

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 47899/2017
7/3/2019

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

In the matter between:

ELLIES ELECTRONICS (PTY) LTD

Applicant

and

THE SOUTH AFRICAN REVENUE SERVICE

Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

[1] This is an appeal in terms of the provisions of section 47(9)(e) of the Customs and Excise Act, 91 of 1964 relating to a determination by the respondent of the applicable tariff in respect of goods imported by the

applicant. Although it is termed an appeal, in essence it is a determination of the applicable tariff *de novo* by the court.¹

- [2] The respondent seeks an order that the late filing of an opposing affidavit together with an affidavit by an expert be condoned. The applicant does not oppose that application. In my view cogent reasons have been provided for the delay and the late filing is condoned.
- [3] The principles of determination of tariff classification are common cause between the parties, well settled and are trite.² The rules for the interpretation of the Harmonised System (2012 version) apply. It need not be restated.
- [4] The process encompasses a three stage process: first, interpretation, i.e. ascertainment of the meaning of words used in the headings and relevant section and chapter notes on the goods concerned; second, consideration of the nature and characteristics of those goods; and, third, the selection of the most appropriate heading in Schedule 1 in respect of those goods.³
- [5] In determining the nature and characteristics of the goods in question, it is trite that the classification must be based upon the product as presented at the time of importation.⁴ The product presented as a whole must be classified.⁵ The goods are characterised by their objective characteristics.⁶ Further in this regard, it was held in *L G Electronics, supra*, that the primary design and use carries the most persuasion.
- [6] The applicant imported two products, both are referred to as “Solar Panel Light Kit”. The only difference being that the one includes 4 lights whilst the other only 2. Nothing turns on this difference.

¹ *Metmark (Pty) Ltd v Commissioner of Customs and Excise* 1984(3) SA 892 (T) at 896C – 897B

² *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* 2007(6) SA 545 (SCA) at [5]

³ *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985(4) SA 852 (A) at 863- H

⁴ *Commissioner, South African Revenue Service v L G Electronics SA (Pty) Ltd* 2012(5) SA 439 (SCA)

⁵ *The Heritage Collection (Pty) Ltd v Commissioner, South African Revenue Service* 2002(6) SA 15 (SCA) at 21C-D

⁶ *The Baking Tin, supra* at 548G-H

- [7] The products were imported during 2015 and the tariff determination occurred in 2015. As recorded earlier, the 2012 version of the Harmonised System applies.
- [8] The main dispute between the parties relates to the nature and characteristics of the product, and hence, which heading should apply in determining the appropriate tariff.
- [9] The applicant contends that the product, in its most rudimentary form and in essence, and for that matter the essential characteristic thereof, is a power unit for generating electricity to be utilised in a 12 volt or 5 volt charge. On the other hand, the respondent contends that the product in essence is a composite product, the primary design and use amounting to a solar light kit.
- [10] It is common cause that, as presented, the product featured as follows:
- (a) The product was contained in a packaging which bore, *inter alia* the wording, "Solar Panel Light Kit". Furthermore, there are depictions on the packaging that indicate LED Lights, 240 Lumens, 5-6 hours of light, USB port, solar power, DIY Intermediate and Emergency Saving;
 - (b) Also depicted are light bulbs, a unit, a solar panel and a tent that appears to be illuminated on the inside;
 - (c) Further wording appears that indicate "Ideal for camping, emergency lighting, cellphone charging, reading, etc.";
 - (d) Inside there were three main components, i.e. a solar panel, a power unit and a set of lights;
 - (e) Connecting cables were included;
 - (f) A technical data sheet was included.
- [11] The three main components are interdependent on one another. None could operate on its own. To an extent the power unit, once charged, could be utilised on its own until the charge is depleted. Thereafter, the power unit has to be re-connected to the solar panel to be recharged. The power unit had no charge as presented. It required connecting to the solar panel to be charged.

