**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

14/9/16

Case No: 50781 / 2015

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

In the matter between:

**DAIKIN AIR CONDITIONING SA (PTY) LTD** Applicant

and

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

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**JUDGMENT**

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**MAKHUBELE AJ**

**INTRODUCTION**

[1] This is an appeal in terms of section 47(9)(e) of the Customs and Excise Act, 91 of 1964, as amended ("the Act") against the tariff

determination of the respondent ("the Commissioner") as contemplated in section 47(1) of the Act.

[2] In addition to a cost order, the relief sought in the Notice of Motion reads as follows:

> *" 1. That the Respondent's tariff determination (annexed to the Founding Affidavit as annexure "NS8"), determining the products under issue under tariff heading 8415.90.05 and tariff heading 8415.90.10, be set aside and replaced with a tariff determination under tariff heading 8415.90.90.*
>
> *2. Alternatively to the above, that the tariff determination be set aside and replaced with a determination that until 17 December 2012 the products are classified under TH8415.90.90 and thereafter under TH8415.90.05 as the case may be".*

[3] It is common cause that the applicant has exhausted all internal remedies in terms of the Act and that it was granted condonation for late filing of this appeal.

**THE FACTUAL MATRIX**

[4] The background facts are largely common cause and may be summarized as follows:

[5] The applicant is an importer and distributor of air conditioning products and parts thereof that are sourced from countries such as Japan, China and Malaysia. The products were entered under tariff heading 8415.83.00/5, 8415.90.90/0 and 8418.69.90/5.

[6] On 11 February 2011, the Regional Manager, Customs Audit of the Office of the Commissioner in Durban wrote a letter to the applicant and advised it that after conducting an audit into its importation of various air conditioning parts for the period April 2007 to May 2010, it was discovered that the air conditioning parts had been incorrectly cleared , thus resulting in an underpayment of duty and VAT. This letter is referred to as a letter of intent.

The letter went on to advise the applicant that the air conditioning parts should have been classified as parts in tariff heading 8415.90.10/2 and not as complete units.

The applicant was advised that it had contravened the provisions of the Act and was liable for payment of customs duty and value added tax, interest thereon as well as penalties. It was afforded an opportunity to make representations and submit supporting documents to rebut the *prima facie* findings of the Regional Manager .

[7] The applicant appointed a Tariff Consultant, Mr Jean Pool of UTi to assist with the representations. These were forwarded to the respondent's Durban Regional office on 21 February 2011.

In essence, the applicant's contention was that its products which are described as ; (a) floor standing indoor units, (b) ceiling type indoor unit and (c) outdoor units are not "*window or wall-type*" as contemplated in tariff heading 8415.10.

[8] The applicant submitted an application for a tariff determination on 16 March 2011 but it did not receive immediate attention .

[9] On 17 March 2011, the Commissioner issued a letter of demand to the applicant and advised that the products were classifiable under TH8415.90.10 .

In this letter , the Commissioner indicated, amongst other things that the "*ceiling units of split systems excluding ducted systems under 8.8KW*" falls within the purview of TH8415.90.10 because, in Its opinion, "*the use of the term "types" (window or wall) makes this a non-exhaustive statement of the location in which the air conditioning units can be fitted with regard to the premises to be cooled. This office therefore takes the view that machines of this kind should be classified as if they were window or wall type.*"

A demand for payment of an amount of R2 148 721-68 including duty, vat penalties and interest was made. The applicant made two payments on 31 March 2011 and 05 May 2011 as provisional payments to secure the amount demanded.

[10] The response to the application for a tariff determination only came on 11 May 2011. The applicant was advised that a tariff determination could not be issued and its recourse in this regard was to launch an internal administrative appeal.

