



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

DELETE WHICHEVER IS NOT APPLICABLE

- | | | |
|-----|-----------------------------|--------|
| (1) | REPORTABLE: | YES/NO |
| (2) | OF INTEREST TO OTHER JUDGE: | YES/NO |
| (3) | REVISED: | YES/NO |

DATE

SIGNATURE

CASE NUMBER: 2022-5522

In the matter between:

FTTX AND ENERGY WAREHOUSE (PTY) LTD

Applicant

and

THE COMMISSIONER

Respondent

FOR THE SOUTH AFRICAN REVENUE SERVICE

Heard: 31 OCTOBER 2024

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 31 JANUARY 2025.

JUDGMENT

LE GRANGE, AJ:

Introduction

- [1] This is an application which was initiated as a review application but is (by agreement between the parties) being dealt with as a statutory appeal as provided for in section 47(9)(e) of the Customs and Excise Act, 91 of 1964 (“Act”) against a tariff determination (CTN 55/2020 dated 5 July 2020) of the product, which is more fully described hereinunder, as an article of plastic in the tariff heading (“TH”) 3926.90 of Part 1 of Schedule No 1 to the Act, whereas the applicant content that the product should be classified as a connector for optic fibre, cable and bundles contemplated in TH8536.70, alternatively as a part thereof as contemplated in TH8538.90 of Part 1 of Schedule 1 of the Act.
- [2] In the premises, the matter before me stands to be dealt with as a complete re-hearing and fresh determination of the merits of the matter with or without additional evidence or information.¹
- [3] Before we delve into the merits, the respondent applied for the filing of duplicating affidavits which application was unopposed. As new, and most probably unexpected, evidence was presented in the replying affidavit, I find

¹ *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590G; *Cell C v Commissioner for the South African Revenue Service* 2022 (4) SA183 (GP) at par 10.

that special circumstances exists for the filing of further affidavits by the respondent.

- [4] The issue then for determination is which tariff heading would be most appropriate for the product.

Classification process

- [5] The three step process of tariff classification seems to be settled in law² and is follows:

- (i) First, interpretation – the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant;
- (ii) Second, consideration of the nature and characteristics of the goods; and
- (iii) Third, the selection of the heading which is the most appropriate to the goods.

- [6] In determining the nature, characteristics and properties of the goods (in accordance with (ii) above), the goods are classified with reference to the nature and characteristics of the goods as a whole.³

- [7] The general rule is that goods are characterised by their objective characteristics, and not by the intention with which they were made, or the use they may be put.⁴ There is, however, an exception to this general rule namely where the wording of the relevant tariff heading, or notes makes the intended

² *International Business Machines (Pty) Ltd v The Commissioner for Customs and Excise* 1985 (4) SA 852 (A) at 863G-H.

³ *The Heritage Collection (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (6) SA 15 (SCA) at 21C-D.

⁴ *South African Revenue Service v The Baking Tin (Pty) Ltd* 2007 (6) SA 852 (A) at 548G-H; *Durban North Turf Club v Commissioner of the South African Revenue Services* 2011 (2) SA 347 (KZP) at paras 36 and 37.

use relevant⁵. See also *Commissioner, South African Revenue Service v LG Electronics SA (Pty) Ltd* where the Court stated: ‘That it is the *primary* design and use which carries most persuasion.’⁶

- [8] I will deal hereinunder with the respective proposed tariff headings, each under their own headings.

TH8536.70

First, interpretation – the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant

- [9] TH8536.70 provide for: ‘Connectors for optical fibres, optical fibre bundles or cables’.

- [10] In *casu*, the words ‘Connectors for optical fibres’ finds application and need to be interpreted.

