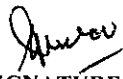




IN THE HIGH COURT OF SOUTH AFRICA /ES
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED ✓	
DATE 9/9/14	SIGNATURE 

CASE NO: 45213/2013

DATE: 12/9/14

IN THE MATTER BETWEEN

COLTRADE INTERNATIONAL CC

APPLICANT

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

RESPONDENT

JUDGMENT

PRINSLOO, J

- [1] This is an appeal in terms of section 47(9)(e) of the Customs and Excise Act 91 of 1964 ("the Act") against a tariff determination made by the respondent in terms of section 47(9)(a) of the Act.

- [2] Before me Mr Vorster SC appeared for the applicant and Mr Meyer SC assisted by Ms Chabedi, appeared for the respondent (also referred to as "the Commissioner").

Introduction

- [3] The applicant is an importer of coconut milk, coconut cream and coconut powder ("the products").
- [4] The Commissioner's delegatee made determinations in terms of section 47(9)(a)(i)(aa) that the products are classifiable under Tariff Heading 2106.90.90 of Part 1 of Schedule 1 of the Act, being "other food preparations not elsewhere specified or included in Part 1 of Schedule 1".
- [5] The applicant contends that the Commissioner erred and that the products should be classified under Tariff Heading 2008.19 as being "fruits, nuts and other edible parts of plants, otherwise prepared or preserved, not elsewhere specified or included".
- [6] The relevant statutory background is well-known in cases of this nature and neatly summarised in the founding affidavit. I refer thereto in broad terms only.
- [7] Section 47(1) of the Act provides, *inter alia*, that customs duty shall be paid on imported goods in accordance with Schedule 1 of the Act, which schedule simultaneously provides for the classification of goods.
- [8] Section 47(8)(a) of the Act provides, *inter alia*, that the interpretation of any Tariff Heading or tariff sub-heading in Part 1 of Schedule 1, the General Rules for the Interpretation of Schedule 1 and every Section Note and Chapter Note in Part 1 of

Schedule 1 shall be subject to the International Convention on the Harmonised Commodity Description and Coding System done in Brussels on 14 June 1983 and the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time.

[9] Section 47(9)(a) of the Act provides, *inter alia*, that the Commissioner may in writing determine Tariff Headings and tariff sub-headings of any Schedule under which any imported goods shall be classified. The Republic of South Africa is a party to the Harmonised System Convention and the Member of the World Customs Organisation.

[10] The structure of Schedule 1 was described as follows in *Secretary for Customs and Excise v Thomas Barlow & Sons* 1970 2 SA 660 (A) at 675D-F:

"The duty which is payable is set out in Schedule 1 to the Act. This Schedule is a massive part of the statute in which all goods generally handled in international trade are systematically grouped in sections, chapters and sub-chapters, which are given titles indicating as concisely as possible the broad class of goods each covers. Within each chapter and sub-chapter the specific type of goods within the particular class is itemised by a description of the goods printed in bold type. That description is defined in the Schedule as a 'heading'. Under the heading appears sub-headings of the species of 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."

[11] Rule 1 of the General Rules for the Interpretation of the Harmonised System contained in Schedule 1 provides as follows:

"The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions ..."

- [12] In this matter, no Section Notes which may provide any assistance for purposes of adjudicating this application were raised by any of the parties.

- [13] The Explanatory Notes follow the systematic order of the Harmonised System. They provide a commentary on the scope of each heading, giving a non-exhaustive list of the main products included and excluded, together with technical descriptions of the goods concerned, eg their appearance, properties, method of production and uses, and practical guidance for their identification. Where appropriate, Explanatory Notes clarify the scope of particular sub-headings.

- [14] In *Thomas Barlow* it was mentioned at 676B-D that in using the Explanatory Notes one must bear in mind that they are merely intended to explain or perhaps supplement relevant headings and Section and Chapter Notes, and not to override or contradict them. The learned Judge of Appeal suggested that in using the Explanatory Notes one must construe them so as to conform with and not to override or contradict the plain meanings of the headings and notes.

- [15] It is common cause that the classification process between Tariff Headings and sub-headings is a three stage process: first, the interpretation or ascertainment of the words used in the headings (and sub-headings) and the relative 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 – see *International Business Machines SA (Pty) Ltd v Commissioner of Customs & Excise* 1985 4 SA 852 (A) at 863G.

