rampersad*** **1964 (4) SA 638 (A)** in this regard at 646 C as follows:

> *"The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with the injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction, to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is, is not identical with what is ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."*

(See also: *Shalala v Klerksdorp Town Council & another* 1969 (1) SA 582 (T) and *Mathope & Others v Soweto Council* 1983 (4) SA 287 (W)).[34]

In the present case "the injunction" to users was that those who wish to claim rebates had to demonstrate with sufficient particularity "the journey the distillate fuel has travelled from purchase to supply" and then with equal particularity indicate the eventual use of every litre of such fuel in eligible purposes. Should the eventual use not be stated or sufficiently indicated, the claim fails. Should the volume of diesel used not be clearly determinable, the claim should also fail. Should the "journey" of every litre not be particularized, the claim would, once again, fail.[35]

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[33] Ibid, para 9.3
[34] Ibid, para 9.4
[35] Ibid, para 9.5

> It is not an answer to say that a refund is only payable in respect total volume used and therefore only substantial compliance is required and that discrepancies are catered for by way of a 20% margin. The 80% of the total volume provided for in Note 6(*b*)(i) is an exact and determined figure and not an arbitrary percentage of what the user claims. I.e. if a user sufficiently, by way of compliance with Note 6(*q*) (including logbooks as defined from time to time) "prove" eligible purchases of say 1000 litre, he qualifies for the percentage (80%) rebate provided for in Note 6(*b*)(i) in respect such purchases used in respect of mining on land in terms of Note 6(*f*). The calculation is expressly set out in Note 6(*b*)(i)(*aa*). The "object" of the "injunction" was not to prove "substantially" 1000 litres. It is either 1000 litres or it is not. The Note is, by its nature therefore peremptory: the user must, in respect of each litre in respect of which a rebate is claimed demonstrate to the Commissioner that the diesel was (i) purchased by the user (ii) for use in mining activities on land and (iii) used by him (or in this case, his contractors) for qualifying mining activities.[36]

[148] The Applicant also argued that the completion of specific documentation was an administrative function designed to facilitate record keeping. However, taking precedence over this form is the substance subject matter of the rebate, which has its intention couched in avoiding a situation of double taxation. Therefore, by denying it the excise rebate and refusing to grant the exemption claimed, SARS is claiming double duty on the same tobacco, once on the bulk cigarette tobacco and again on the completed cigarettes. To me, this is an unfortunate situation with an unavoidable consequence. The *fides* of the Applicant and given facts causing the present issue is of little relevance. What is relevant the Applicant's compliance or non-compliance with the Act.

[149] One must weigh the cost of condoning the Applicant's non-compliance with the Rule because of the given facts and its *bona fides* vis-à-vis the potential floodgates that the concession may expose the Commissioner to. In my view, if the former were to prevail in favour of the Applicant, the Commissioner's effective administration of the

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[36] Ibid, para 9.6

Act would be put in serious jeopardy. There would be a flurry of applications by all and sundry coming to him on similar good cause reasons for concessions, condonation, or exemptions in whatever way one names it.

[150] According to SARS, section 75(5) prescribes the Commissioner's powers to a scenario where goods that were imported **"*in full compliance*"** with a rebate are for whatever reason, can no longer or need to be used in terms of that rebate item. Section 75(10) on the other hand prescribes with the Commissioner's power "to exempt" (as opposed to "condone") a person from having to comply with the provisions of the said section. Read in context, SARS contends that this provision essentially deals with the position where goods that were **"duly"** imported, either duty paid or under rebate of duty, subsequently came to be used in a process that allows for the importation under rebate of duty, or in terms of a different rebate item. Thus, the provisions to both subsections, 6(a) and (10) of section 75 of the Act prescribe the Commissioner's powers to where the intended use of duly imported goods have changed after importation. The difference here is that the former deals with the duty aspect and the latter to compliance with the statutory provisions relating to the (new) rebate item to be employed.

[151] Its best to illustrate the Commissioner's interpretation and exercise of his discretion under section 75(10)(a) by way of example. Imagine a situation where an importer imports consignments of tobacco and declares them under rebate of duty under the guise that they would be manufactured into being cigarettes. Assume that all due processes and duties were followed to the letter. The importer is levied as should be and its liability ceased upon the consignment reaching the manufacturer and excise environment. Thereupon the due liability is borne by the manufacturer. Further imagine that the importer and the manufacturer are one and the same party. Then for whatever reason arising, the importer but now acting as the manufacturer decides to no longer dispose of the tobacco as cigarettes but manufacturers it into cigars to be sold in bulk and for home consumption. In this new change, whole new different rebate notes, items and duties are triggered. However, the situation which the importer/manufacturer would then find themselves in is that the tobacco was already duly entered and levied or even rebated under the auspices that it would have been manufactured into being cigarettes. What is the remedy?

