

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO : 6067/2005

In the matter between :

THE BAKING TIN [PROPRIETARY] LIMITED
Applicant

and

THE MINISTER OF FINANCE N.O
Respondent

First

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**
Respondent

Second

JUDGMENT DELIVERED THIS 22nd DAY OF MARCH, 2006

FOXCROFT, J : This is an appeal in terms of section 47(9)(e) of the Customs and Excise Act, No 91 of 1964 [*the Customs Act*] against determinations made by the Commissioner for the South African Revenue Service [*the Commissioner*]. The Commissioner is Second Respondent in this appeal and First Respondent abides the judgment of this Court.

The case concerns three determinations made by the Commissioner on

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4 May 2004, 27 August 2004 and 3 February 2005 in connection with aluminium products which Applicant describes as '*catering consumables*'. These goods were imported, and the issue in this matter is

their correct classification for customs duty purposes in terms of the Customs Act. Applicant contends that the imported goods are not subject to excise duty since, so Applicant contends, they fall to be classified as goods described under heading 76.16.99.90 of Schedule 1 of the Customs Act [*the Schedule*]. The applicable parts of the Schedule appear at page 248-249 of the papers. The various items under heading 76.15 are as follows :

"Table, kitchen or other household articles and parts thereof, of aluminium; pot scourers and scouring or polishing pads, gloves and the like, of aluminium; sanitary ware and parts thereof, of aluminium: ..."

Under that heading, individual items are classified under further sub-categories, including 76.15 19 20 entitled '*Hollowware*' for table or kitchen use (excluding buckets). 76.15 19 90 is described as '*Other*'. Heading 76.16, is entitled

'Other articles of aluminium',

and the last item under that heading being 76.16 99 90 is also described as '*Other*'.

It is this last sub-heading which Applicant contends governs the goods which it imported and which are therefore duty free.

Ms R R Cremore, a Tariff Specialist in the employ of the South African Revenue Service [‘SARS’] sets out in her answering affidavit that she

“made two tariff determinations in connection with the aluminium foil containers imported by the Applicant under bill of entry No 5894 dated 17 March 2004. The first tariff determination was made on 4 May 2004 ...

I determined that tariff sub-heading 76.15.19.20 applies to the goods imported by the applicant.”

She adds that after a re-submission for a determination in respect of the same goods, something which frequently occurs, she was

“afforded an opportunity to consider [the] matter afresh and to amend a tariff determination if an earlier determination is shown to be incorrect.”

She also carefully considered submissions contained in the application for a new tariff determination prepared by Mr Quintus van der Merwe of Shepstone & Wylie *“wherein it was contended that tariff heading*

7615.19.90 applies.”

She continued :

“There was nothing in the submission to call into question the tariff determination made by me on 4 May 2004 and I subsequently confirmed it when I made the second tariff determination. I note, en passant, that the applicant has since shifted from the stance adopted by Shepstone & Wylie in that it now contends in the notice of motion that the goods should be classified under tariff heading 7616.99.90.”

The third determination referred to above, was made on 3 February 2005 by Mr Jan Pool [Record, p.292].

In his Replying Affidavit, Mr *Spence* (on behalf of Applicant) states that

“I am advised that the right of appeal described in section 47(9)(e) of the Customs Act can logically only arise when the Commissioner has made a final determination. If a tariff determination has been resubmitted to the Commissioner for his reconsideration in terms of section 47(9)(d)(bb) then the date of the determination will be the date upon which the final determination is made. This will be the date upon

which the Commissioner either amends the determination which has been submitted to him for reconsideration, or advises the importer that his earlier determination is final and will not be amended.”

I entirely agree with the advice given to Mr Spence. Any other construction would, in my view, be unfair, unworkable and contrary to the provision for reconsideration of determinations, apparently a frequent occurrence.

The matter was certainly prosecuted within the period of one year commencing on 3 February 2005, and was in fact set down for hearing in the Third Division of this Court on 23 August 2005. On that day an order of this Court provided for the further conduct of the matter.

The period of one year within which to commence appeal proceedings is, in any event, not cast in stone. Section 96 of the Customs Act provides in subsection (1)(c) as follows :

“(i) The State, the Minister, the Commissioner or an officer may on good cause shown reduce the period specified in paragraph (a) or extend the period specified in paragraph (b) by agreement

with the litigant.

- ii) If the State, the Minister, the Commissioner or an officer refuses to reduce or to extend any period as contemplated in subparagraph (i), a High Court having jurisdiction may, upon application of the litigant, reduce or extend any such period where the interest of justice so requires.”*

The first period referred to is the period of one month during which time legal proceedings may not be commenced. The latter period referred to, which the Court may extend, is the period of a year and which is in dispute in the present matter. If I were to be wrong in regarding Applicant to be properly within the period of one year allowed by the Customs Act to commence the appeal, I would most certainly exercise the discretion conferred upon me by the Customs Act to extend the period of one year for the few months required to prevent extinctive prescription, if the year were notionally to commence on the date of the first determination, viz. 4 May 2004.