The different classifications contended for by the two parties

[16] The applicant contends that the coconut milk and coconut cream fall to be classified under TH 2008.19. This resorts under Chapter 20 of the Tariff Book which is headed "Preparations of vegetables, fruit, nuts or other parts of plants".

[17] TH 20.08 reads as follows:

- | | |
|---------|--|
| "20.08 | Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included.

(Mr Vorster submitted that, for purposes of this dispute, nothing turns on the words 'whether or not containing added sugar or other sweetening matter or spirit'.) |
| 2008.1 | Nuts, ground-nuts and other seeds, whether or not mixed together. |
| 2008.11 | Ground-nuts. |
| 2008.19 | Other including mixtures." |

[18] It is evident from the above, so it is argued by the applicant, that TH 2008.19 includes fruit, nuts and other edible parts of plants, otherwise prepared or preserved.

[19] It is perhaps worth mentioning that years earlier, in about 2005, the Commissioner classified the products under the same Tariff Heading contended for now by the applicant, namely TH 2008.19, and for the next seven years the products were duly cleared under that Tariff Heading on behalf of the applicant. In 2012, officials of SARS in East London conducted a post-clearance audit and concluded that TH 2106.90.90 applies instead of TH 2008.19. This is the Tariff Heading now contended for by the Commissioner.

[20] Chapter 21 is headed "miscellaneous edible preparations".

[21] TH 21.06 reads as follows:

"21.06 Fruit preparations not elsewhere specified or included:
2106.90 Other:
2106.90.90 Other."

[22] It is evident from the above that TH 2106.90.90 includes other fruit preparations not elsewhere specified or included. As pointed out by the applicant, the question is whether coconut milk, coconut cream and powder fall to be classified under another Tariff Heading and, in particular, TH 20.08. I add that, for present purposes, the Commissioner is prepared to treat all three the products, namely cream, milk and powder, on the same basis.

[23] By way of background, counsel for the applicant also referred to Chapter 8 which covers, *inter alia*, edible fruit and nuts. By name, it also covers coconuts in sub-heading 08.01. However, as pointed out by counsel, the products, as imported, do not qualify for classification under Chapter 8, as they are "otherwise prepared or

preserved" as envisaged in Tariff Heading 20.08, *supra*. An exclusionary note specifically reads:

"The chapter further excludes ... (ii) edible fruit and nuts and peel of melons or citrus fruit prepared or preserved otherwise than as described above (**chapter 20**)." (Emphasis added.) This chapter therefore appears to recognise that fruit and nuts ... preserved otherwise than as described in other chapters fall to be classified under Chapter 20.

In my view, this reference to Chapter 20 is not insignificant for present purposes.

The nature and characteristics of the products

[24] Importantly, counsel for the applicant reminded me of what is stated in the small print exclusion (a) in the Explanatory Notes to TH 21.06 (the one contended for by the Commissioner). It reads as follows:

"The heading further excludes:

- (a) preparations made from fruit, nuts or other edible parts of plants of heading 20.08, provided that the essential character of the preparations is given by such fruit, nuts or other edible parts of plants (heading 20.08) (emphasis added)."

In my view there is much to be said for counsel's submission that this exclusionary note makes it clear that if the coconut products retain the essential character of coconuts they cannot fall within TH 21.06 and must fall within TH 20.08.

[25] As far as the retention of the essential character of the preparations made from fruit, nuts or other edible parts of plants of heading 20.08 is concerned, as foreshadowed in

the exclusion (a) in the Explanatory Notes to TH 21.06, this subject is dealt with in an affidavit by an expert witness, offered in support of the case of the applicant, namely Ms Lawan Poomphruk, quality assurance manager of Thai Coconut Co Ltd, where the products are manufactured. The Commissioner offers no evidence in rebuttal to what Ms Poomphruk says and accepts that the products are manufactured as set out in paragraph 9 of her affidavit. The Commissioner also accepts that the so-called Codex definition of coconut milk/cream as cited in paragraph 10 of the affidavit of Ms Poomphruk is correct. Furthermore, the Commissioner accepts, as I have already stated, that for classification purposes, the milk, cream and powder are essentially the same and can therefore be treated the same.