[152] In the above scenario, this is where section 75(10)(a) finds applicability. Whereupon a consignment of goods that has been duly entered and/or duty paid under rebate item X subsequently becomes disposed of in a manner that eligibles it for rebate Y and/or attracts different set of duties, rebate admissions etc, it is in that instance that the Commissioner may exempt the importer slash manufacturer from prior compliance to what would have been the prescribed course had the tobacco at first instance and port of entry been declared that it was going to be manufactured into being cigars.

[153] The Applicant in that instance could only be entitled to whatever rebate item applicable to cigars at the incidence of retrospective exemption from having to have prior complied with the relevant prescriptions of either the Rule, Rebate Item or Schedule or notes thereto applicable to cigars. But for this to happen, the applicant applying for exemption under section 75(10)(a) in this mooted scenario would have had to first properly entered and followed all relevant prescripts to the original consignment of tobacco that was then intended for manufacturing into cigarettes. It is only in that way that the applicant could in that incidence admit the cigars under their relevant rebate item as the initial consignment of tobacco was duly and properly entered in the ordinary course of customs and excise business.

[154] The difference in the above illustration with the Applicant's situation is that there was no due entry of the tobacco in the excise environment. The move from the customs environment to the excise environment, so the Commissioner submits, is done by completion of the ZRWs. Therefore, the situation of the Applicant is not that it had disposed of the goods in a manner which was not originally indicated at customs parlance, but rather the fact that it simply did not comply with the Rules of the Act, its reasons and given facts notwithstanding. If the Applicant's situation was as described in the scenario, and assuming all relevant customs and excise processes were duly followed, the Commissioner would have been entitled to exempt the Applicant from whatever prescripts of a Rebate Item or process occasioned after the fact. The exemption would apply to the subsequently realized product which was not what was entered at the customs environment subject to whatever conditions that the Commissioner would impose.

[155] The above example illustrates the Commissioner's treatment of section 75 and his understanding and exercise of his discretion in terms of the section 75(10)(a). A longtime established rule and operationalization of the Act by the Commissioner should not be of easily disrupted by a Court by virtue of its opinions of how the discretion or administration of the Act should be operationalized unless such interference is warranted by the Constitution. This is not a huge ask but mere deference to the separation of powers doctrine and respect of the Executive's terrain. Wallis JA in ***Commissioner SARS v Bosch***[37] supports the same. Writing for the Court, he stated that:

> 'There is authority that, in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it may be a valuable pointer to the correct interpretation.'[38]

[156] The Applicant would submit that this interpretation is too restrictive. Yes, it may very well be, but that is not to say that it should not be. If its judicially sound, then the restrictiveness of its rational is what it should be.

[157] Statutory interpretation should not be held hostage by tyranny of semantics and dictionary definitions lest the context and purpose of an Act be frustrated. Again, in the words of Collin J in ***Graspan Colliery SA (Pty) Ltd v Commissioner for the South African Revenue Service*** (supra) *'it is not the individual words used in the phrase*

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[37] *Commissioner SARS v Bosch* (394/2013) [2014] ZASCA 171
[38] Ibid, para 17.

which calls for interpretation, but indeed, interpretation should be given to the phrase itself.'

[158] In the premises the Applicant's application fails and its declarator is refused. The declarator sought by the Commissioner is upheld.

Costs

[159] Ordinarily costs would follow the result in favour of the successful party. However, from the case record, I have observed that the separation application was by agreement of the parties for the convenience of both. SARS brought the application before Kubushi J in terms of Rule 33(4) of the Uniform Rules. In that application both parties were ordered to share in equal half the costs of that application. Therefore, my order will be that each party bears its own costs.

[160] In the premises the following order is made:

1. The application is dismissed.
2. It is declared that neither the proviso of section 75(10)(a) nor the common law authorises the Commissioner for the South African Revenue Service to exempt non-compliance with the conditions prescribed by Rule 19A.09(c).
3. Each party is to bear its own costs.

FLATELA LULEKA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 10 October 2023

Counsel for Applicant:	M W Janish SC instructed by Webber Wenzel Attorneys
Counsel for the Respondent:	JA Meyer SC with him L G Kilmartin instructed by State Attorney, Pretoria
Date of Hearing:	22 February 2023
Date of Judgement:	10 October 2023