

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASENO: 34051/2021

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

11-03-2024

Date

Signature

Hi Tec Nuts (Pty) Ltd

1st Applicant

Pro-Tech Fasteners (Pty) Ltd

2nd Applicant

and

CSARS

Respondent

JUDGMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND
SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL /
UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE
DEEMED TO BE 8 MARCH 2024**

The question

- [1] An untapped nut is a nut without an internal thread. Is an untapped nut a threaded or non-threaded article for purposes of the Customs and Excise Tariff?¹
- [2] The Commissioner classified untapped nuts imported by the applicants as 'Threaded articles', a sub-heading of the heading that includes a number of products, including 'nuts'.
- [3] Applicants contend that the Commissioner should have classified the nuts imported by itself under the sub-heading 'Non-threaded articles'. The classification of these products as 'Threaded articles' increased the duty payable on their import.
- [4] Consequently, they appeal against that determination under s47(9)(e) of the Customs and Customs and Excise Act 91 of 1962. They appeal against three tariff determinations of products imported by applicants. These were made by the Commissioner on 2 August 2019. They were made under serial numbers 41/2019 (affecting first applicant – Hi-Tec) and under serial numbers 33/2019 and 34/2019 (affecting second applicant – Pro-Tec).
- [5] The relief sought is an order upholding their appeal by setting aside the three tariff determinations.
- [6] The Commissioner seeks –
- the dismissal of the appeals against determinations 33/2019 and 41/2019; and
 - the reconsideration of determination 34/2019 and its correction by determining it to be classifiable under tariff heading 7318.16.20 instead of 7318.26.30.

¹ The Tariff is to be found in Schedule 1 Part 1 Section XV of the Customs and Customs and Excise Act 91 of 1962.

The determinations

- [7] The determinations made by the Commissioner were the following:
- [a] Under Determination 41/2019, the M8 and M10 non-threaded hexagon flange weld nuts were classified under tariff heading 7318.26.20.
 - [b] Under Determination 41/2019 the DIN 928 M10 non-threaded blank square weld nut was classified under tariff heading 7318.16.90.
 - [c] Under Determinations 41/2019 and 33/2019 the DIN M24 non-threaded hexagon blank nut was classified under tariff heading 7318.60.90;
 - [d] Under Determination 34/2019 the M10 non-threaded hexagon flange nut was classified under tariff heading 7318.26.30.

Nature of the appeal

- [8] It is a statutory appeal. Consequently, it is a rehearing.² Both parties agree that the re-hearing of the classification requires me to interpret and apply the Tariff, particularly as it applies to heading 73.18.
- [9] Heading 37.18 applies to the following products: 'screws, bolts, nuts, coach screws, screw hooks, rivets, cotter-pins, washers (including spring washers) and similar articles of iron or steel'.
- [10] Both parties further agree. Under the Customs and Excise Act, classification (as between different headings) takes place in three stages:³

² Tikly v Johannes NO 1964 (2) SA 588 (T) at 590

³ Relying on International Business Machines (Pty) Ltd v the Commissioner for Customs & Excise 1985 (4) SA 852 (A) at 863.

- [a] First, I must interpret the words used in the headings and the relative section and chapter notes (while having regard to the Rules for the Interpretation of the Harmonized System)⁴;
- [b] Second, I must consider the nature and characteristics of the products due for classification.
- [c] Third, I must select the heading most appropriate for the products.