[26] In her affidavit, Ms Poomphruk states that the question which has been posed to her is whether coconut milk and coconut cream retain the character of the original coconut meat having regard to the processes to which the coconut meat is subjected during the manufacture of the two products as described.

[27] In paragraph 9 of her affidavit, the witness then gives a detailed description of the commercial manufacture of the coconut milk and coconut cream in question. For purposes of this judgment, I only quote the initial paragraphs:

"9.1 Firstly, the matured coconut is dehusked, deshelled and the coconut juice, (also known as 'coconut water') is drained off. This leaves only the white meat, known as endosperm, endocarp or kernel, which in the mature coconut is inedible and can only be used for making desiccated coconut (whether or not defatted), coconut cream (whether concentrated or not) or coconut milk of various grades (determined according to the fat content).

- 9.2 The kernel is then comminuted. 'Comminution' is any process by which a product is reduced to minute particles. In the case of coconut kernel, this is accomplished by shredding the kernel.
- 9.3 The third major step is to express or extract the edible endosperm. This is accomplished through machinated crushing of the comminuted coconut kernel. The crushing causes expression of the edible endosperm in emulsion form. An emulsion is commonly defined as 'a fine dispersion of minute droplets of one liquid in another in which it is not soluble or miscible'. This is an accurate description of the liquid endosperm thus obtained. In the process of crushing the inedible fibres are separated and strained out, leaving the liquid endosperm behind." (Emphasis added, with particular reference to the term "crushing".)

[28] In paragraph 12 of her affidavit, Ms Poomphruk then answers the question initially posed to her, *supra*, namely whether the coconut milk and coconut cream retain the character of the original coconut meat. She does so in the following terms:

"Further, it appears self-evident to me that since the expression of the liquid emulsion by the crushing of comminuted coconut endosperm results in cream or milk which retains all the nutritive and organoleptic characteristics of the original coconut meat while the fibrous dregs retain very little or none of these characteristics, that the essential character of the original coconut meat is retained in the endosperm emulsion." (Emphasis of "crushing" added.)

The reference to "organoleptic characteristics", is a reference to those characteristics relating to aroma, flavour and taste.

The witness also states that the addition of water (when it comes to manufacturing the coconut milk for example) to the usable endosperm emulsion, does not lead to a product which differs in material respects from the original endosperm. This also holds true for the permissible minute quantities of emulsifiers and stabilisers which are added and which do not serve to alter the character of the product, but rather to enhance it.

[29] Another expert witness whose evidence on oath is offered in support of the applicant's case, is Dr Nattapol Tangsuphoom a lecturer at the Institute of Nutrition, Mahidol University in Thailand. As part of his Ph.D degree he was required to submit to the Pennsylvania state university in America, a dissertation titled "Properties and Structure of Coconut Milk Emulsions".

[30] This witness echoes the testimony of Ms Poomphruk in the following terms:

"8. Regarding coconut milk and cream, such products are the aqueous (my note: of water, containing water) extract of solid endosperm of mature coconuts. These products may be described as the emulsion of natural coconut oil bodies (that are naturally embedded in a solid endosperm) and aqueous phase (added water and water naturally also present in the coconut endosperm).

9. The process of coconut milk and cream extraction, namely mechanical pressing with or without the addition of water, does not affect the characteristics of the endosperm. The other substances which are added in minute proportions (less than 0.5% by weight of the total product) in order to preserve and stabilise the products, such as ..., also

do not alter the essential character of coconut constituent of the products in question."

Apart from the odd bare denial to be found in the opposing affidavit, the Commissioner offered no evidence in rebuttal of what these two witnesses had to say.

The Commissioner's case and remarks with regard thereto

- [31] The deponent to the opposing affidavit is a tariff research specialist but not an expert with regard to the preparation of these products as are the two people from Thailand.
- [32] As I already stated, it is recognised in the answering affidavit that the Commissioner accepts that the products are manufactured as described by Ms Poomphruk in paragraph 9 of her affidavit, that the Codex definition of coconut milk/cream cited by Ms Poomphruk is correct and that for classification purposes the milk, cream and powder are essentially the same and can be treated the same.
- [33] Significantly, the Commissioner agrees that as far as the organoleptic characteristics of the products are concerned, ie those relating to aroma, flavour and taste, they are derived from the coconut, and therefore represent that of a coconut.