On the merits of the matter, Mr Spence, the Managing Director of the Applicant, refers to a letter from the Controller Customs: Cape Town dated 4 February 2005 in which a sample of the commodity being assessed was referred to as

“a rectangular aluminium foil container, disposable, with the following dimensions :

Base: (approximately) 13cm wide x 18.5cm.

The sides are approximately 3.1cm high and incline outwards from the base.”

It is then stated that

“Protestant states that the commodity is primarily used in the baking industry: The food is placed in the foil container during the production and cooking phase. Counsel avers that the essence of the product is that it is designed to be used once, and once used, is discarded.”

The Controller clearly did not agree with the protestant's view, and treated the items as *‘articles for kitchen use’*. The Controller added :

“It is submitted that the article in issue is used as a baking tin or baking dish, either during the cooking phase of the food contained therein e.g. a bakery or in the home in the case of an uncooked food product.”

After referring to usage in hotels, restaurants, boarding houses etc., the letter continues :

“The EN's do not specify any requirements as to durability.”

I take it that the reference 'EN' is to the term '*Explanatory Notes*', which features throughout the Schedule previously referred to.

In the fairly recent case of **LEWIS STORES [PTY] LTD v MINISTER OF FINANCE & ANOTHER, 65 SATC 172**, the goods in issue were pots and pans and therefore clearly hollowware within the meaning of that word as it appears in the Shorter Oxford English Dictionary - where it is still printed with a hyphen - and a year of origin 1416 is given. The word is defined as '*bowl or tube shaped ware of earthen ware, wood or (now esp.) metal*'. In the New Concise Oxford English Dictionary the hyphen has disappeared, as befits the normal progression of such constructions, and the word is defined as '*hollow cookware or crockery, such as pots or jugs*'.

In essence, the customs officials considered that the containers which had been imported in this case were cookware - or were at least capable of being used as cookware - and the importers regarded them as consumables.

Mr Jonkers, in his affidavit on behalf of Second Respondent, maintains that the aluminium foil containers imported by Applicant cannot be

likened to ‘*consumables*’ as defined by the New Oxford Dictionary published in 1998 as ‘*a commodity that is intended to be used up relatively quickly: drugs and other medical consumables*’. Mr Jonkers then attaches extracts from that dictionary and the third edition of the Shorter Oxford English Dictionary.

No reason is provided for his view that the aluminium foil containers imported by Applicant ‘*cannot be likened to consumables*’. If it is true that the imported articles are intended to be disposed of and replaced rapidly, as contended for by Applicant, then they are certainly, in my view, intended to be used up relatively quickly. Mr Jonkers, in answering this allegation, merely says that the correct customs classification has been convincingly displayed.

Reverting to **LEWIS STORES v MINISTER OF FINANCE** *[supra]*, SCHUTZ, JA referred to an earlier decision in the Appellate Division, where TROLLIP, JA in **SECRETARY FOR CUSTOMS AND EXCISE v THOMAS BARLOW & SONS LTD, 1970[2] SA 660 [A] at 675 D-F** dealt with the structure of that part of the Customs and Excise Act which was relevant, and which is relevant before me in the present matter. TROLLIP, JA explained how Schedule 1 of the Customs Act is grouped in sections, chapters and sub-chapters, given titles indicating as concisely as possible the broad class of goods each covers. TROLLIP, JA went on :

“Within each chapter and sub-chapter the specific type of goods within

the particular class is itemized by description of the goods printed in bold type. That description is defined in the Schedule as a “heading”. Under the heading appear sub-headings of the species of the goods in respect of which the duty payable is expressed. The Schedule itself and each section and chapter are headed by “notes”, that is, rules for interpreting their provisions.”

There was no difficulty about pots and pans being hollowware in the matter before SCHUTZ, JA, and his reference to the decision of NICHOLAS, AJA (as he then was) in **INTERNATIONAL BUSINESS MACHINES SA [PTY] LTD v COMMISSIONER FOR CUSTOMS AND EXCISE, 1985[4] SA 852 [AD] at 863.**

“Classification as between headings is a three-stage process: First, interpretation – the ascertainment of the meaning of the words used in the headings (and relevant section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.”

[Emphasis applied].

Taking interpretation first, the applicable heading is “Table, kitchen or other household articles and parts thereof, of aluminium; ...”. One must, of course, look for ordinary meanings of the words used, since there is no definition section in the Customs Act determining their meaning.