- [12] It is further common cause between the parties that the product is mobile.
- [13] The applicant contends that although the product consists of three main parts, the power unit, which is the middle part once connected, is designed and functions as a generator. As a generator, it converts the energy received from the solar panel to Direct Current, either 12 Volt or 5 Volt. The contention of the applicant is further that as such, the power unit is the essential part of the product.
- [14] It is further submitted by the applicant that attachments such as the lights, the cellular phone, DVD players and the like are just that. It is for the end user to decide whether to use any of the possible attachments should he or she so wish. It is further contended by the applicant that the attachments are not part of the design or functionality of the power unit. It is conceded by Mr Barnard, who appeared on behalf of the applicant, that the power unit is dependent upon the connecting thereof to the solar panel to be charged initially and after depletion of the charge, to be recharged. Mr Barnard further submitted that after the power unit is charged, the power unit acts as a generator. The design and functionality of the product, so it is contended by the applicant, is that of a solar power generator used to generate, from solar energy to DC, and store this energy source.
- [15] The applicant submits that the design and functionality of the product being that of a generator, and applying the general rules of interpretation of the Harmonised System, the product tariff should be determined with reference to Tariff Heading 85.01 – Electric motors and generators (excluding generating sets) of Part 1 of Schedule No 1 to the Customs and Excise Act.
- [16] However, the respondent determined the tariff heading with reference to Heading 9405.40.21 of Schedule 1, as “Lamps and lighting fittings, including searchlights and spotlights and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other, containing light emitting diodes (LED) as source of illumination”.

- [17] The point of dispute is a narrow one. The issue is whether the product is merely a generator, or, a source of illumination as described in Tariff Heading 9405.40.21, as contended for by the respondent.
- [18] In considering this dispute, what has to be determined is whether the product can be described having an essential part, or whether the product has no essential part but is made up of different components, all having no essential characteristics.
- [19] It is to be noted that the product manual or data sheet, supplied by the manufacturer and included in the packaging, describes the design and use or purpose as:
- “It (s)erves as a multi-function mini solar home lighting system. On a fully charged battery, the unit is mainly used to provide lighting during power failures, camping, travelling and many outdoor activities where light may be needed, ideal for emergencies.*
- Other uses are a backup power charger for mobile phones, cameras, MP3 players, PSPs, iPods etc.”*
- [20] In view of the foregoing, the respondent submits that the primary design and use of the product is that of a light source. On a purposive reading of the foregoing quote, the primary design and use is that of a solar lighting system. The use as a backup power charger is clearly a secondary use.
- [21] The product as presented, and as described in the product manual or data sheet supplied therewith, is in my view clearly aimed at supplying an alternative light source. It is irrelevant for what the end user may use the product.
- [22] Further in my view, had the product as presented not contained the lights, the approach adopted by the applicant and as contended for on its behalf, may have been persuasive. However, the inclusion of the lights, as part of the product, cannot be ignored as submitted by Mr Barnard. The inclusion of the lights have a purpose. That purpose is clearly defined by the combination of the three main components in the

package and as defined in the product manual or data sheet. The primary design and use of the product is a solar panel light kit.

- [23] The primary design and use of the product being a solar power panel light kit, the product as presented cannot fall under Tariff Heading” 85.01 “- *Electric motors and generators (excluding generating sets)*” of Part 1 of Schedule No 1 to the Customs and Excise Act.
- [24] The more appropriate Tariff Heading, in my view, is that of “9405.40.21” of Schedule 1, “*Lamps and lighting fittings, including searchlights and spotlights and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other, containing light emitting diodes (LED) as source of illumination*”.
- [25] The experts called on behalf of the parties appear to agree in general as to the characteristics of the product. However, Mr Reyneke, on behalf of the applicant, makes a sharp right turn after agreeing in principle with Mr Wozniak, called on behalf of the respondent, without clearly explaining his diversion. Mr Reyneke’s evidence, in so far as it disagrees with that of Mr Wozniak, cannot be accepted. Mr Wozniak convincingly argues that the product is primarily a solar panel light source. I accept his evidence.
- [26] It follows, in my view, that the appropriate and correct determination, applying the general rules of interpretation of the Harmonised System, of the Tariff Heading is that of “9405.40.21” of Schedule 1, “*Lamps and lighting fittings, including searchlights and spotlights and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other, containing light emitting diodes (LED) as source of illumination*”.
- [27] On the issue of costs, the respondent employed senior and junior counsel, whilst the applicant employed a senior junior counsel. Without denigrating Mr Barnard’s abilities, in my view the employ of two counsel was necessary.

I grant the following order:

1. The application is dismissed with costs, such costs to include the costs consequent on the employ of two counsel;
2. The costs of the expert, Mr Wozniak, to be included in the costs of the respondent to be paid by the applicant.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant: JM BARNARD
Instructed by: KAMPEL KAUFMANN ATTORNEYS

On behalf of Respondent: JA MEYER SC
WN MOTHIBE
Instructed by: THE STATE ATTORNEY