Perhaps to avoid any confusion, it is worth revisiting the fact that the Thai witnesses state emphatically, in their uncontested evidence, that the essential character of the original coconut is retained in the final product.

I say this because of the wording of the exclusion contained in the last Explanatory Note to the heading 21.06, *supra*, which is recognised by the deponent to the opposing affidavit and the provisions of which I quote again:

"This heading further excludes:

- (a) preparations made from fruit, nuts and other edible parts of plants of heading 20.08, provided that the essential character of the preparations is given by such fruit, nuts or other edible parts of plants (heading 20.08)."
- (Emphasis added.)

From this it follows in my view, as argued by counsel for the applicant, (and apart from other considerations which may tilt the scales in favour of the Commissioner) that the products cannot be classified under TH 21.06 because they are excluded therefrom and fall to be classified under heading 20.08.

[34] The deponent on behalf of the Commissioner records that the parties agree that the two competing Tariff Headings are 20.08 and 21.06. She points out that TH 21.06 is a residual heading. She argues that the practical import thereof is that the question which needs to be answered is whether the coconut milk, cream and powder fall to be classified under TH 20.08: if it does then the appeal must succeed; if it does not, then by default it is classifiable under TH 21.06. It is difficult to see how the preparations can be classified under 21.06 at all, given the significance of the exclusion to the Explanatory Note, *supra*, and the fact, which is common cause, that the preparations retain the essential character of the coconut.

[35] Nevertheless, the defendant goes on to refine the argument of the Commissioner by stating the following:

"19. Tariff Heading 20.08, read with the two Explanatory Notes, has two requirements which are to be met by a product in order to be classifiable thereunder:

19.1 as far as its physical state is concerned it has to be 'whole, in pieces or crushed' ('the first requirement/note');

19.2 as far as its organoleptic characteristics are concerned, they must essentially be that of the base product, coconut in the present instance ('the second requirement/note').

20. The Commissioner is satisfied that the products in issue comply with the second requirement.

21. As far as the first requirement is concerned the products have been processed to the extent that they are (stabilised and preserved) emulsions. They have therefore been processed to the extent that they are way beyond the requirement of 'whole, in pieces or crushed'. Tariff Heading 20.08 does not cater for emulsions."

[36] The "two referred to Explanatory Notes", mentioned by the deponent, do not both deal with the requirement of "whole, in pieces or crushed" but I assume that what the deponent has in mind is the following:

1. the General Explanatory Note to Chapter 20 reads as follows:

"This chapter includes:

(1) ...

(2) ...

(3) jams, fruit jellies, marmelades, fruit or nut purées, fruit or nut pastes, obtained by cooking;

(4) homogenised prepared or preserved vegetables and fruit;

- (5) fruit or vegetable juices, neither fermented nor containing added alcohol, or of an alcoholic strength by volume not exceeding 0.5% volume;
- (6) ...
- (7) ...
- (8) ...

These products may be whole, in pieces or crushed." (Emphasis added.)

2. The Explanatory Note to heading 20.08 reads as follows:

"Fruit, nuts and other edible parts of plants, otherwise prepared or preserved ... not elsewhere specified or included

- nuts, ground-nuts and other seeds, whether or not mixed together:

2008.11 - - ground-nuts

2008.19 - - other, including mixtures (this is the one contended for by the applicant)

2008.20 - pineapples (this is followed by another series of subheadings dealing with other fruits).

This heading covers fruit, nuts or other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other chapters or in the preceding headings of this chapter."

[37] The Explanatory Note then goes on to state that the heading includes *inter alia*:

- "(1) almonds ...
- (2) 'peanut butter', consisting of a paste made by grinding roasted ground-nuts ...
- (3) ...
- (4) ...
- (5) ..."

[38] From the foregoing, it appears that the Commissioner's case is based exclusively on an argument that the products are not "whole, in pieces or crushed" and, as a result, cannot be classified under Chapter 20.