- [11] In this regard, Note 7 to Chapter 85 provides an explanatory note to the term ‘connectors for optical fibres, optical fibre bundles or cables’, and as follows: ‘For purposes of heading 85.36, ‘connectors for optical fibres, optical fibre bundles or cables’ means *connectors that simply mechanically align optical fibres end to end in a digital line system*. They perform no other function, such as the amplification, regeneration or modification of a signal.’ [Emphasis added]

- [12] ‘Connector’ is defined by Oxford Languages, as:

- a thing which links two or more things together. "a pipe connector"

⁵*Commissioner, South African Revenue Service v Komatsu SA (Pty) Ltd* 2007 (2) SA 157 (SCA) at 160F – 161A; *Mustek Ltd v South African Revenue Service* 2017 JDR 0729 GP at par 15.

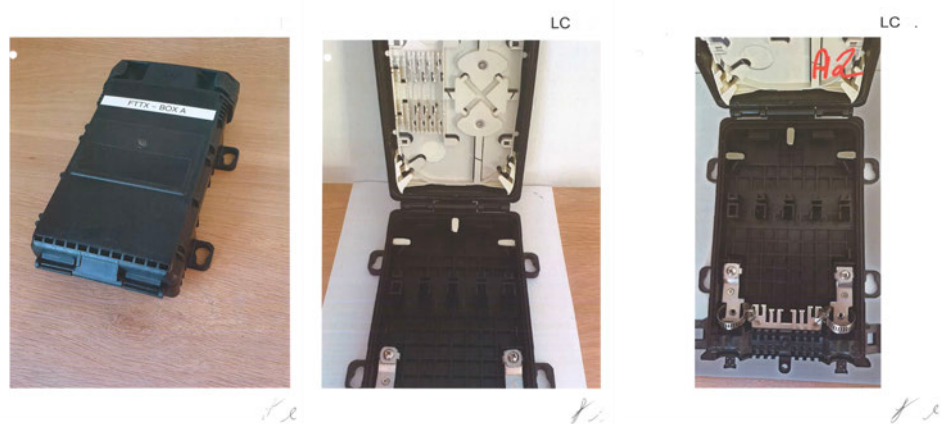
⁶ 2012 (5) SA 439 (SCA) at par 16.

- a device for keeping two parts of an electric circuit in contact. “a cable connector”

[13] Considering all of the above, a ‘connector for optical fibres’ would be a product, thing or device which would enable the mechanical alignment and joining of two optical fibres end to end in a digital line.

Second, consideration of the nature and characteristics of the goods

[14] The goods in question is described in the literature as a ‘FCST01131 Fiber Optical Splice Closure – 8 Core’ and were imported in the state as reflected in the following photos.



[15] According to Mr. Cheng, the product or similar products are called a ‘tray’ in the industry and for that reason I will refer to it as such.

[16] Describing the tray (as the respondent does) as just a box is inaccurate. It is clear from the photos and the evidence before me, that the tray (at the time of importation) was made up of various parts or components being (i) a black outer plastic box, (ii) a white inner splice tray, (iii) two metal clamps, and (iv) various other metal screws and plates. The evidence further points out that it may possibly also have had a clear plastic bag containing cable ties, splice protectors, wall plus, and screws.

- [17] The papers has borne out that the tray may be accompanied with or without cable fibre connectors. None was however included at the time of import. The latter aspect was a contentious issue in the correspondence between the parties and do I find the applicant's persistence that the tray did included connectors, deplorable.
- [18] Be that as it may, the position is clear and Mr. Cheng provide further insight to the tray, without connectors. His evidence is that a fibre-optic cable has extension and bend radius limitations, when exceeded can result in fibre breakage or excessive amount of light signal power losses. *In order to prevent this, it is standard practice for fibre-optic cables to be installed in a tray or duct.*
- [19] Mr. Cheng further conclude that the tray is a plastic box *designed* to perform two functions:
- 'To organise optical fibre cables and integrated components such as connector and midcouplers; and
 - To protect them from being damaged as above, as well as from the elements in general. As far as the latter function is concerned, I may add that the product is quite sturdy and has evidently been designed and manufactured for internal and external use.'
- [20] From the above it is clear that the tray was specifically designed and manufactured to forms an integral part of a standard fibre installation, more specifically at the (or certain) connection points.
- [21] After describing what an optic cable connector entails, Mr Cheng concludes that the tray is not a connector. If I understand his evidence correctly, the tray is not a connector in itself but is specifically designed with the primary

function to facilitate and ensure an easy, safe, proper, functional and aligned connection of optical fibre.

