

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 2020-52890

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
31 August 2020	
DATE	MOKOSE SNI

In the matter between:

DERMAL INSTITUTE OF SA (PTY) LIMITED

Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICA

REVENUE SERVICES

Respondent

JUDGMENT

MOKOSE J

Introduction

[1] This application is an appeal in terms of Section 65(6)(a) of the Customs and Excise Act 92 of 1964 ("the Customs Act") which is considered a re-hearing of a value determination made by the respondent. The respondent determined that the applicant should include the trade discount it

receives as part of the customs value of its imported goods which view the applicant contends is contrary to the provisions of the General Agreement on Tariffs and Trade ("GATT") which have been incorporated into Sections 65, 66, 67 and 74A of the Customs Act. According to the applicant, this is contrary to the provisions of GATT. The primary basis to determine customs value is the transactional value, which is the price actually paid or payable for the goods when sold for export into the Republic of South Africa.

Brief Facts

[2] The facts are undisputed by the parties. The applicant, a distributor for Dermalogica Inc, is an American company owning trademarks in respect of a range of skincare products, concluded a distributorship agreement with the supplier on 1 January 2013. This agreement was concluded for a period of 5 years but was subsequently extended. The applicant is the exclusive distributor of the licensed products not only in South Africa but other African countries. The applicant and the distributor are not related as defined in Section 66(2)(a) of the Customs Act.

[3] Clause 50 of the agreement between the parties, states that the price for products payable by the applicant is the price for the products only. The applicant would be responsible for all other charges associated with the purchase known as a purchase free-on-board ("FOB"). This means that the applicant would be responsible for the cost of transportation of the products, insurance, freight, taxes duties and all costs associated with customs clearance. To ensure competitive pricing for each territory, the supplier's price structure provides for discounts to affiliates. These are international discounts which discounts are solely in the discretion of the supplier, and which prevail for a period of 1 year.

[4] For 2018 the applicant was entitled to a general discount of 8% subject to certain exceptions. An exception to such discounts was for promotional items, launch discounts and support and non-standard items, among others, carton boxes.

[5] On 25 October 2017 the supplier issued the applicant with a customs invoice for the sum of \$712 123,47 being the gross price with a discount of the sum of \$79 555,52. The nett amount payable

was therefore the sum of \$632 567,95 being the amount paid by the applicant to the supplier. The goods were cleared through the applicant's clearing agent.

[6] The South African Revenue Services ("SARS") raised a query on the shipment requesting an explanation pertaining to the international discount. At the time that the valuation determination was made, SARS reasoned that *"the trade discount is preferential and is a matter of routine. It should be included in the customs value..."*.

[7] As a result thereof and on 15 January 2018, SARS issued a value determination regarding the discount. The determination was that *"the trade discount is preferential and is a matter of routine. It should be included in the customs value. Penalty will follow"*. It is however noted that in its answering papers, SARS provided a reason different to that given at the time of the valuation determination. The respondent contends that the applicant failed to provide a proper explanation for the discounts including the discount structure, it failed to provide evidence of similar discounts to other buyer and that it failed to demonstrate that the percentage discounts granted were within the norm. In particular, it alleged that the applicant's trade discount of 8% referred to as level 2 would not be acceptable for customs valuation as determined by SARS. The aforesaid requirements are derived from the SARS Customs Valuation Guide.

[8] To have the goods released the applicant passed a voucher of correction as contemplated in Section 40(3)(a) of the Customs Act.

Issue

[9] The issue for determination before this court is whether the respondent can disregard the discount the applicant receives and tax the applicant on the amount higher than the transaction value.

Legal Framework and General Principles Governing Customs Valuation

[10] In terms Article 1 of the GATT, to which South Africa is a signatory, the primary basis for the customs value determination is the transaction value. This is the actual price paid or payable. Articles 1 to 7 of the GATT define how the customs value of imported good is to be determine under the GATT.

The primary method of customs valuation is defined in Article 1. Imported goods are valued in accordance with the provisions of this article whenever the conditions contained therein are met.

[11] Section 40(1) of the Customs Act provides that no entry shall be valid unless the true value of the goods on which duties are leviable or which is required to be declared under the provisions of this Act and the true territory of origin, territory of export and means of carriage have been declared.