An article, in my view, used as a household article, refers to an implement. This is defined in the Shorter Oxford Dictionary as having its origins in the Latin word *'implementum'* meaning a filling up and taken as being equivalent to *'that which serves to fill up or stock (a house, etc.)'*. The first meaning of the English noun given is *'things that serve as equipment or outfit, as household furniture, ecclesiastical vestments, etc.'* The word *'article'* itself derives from the diminutive *'articulus'* of *'artus'*, meaning *'a joint'*. The Shorter Oxford Dictionary gives for the Latin word *'articulus'* the meaning, *'the parts joined on'*; whence *'transf. the component parts'*.

Pots, pans, kettles, jugs, bowls etc. are all obviously implements and therefore articles of household use. A light weight metal container capable, perhaps, of being used as a roasting pan on a few occasions before being thrown away, is not, to my mind, part of one's kitchen equipment. I would venture to suggest that in the vast majority of households, where ready-made foods are bought and contained or packaged by way of thin metal containers such as those imported by Applicant, these containers would be discarded immediately after use. They cannot be properly likened to pots and pans in the ordinary

sense.

I turn to the second and third criteria referred to by NICHOLAS, AJA. These are the nature and characteristics of the goods, imported as Applicant says as ‘*catering consumables*’ and the selection of the heading most appropriate to the goods. Applicant contends that these aluminium foil containers are in essence containers used for the preparation and packaging of pies and pre-cooked food by the catering industry, and are not designed for use as pans for roasting or kettle braais. [See Record, p.349].

The important allegation is then made in reply by Applicant that the foil pans manufactured by Hulett and depicted on photographs Annexures ‘J.13’, ‘J.14’ and ‘J.15’ are quite different from those imported by Applicant.

I am fortified in my view of this case by the Explanatory Note after the heading in 76.15, which reads as follows :

“This heading covers the same types of articles as are described in the Explanatory Notes to headings 73.23 and 73.24, particularly the kitchen utensils, sanitary and toilet articles described therein.”

Turning to the Explanatory Notes to 73.23, which is a heading almost identical to 76.15 - the difference being that one is here concerned with aluminium and not iron or steel - one finds that the group is regarded as comprising a wide range of iron and steel articles used for table, kitchen or other household purposes. Looking at the first of the groups referred to, one notes articles for kitchen use and a wide selection of what would properly be called cookware or storage ware such as milk cans, bread bins, tea caddies, plate racks, funnels, etc.

Moving on to sub-paragraph 2 in the Explanatory Note to 73.23, the articles for table use described are all articles of a permanent or semi-permanent nature. Durability is a feature of all of these items and speaks for itself.¹ Obviously, for example, teapots made out of thin aluminium foil would not last very long. When one has regard to the category of items listed, it becomes clear that to call a container usually coming into the kitchen as packaging, a roasting pan after it has fulfilled its primary purpose, is not only a distortion of language, but a denial of the nature and characteristics of this container.

¹ Accordingly it was not necessary for the Explanatory Notes to require '*durability*' [See the stance of the Controller at p33, as referred to earlier]

The third category in the Explanatory Notes relates to boilers, dustbins, buckets, coalscuttles, bootscrapers, stands for flat irons and other items no longer in common use, for instance shoe trees.

The articles in the three groups are all utensils, implements or equipment making up the kitchen, the table or the household generally. Aluminium foil packaging, capable of being used on a makeshift (that is to say, a temporary or interim) basis to heat or cook food does not, in my view, properly fall into those categories.

My conclusion renders it unnecessary for me to decide how hollow a plate has to be before it properly becomes hollowware, as opposed to flatware, which is defined in the dictionaries as something of a relatively flat nature. Once the aluminium foil containers do not properly fit the classification contended for by Respondent, then they fall to be classified for duty purposes under tariff sub-heading 76.16.99.90. The result is that they are duty free.

In my view the category contended for by Applicant is the correct one, and Second Respondent's determinations were incorrect.

There will accordingly be an order in terms of paragraphs 3, 4 and 5 of the Draft Order annexed to the Replying Affidavit of Mr Spence (page 372) save that the date '3 May 2004' in paragraph 4 should be amended to read '3 February 2005'.

J G FOXCROFT

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REPORTABLE JUDGMENT

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Counsel for Appellant	:	M WRAGGE [SC]
Instructed by	:	HEUER & ASSOCIATES
Advocates for Defendant	:	R T WILLIAMS [SC] C M D TSEGARIE
Instructed by	:	STATE ATTORNEY, CAPE TOWN
Dates of Hearing	:	27 th February, 2006
Date of Judgment	:	22 nd MAY, 2006