- [22] I agree with the above. The tray itself has as primary function to facilitate (together *with* a connector(s)) a proper connection but does not in itself enable a connection of optic fibres. It is thus not a connector.

- [23] The applicant's contention that the tray is indeed functionally a connector, fall further foul when regard is had to the fact that some of the fibres may just pass through the tray without being connected.

- [24] I further agree with the respondent that the difference between an empty tray and one fitted *with* connectors is material, to such an extent that it is determinative of the classification thereof. In the event that the tray contained connectors upon entry, I submit that another characterisation of the product, may be warranted.

TH 85.38

First, interpretation – the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant

- [25] TH 85.38 provide for: 'Parts suitable for use solely or principally with the apparatus of heading 85.35, 85.36 or 85.37'.

- [26] In reply, the applicant (not waiving its initial stance) introduces an alternative classification, under TH8538.90. Contending that the tray is a part, suitable for use solely or principally with the apparatus of heading 85.36, the latter which is the 'connectors for optical fibres'.

- [27] The respondent, having had the opportunity to answer hereto, did not contest the point in duplication but raised the argument that this classification is also incorrect. For its reasoning, the respondent considered the definition of the word 'Part(s)' (in the tariff heading) and stated (using only one of the multiple dictionary references) it to be 'a portion or division of a whole that is separate or distinct; piece, fragment, or section; constituent: the rear part of the house; to glue the two parts together.', and argued that as the tray is not *a part* of the connector for optical fibres, that such a classification would also not suffice.
- [28] The argument fails to consider the heading in full, which is composed of a complete sentence with multiple words and not just the word 'Parts'.
- [29] The correct question would be, what is meant with 'Parts suitable for use solely or principally *with* the connectors for optical fibres'?
- [30] Using the word 'with' in the sentence is indicative that the 'part (piece/fragment/section)' is not a part(s) *of* the connector but rather another part(s) which can be used *with* the connector, to ensure a certain or specific outcome.
- [31] It is further clear from the wording of the tariff heading and more specifically the use of the words '... suitable for use solely or principally with ...' that the part(s) must have an intended use. Hence this is a matter where the exception to the general rule (as referred to above) comes in play and where the wording of the relevant tariff heading or notes makes the intended use relevant.

Second, consideration of the nature and characteristics of the goods

- [32] Considering the nature and characteristics of the tray as already stated above, it is clear that the tray was specifically designed for use solely or principally,

as a standard practice *with* fibre connectors and cables, to facilitate and ensure an easy, safe, proper, functional and aligned connection of optic fibres.

[33] For this reason, I find that the tray sits comfortably within TH85.38.

Third, the selection of the heading which is the most appropriate to the goods

[34] Considering that TH8538.10 is in no way relevant, the most appropriate heading is TH8538.90.

TH 3926.90

[35] My finding above is dispositive of a finding that the tray falls within TH3926.90.

Order

[36] In the result the following order is made:-

1. The respondent's application for the filing of a duplicate affidavit is granted with no order as to costs.
2. The tariff determination no CTN 55/2020 dated 5 July 2020 is set aside.
3. The product described as 'FCST01131 Fiber Optical Splice Closure – 8 Core', imported under cover Bill of Entry 5016178 dated 21 January 2020 are classified in TH 8539.70 of Part 1 of Schedule No. 1 to the Customs and Excise Act, 91 of 1964.
4. The respondent is ordered to pay the costs hereof inclusive of the costs of counsel taxed on scale C.

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A J LE GRANGE

ACTING JUDGE

APPEARANCES:

COUNSEL FOR APPLICANT: Adv J. M. Barnard instructed by Ryan
Attorneys Inc.

COUNSEL FOR RESPONDENT: J. A. Meyer SC instructed by VDT
Attorneys.