[12] The Customs Valuation Guide stipulates that discounts given for the following reasons are deductible:

- (i) the buyer undertakes certain activities for or on behalf of the seller as part of the payment under the contract of sale;
- (ii) the buyer provides other goods or service to third parties for or on behalf of the seller as a condition of sale of the imported goods;
- (iii) the party's relationship affects the price;
- (iv) the price of the imported goods has received credits made in respect of earlier transactions; and
- (v) the Guide also provides that before a discount price can be considered as customs value, the discount percentage and reason for the discount must be declared on the invoice as provided for in Section 41(4)(a).

[13] Section 65 of the Act provides that the value for duty purposes on any goods imported into the Republic is, subject to the provisions of this Act, at the time of entry for home consumption, the transaction value thereof, within the meaning of Section 66.

[14] Section 66 of the Customs Act provides that the transaction value of any imported goods shall be the price actually paid or payable for the goods when sold for export to the Republic, adjusted in terms of Section 67.

[15] Section 67(1) provides that, in ascertaining the transaction value of any imported goods in terms of Section 66(1), there shall be added to the price actually paid or payable for the goods, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable, any commission other than a buying commission, brokerage, the cost of packing including that of the labour and materials concerned and the cost of containers which are dealt with as being for customs purposes one with the goods.

[16] In terms of Section 74A(1), the interpretation of Sections 65, 66 and 67 shall be subject to the agreement concluded at Geneva on 12 April 1979 and known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, the interpretive Notes thereto, the Advisory Opinions, Commentaries and Explanatory Notes, Case Studies and Studies issued under the said Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade ("GATT").

Arguments

[17] The applicant appeals a determination by the respondent in terms of the abovementioned provisions of the Act. An appeal against a determination may entail a re-hearing of the matter. A fresh determination may be made of the merits with additional evidence if available.¹ This appeal turns on the interpretation of Section 65(6)(e) of the Act. It is a wide appeal and is considered a re-hearing of the value determination by the respondent. It is fundamentally different from an appeal in the strict sense or a review as it is heard *de novo*. Accordingly, the court is not confined to the record and is in the same position as the first-instance decision-maker.²

[18] SARS opposes this application on the basis that the applicant failed to comply with the requirements of the Customs Act and the GATT. It is of the view that it correctly refused the discount because the applicant did not provide all particulars necessary to make a valid entry and all particulars in respect of the transaction value in terms of the discount on the invoice as required by Section 41(4) of the Customs Act. Furthermore, SARS contends that the applicant failed to provide particulars necessary on the invoice for it to determine the value, which is the amount actually paid and not as stated in the invoice in accordance with Section 66 of the Customs Act.

¹ Commissioner of SARS v Levi Strauss SA (Pty) Ltd 2021 (4) SA 76 (SCA) at para 25

² Cell C (Pty) Ltd v Commissioner, South African Revenue Service 2022 (4) SA 183 (GP) at para 10

[19] The respondent admits that it did not rely on the Valuation Guideline but merely consulted it in addition to the sections of the Customs Act as stated above as well as the GATT. The respondent further contends that it has not accepted the applicant's version that it receives the discount based on an agreement concluded with the supplier as it is contradictory. It accepts that four documents were furnished to it to explain the discount. Those documents are the handwritten note provided to SARS, the follow up letter, the distribution agreement and the affidavit of the supplier. All these documents were attached to the affidavits filed and attached to the court documents.

[20] The applicant contends that the additional evidence furnished to this court is uncontested. It contends that insofar as the respondent seeks to rely on its Valuation Guidelines, they have no force of law. The applicant referred the court to the matter of *Marshall and Others v Commissioner for the South African Revenue Service*³ in which the Constitutional Court held that the use of these guidelines should be avoided when interpreting relevant statutes.

[21] The respondent contends that it consulted the Valuation Guideline in its determination. As stated in the Marshall matter (supra) this Guideline does not have the force of law. Such a determination based on the respondent's own interpretation of the legislation does not result in a statutory requirement which the applicant is under a legal obligation to comply with.