The dispute over classification

[11] What the parties do not agree on, is the outcome of that classification. Applicants contend:

- [a] The products classified by the Commissioner are all nuts.
- [b] But they are untapped:
 - [i] Therefore, they are not threaded;
 - [ii] Therefore, they should not have been classified as a product under the sub-heading 'Threaded articles' under Tariff heading 73.18 of the Tariff;
 - [iii] They should instead have been classified as a product under the sub-heading 'Non-threaded articles' under Tariff heading 73.18;
 - [iv] There is no provision for 'nuts' under 'Non-threaded articles'. So, unthreaded nuts should be classified

⁴ See, Commissioner, SARS v The Baking Tin (Pty) Ltd 2007 (6) SA 545 (SCA) at [5] where Lewis JA, relying on Secretary for Customs & Excise v Thomas Barlow & Sons Ltd, confirmed that the chapter or explanatory notes are not helpful, but not the primary source of the rules of interpretation of the Tariff.

under 'Other' in heading 7318.29 under the sub-heading 'Non-threaded articles' because 'Other' under the sub-heading 'Non-threaded articles', contemplates untapped nuts.

[12] The Commissioner contends:

- [a] The nuts in question - hexagon flange weld nuts, blank square weld nuts, and hexagon blank nuts – are all untapped (and consequently, unthreaded) nuts.
- [b] All nuts fall within heading 73.18;
- [c] The sub-heading 73.18.1 of the heading 73.18 is 'Threaded articles';
- [d] The sub-sub heading 73.18.16 of the sub heading 73.18.1 is 'Nuts';
- [e] The sub-heading 73.18.2 is 'Non threaded articles';
- [f] There is no sub-sub heading under 73.18.2 that describes a product called 'nuts';
- [g] The explanatory note to 'Screws, Bolts and Nuts' includes a note that reads: "Bolts and nuts ... for metal, *whether or not threaded or tapped*⁵ ... used to assemble or fasten goods so that they can readily be disassembled without damage'.

Applying the rules of classification here

[13] Is it as simple as Mr Puckrin for applicants submits? He submits (invoking Lewis Carroll) that: words must mean what they say; an

⁵ My emphasis.

untapped nut is unthreaded; as such, it lacks the essential feature of a nut; unthreaded nuts can comfortably be accommodated under sub-sub heading 'Other' in 7318.29, under the sub-heading 'Non-threaded articles' in the Tariff?

[14] Now, what Humpty Dumpty said⁶ was: "When I use a word, it means just what I choose it to mean – neither more nor less." What I am required to do here is to apply the Tariff. It is a Schedule to the Customs and Excise Act. It is legislation. And, interpreting legislation requires that when applying the rules of classification endorsed by International Business Machines (Pty) Ltd,⁷ I must interpret the words in the Tariff - not according to 'speaker meaning'⁸ (as Humpty Dumpty would have it) but - in conformance with their grammatical meaning, the purpose of the Tariff, its headings and sub-headings, the Customs and Excise Act and the Constitution.⁹

[15] The *contra fiscum* rule applies, when confronted with ambiguity in the language of a fiscal statutory instrument, unless that results in absurdity; i.e. the taxpayer benefits from ambiguity.¹⁰ If there is ambiguity here, the applicants benefit by the classification of untapped nuts under 'Non-threaded' articles. Consequently, they would pay less duty than they would on tapped nuts that are 'Threaded articles'.

[16] Is the tariff (its headings and language) ambiguous about whether untapped nuts are classified as 'Threaded' or 'Non threaded' articles. That depends on the purpose of the two sub-headings 'Threaded' and 'Non-threaded' articles.

⁶ In Lewis Carroll's *Through the Looking Glass* (1871).

⁷ 1985 (4) SA 852 (A) at 863

⁸ See, Swain JA in *Telkom v CSARS* 2020 (4) SA 480 (SCA) at [11].

⁹ *Jaga v Dönges* NO; *Bhana v Dönges* NO 1950 (4) SA 653 (A) at 662 – 4, approved in *Bertie Van Zyl (Pty) Ltd v Minister for Safety & Security* 2010 (2) SA 181 (CC) at [21].