[39] In this regard, it seems to me that the following remarks may not be out of place: firstly, the General Explanatory Note provides that the products may be (and not "has to be" as stated by the deponent) whole, in pieces or crushed. Secondly, it appears from the description by Ms Poomphruk about the manufacturing process that the endosperm is well and truly crushed as part of the operation. When quoting from paragraph 9 of the affidavit of this witness, I emphasised repeated reference to the term "crushing". Thirdly, it may be arguable that the products are, at least in a sense, still "in pieces" because it is not disputed that they retain a measure of edible solids. This is also evident from the fact that upon drainage of the liquid, one is left with the powder which is one of the products imported. Fourthly, it seems to me that the deponent is over-emphasising the significance of the wording of the Explanatory Notes and under-emphasising the "plain meaning of the headings and notes" which approach does not pay due regard to the caution expressed by the learned Judge of Appeal in *Thomas Barlow, supra*. The plain meaning is simply "fruits, nuts and other edible parts of plants, otherwise prepared or preserved ... not elsewhere specified or

included". It seems to me that the method used in Thailand may comfortably resort under the phrase "otherwise prepared or preserved ... not elsewhere specified or included".

[40] I also find no indication in the notes or the headings that milk, creams and powder are excluded from classification under this Tariff Heading. I find no indication that emulsions are excluded, as argued by the deponent.

[41] I am alive to the argument offered on behalf of the Commissioner that other apparently liquid preparations, such as homogenised prepared tomatoes and tomato juice are classifiable under this Tariff Heading but only because they are specifically included by the Explanatory Note, whereas the same cannot be said for the products under discussion. It is not clear to me what authority this argument is based on, but I am nevertheless of the view that if the plain meaning of the headings and notes indicate inclusion in a particular Tariff Heading of a certain product, that should happen, even if the product is not specifically included by special mention in an Explanatory Note. I am of the view that the product does not fall to be automatically excluded simply because it is not expressly included by name.

Conclusion

[42] In essence, the main, and only, attack offered by the Commissioner against the case of the applicant, is that the products are not "whole, in pieces or crushed" when imported.

[43] In the replying affidavit, the applicant revisits the wording of the Explanatory Note to TH 20.08 which I quote again for easy reference:

"This heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other chapters or in the preceding headings of this chapter."

[44] The applicant then goes on to argue as follows:

"The above-mentioned Explanatory Note states that crushed 'nuts and other edible parts of plants' must be further prepared or preserved. This means that the 'further preparation' must extend beyond mere 'crushing'. It is common cause that the imported products in issue have been obtained by crushing, and have been further prepared as required in the Explanatory Note, by straining off inedible fibres, and adding water and stabilisers. In this regard reference is for example made to the affidavits of Ms Poomphruk and Dr Tangsuphoom, which are uncontested by other expert evidence.

In this regard cognisance must also be taken of Note (5) to the Explanatory Notes, which states that TH 20.08 also includes 'whole fruits ... crushed and sterilised, whether or not containing added water or sugar syrup but in a proportion insufficient to render them ready for direct consumption as beverages' (my note: the products in question are also not ready for direct consumption as beverages, but used as additives in the preparation of other dishes and confectionary).

The fatal error in the respondent's argument is the incorrect contention that 'prepared or preserved' cannot extend beyond products in a crushed state. From the quote above, this is not what the Explanatory Note actually states and

the Note does not lend support to the narrow interpretation contended for by the respondent."

[45] The applicant further argues in reply:

"To fall in Chapter 20, the coconuts must be prepared beyond pulping and crushing. This means that crushed preparations, and preparations prepared beyond crushing, are included in TH 20.08 as long as the products have been prepared or preserved otherwise than provided for in Chapter 8."

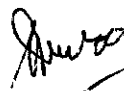
[46] In my respectful view this argument correctly summarises the situation.

[47] It follows that the appeal has to be upheld in the circumstances.

The order

[48] I make the following order:

1. The applicant's appeal against the tariff determinations, in respect of products described as canned coconut milk 10-11% fat, canned coconut milk 14-15% fat, canned coconut milk 19-20% fat, canned coconut cream 19-20% fat, UHT coconut cream and coconut powder, is upheld.
2. The tariff determinations mentioned in 1 above are set aside and replaced with a tariff determination that the products described in 1 above, are classified under Tariff Heading 2008.19.
3. The respondent is ordered to pay the costs, which will include the costs of senior counsel.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

45213-2013

HEARD ON: 30 JULY 2014
FOR THE APPLICANT: J P VORSTER SC
INSTRUCTED BY: SHEPSTONE & WYLIE
FOR THE RESPONDENT: J A MEYER SC ASSISTED BY M P D CHABEDI
INSTRUCTED BY: STATE ATTORNEY