[21] From the documents before this court, it is evident that the applicant furnished the respondent with the four documents enunciated above in an attempt to explain the discount on the invoice. Whilst the respondent has accepted the applicant's version that it receives the discount based on an agreement concluded with the supplier, it contends that it has not accepted the evidence provided because it contends that it is contradictory. The respondent further contends that the agreement was not forthcoming although it had been informed by the clearing agent that they have requested the agreement from the importer explaining the trade discount. This was not available until July 2018, when it was attached to a notice to litigate in terms of Section 96 of the Act.

[22] The respondent contends further that Clause 51 of the agreement furnished read that all prices of products will be at Dermalogica's *bona fide* wholesale price effective at the time Dermalogica

³ 2019 (6) SA 246 (CC)

accepts the distributor's order for products. It further read that Dermalogica retains the absolute discretion to establish and adjust the prices of products, establish policies and discounts for volume purchases, establish and impose handling, packing and shipping and delivery charges. The terms and conditions of the agreement did not give descriptions or specific details on discounts. The agreement was also not signed but had an electronic date of 11 March 2009. Two further agreements were furnished during October 2020 having been attached to the founding affidavit. The date of the agreement was not visible on the contract nor were the signatures of the parties legible. Furthermore, the affidavit signed by the supplier's Vice President did not attach the contract nor did it refer to the specific consignment or invoice in question, nor does it refer to the commodity that the 8% discount was applicable to.

[23] Whilst it may be so that the description of the goods and the details of the discounts were not included on the terms and conditions of the agreement, this does not diminish the fact that the information was granted by the applicant to enable the respondent to ascertain whether the customs payable was in fact on the transaction value.

[24] If regard is had to the GATT and the Customs Act, the primary basis to determine customs value is the transaction value which is "the price actually paid or payable for the goods when sold for export to the Republic". Accordingly, the respondent cannot disregard the discount received by the applicant and tax it on a higher amount than the transaction value. The respondent fails to advance reasons for its position that the applicant's trade discount of 8% would not be acceptable for customs valuation determined by it in circumstances where it has accepted the existence and structure of the trade discount and that the supplier also determines discounts to be provided to suppliers in other countries. It has also accepted that the applicant and supplier are not related parties as contemplated in Section 66(2)(a) of the Act.

[25] There is no reason before the court why the costs should not follow the cause.

[25] Accordingly, the following order is granted:

1. The "transaction value" of the goods for purposes of Section 65 of the Customs and Excise Act of 1964 is the price nett of the discount granted by the exporter, Dermalogica Inc (located in

California, United States of America) to the applicant in terms of the agreement between them, in circumstances where Dermalogica Inc is paid the amount nett of the discount, being the price paid or payable for the goods as contemplated in Section 66 of the Customs and Excise Act, 1964.

2. The value determination by the respondent dated 15 January 2018 is set aside and the following is stated:

"The trade discount is preferentially and is a matter of routine. It should be included in the customs value. VOC required to include discounts in customs value. Penalty will follow."

3. The applicant may within 90 days of this order, submit vouchers of correction to the respondent as contemplated in Section 40(3) of the Customs and Excise Act 1964, rectifying the correct customs value of the goods declared on the bills of entry submitted by the applicant to the respondent since the value determination (3 January 2018), together with supporting documentation.
4. The applicant may claim a refund of duties for the bills of entry in respect of which vouchers of correction were passed (per prayer 3 above), claiming excess duties paid, subject to the provisions of Section 76B of the Customs and Excise Act 1991.
5. The applicant may apply for a refund of the provisional payments paid to the respondent subsequent to the value determination in terms of Section 91 of the Customs and Excise Act 1964, namely an amount of R73 860,31 for alleged under-declaration of customs duties and a provisional penalty payment of R21 490,56 for alleged under-payment of value-added tax,
6. Costs, including the costs of counsel on Scale B.

A handwritten signature in black ink, appearing to be 'SNI MOKOSE J', is written over a solid black rectangular redaction box.

SNI MOKOSE J

Judge of the High Court of
South Africa Gauteng
Division, PRETORIA

For the Applicant: Adv N Komar

On instructions of: Shepstone & Wylie Attorneys

For the Respondent: Adv E Mkhawane

On instructions of: VDT Attorneys

Date of judgment: 31 August 2026