¹⁰ *Telkom v CSARS* 2020 (4) SA 480 (SCA) at [11]

- [17] Is the purpose of the sub-heading 'Non-threaded articles' to include untapped nuts in sub-sub heading 7318.29, namely 'Other' non-threaded articles?
- [18] That is not likely. Particularly, as Mr Meyer for the Commissioner submits, it appears that the purpose of the sub-heading 'Threaded articles' is to include all nuts under its ambit.
- [19] Sub-sub heading 73.18.16 under the sub-heading 'Threaded articles' refers to 'Nuts'. There is no reference to untapped nuts under the sub-headings 'Threaded articles' or 'Non-threaded articles', or any of its sub-sub headings. That must mean, that the Tariff contemplates that 'Nuts' includes all nuts, including untapped nuts. Or, that the mischief targeted by 'Threaded articles', is nuts whether tapped or untapped.¹¹
- [20] The inclusion of 'Nuts' under 'Threaded articles' is also consistent with rule 2(a)(i) of the Harmonized Rules, to which I must have regard.¹²
- [21] According to rule 2(a)(i) the scope of any heading that refers to a particular article covers not also the complete article, but also the article finished or unfinished, provided that, as presented, the article has the essential character of the complete or finished article.
- [22] The explanatory note to 73.18 is a helpful guide.¹³ In so far as there may be any ambiguity about whether untapped nuts are included under 'Threaded articles', the explanatory note helps to dispel that ambiguity. It records that, 'Nuts' under the sub-heading 'Threaded articles', includes nuts whether they are tapped or not.

¹¹ Pottie v Kotze 1954 (3) SA 719 (A) at 724H-727A

¹² CSARS v The Baking Tin (Pty) Ltd 2007 (6) SA 545 (SCA) at [5]

¹³ Secretary for Custom and Excise v Thomas Barlow & Sons Ltd 1970 (2) SA 660 (A) at 679F – 680B-C

[23] Having regard to rule 2(a)(i) and taking guidance from the explanatory note to 73.18, has the same result as applying the common law rules of statutory interpretation. The sub-heading 'Threaded articles' extends to 'Nuts'. Therefore, it extends to all nuts whether tapped or untapped. That must be so, particularly where what was presented were untapped nuts. They lacked only tapping. As presented, they had the essential character of a nut (even though they were unthreaded). And 'Nuts' are included under 'Threaded articles'.

[24] Consequently, I find that the untapped nuts presented to the Commissioner, were correctly classified under the sub-sub heading 'Nuts', under the sub-heading 'Threaded articles', under heading 73.18. It follows that the statutory appeal fails.

[25] The only remaining question is whether I should correct determination 34/2019 by determining it to be classifiable under tariff heading 7318.16.20 instead of 7318.26.30. Since the statutory appeal is a reconsideration, it is appropriate for me to correct what is wrong with determination 34/2019, which I do.

Costs

[26] Mr Puckrin submitted that costs should not follow the result here, because of the conduct of the Commissioner.

[27] The award of costs is discretionary. The conduct of the parties is relevant to the exercise of my discretion.

[28] The conduct complained of here is about a withdrawal of a concession by the Commissioner. According to the applicants SARS conceded on 8 June 2021 the applicants' classification of the Hex Flange Weld Nut (M10) and Blank Square Weld Nut (DIN928) as non-threaded articles under the Tariff. But later he withdrew that concession. In his answering affidavit, the Commissioner says that

while he made that concession, he never amended their original classification as 'Threaded articles'. And he was advised that the original determination is correct.

[29] This conduct does not appear to me to be so objectional that it warrants disapproval by departing from the usual costs orders.¹⁴

[30] The statutory appeal fails. Costs usually follow the result. Consequently, applicants should pay the costs of the appeal.

Order

[31] I make the following order:

[a] The statutory appeals against determinations 33/2019 and 41/2019 are dismissed.

[b] The classification in Determination 34/2019 is corrected and made under tariff heading 7318.16.20.

[c] The applicants are ordered to pay the costs of the statutory appeal.


TJ BRUINDERS
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA

Date of Hearing: 27 February 2024

Date of Judgment: 11 March 2024

For the applicant: Adv HJ Synman

For the respondent: JA Meyer SC

¹⁴ Public Protector v SARB 2019 (6) SA 253 (CC) at [219]-[227]