[10.1] It appears from the record filed though that the matter subsequently received attention because on 31 July 2012 a letter was directed to the applicant. It reads in part as follows:

*"From the Durban branch office as well as the HSC opinion, SARS is of the view that the determination is correct in terms of the existing HS Nomenclature and HSEN and this view was supported in the HSC by a vote of 44 to 5, which was also on the basis of the current HS Nomenclature and HSEN.*

*For this, one needs to be mindful of the fact that the HSEN's are drafted with the intention of being in conformity with the HS Nomenclature, not or the legal Notes thereto, meaning , obviously, that as far as the WCO is concerned (and as far as SARS is*

*concerned) the extant Nomenclature provides for classification in subheading 8415.10 of the genus of split-system air conditioner here in dispute, and all that the possible amendment to the HSEN will serve, is to allay misunderstandings or eliminate possible ambiguity. In this instance, the product at issue, been an indoor ceiling mounted imported separately is considered classifiable within sub-heading 8415.90.05 as the indoor part of a split system."*

[11] The internal appeal was submitted on 17 June 2011. It was referred to the Tariff Policy Section which in turn and by agreement with the applicant referred it to the World Customs Organization ("WCO") for a formal opinion. The WCO's decision was made during March 2012 and was duly published in its website on 17 December 2012 in the form of a generic classification opinion and an amendment to the Explanatory Notes.

[11.1] The internal appeal was decided on 31 July 2012 against the applicant . The applicant was however only notified on 21 February 2014.

The goods were determined to be classifiable under tariff heading 8415.90.05.

[12] The applicant duly filed a notice to litigate on 14 October 2014. As indicated above, the appeal decision was only transmitted to the applicant some 19 months after it was made. Section 47(9(f) of the Act provides that " *Such appeal shall, subject to section 96 (1), be prosecuted within a period of one year from the date of the determination.*"
In this regard, an application for extension of the one-year period as contemplated in section 96(1)(c)(i) of the Act was made and duly granted on 04 June 2015.

[13] In a letter dated 17 April 2015, the Commissioner reiterated, amongst other things that the decision to classify the ceiling type air conditioning units under tariff subheading 8415.90 and particularly 8415.90.05 as part of a window or wall type of a split system was "*based on the WCO Secretariat opinion which stated that the ceiling type is also considered to be window/wall type. The Secretariat also stated that the issue of 'type 'is not exhaustive and therefore ceiling type should be considered as similar to window/wall type air conditioning system.*"

[14] It is common cause that an earlier informal one on the same issue during 2002 preceded the WCO opinion of 12 December 2012. The circumstances were as follows:

[14.1] On 06 June 2001, the Commissioner forwarded a request to the WCO for an opinion on whether subheading 8415.10 covers only air conditioning machines designed to be fitted to the wall or to the window , whether self-contained or consisting of separate elements, or whether the text of this subheading also encompasses machines of the same type, designed to be fitted to other locations in the premises to be cooled, such as the ceiling, for example.

[14.2] On 6 July 2002, the WCO advised that " *Bearing in mind the wording of subheading 8415.10, the Secretariat considers that the inclusion of the word "types" (window or wall types) makes this a non-exhaustive statement of the location in which the air conditioning machines at issue can be fitted in the premises to be cooled. Consequently, the Secretariat takes the view that the machines of this kind should be classified here even if they are not intended to be fitted to the wall or to the window, provided that they satisfy the conditions laid down in Subheading Explanatory Note 8415.10 on page 1426...*"

The WCO qualified its view by stating that if the Commissioner was not satisfied, it was "*willing to examine the question with reference*

*to the characteristics of any specific machine for which you are able to provide technical literature ..."*

[14.3] The South African authorities were not satisfied with this response and on 16 August 2002 a letter was directed to the WCO in terms of which the latter was advised, amongst other things that the advise given in the letter 02 August 2002 that I quoted above has generated some concerns and they were wondering whether it is not a contradiction in terms and furthermore, the interpretation was not in line with the wording of the item.

The WCO was urged to reconsider the matter after perusing the additional comments provided by the respondent. There is no indication in the record whether there was any reconsideration of this informal opinion or not after the WCO was provided with additional comments.

**THE LEGISLATIVE FRAMEWORK**

[15] Section 47(1) of the Act provides , amongst other things that customs duty shall be payable on imported goods in accordance with Schedule No.1 to the Act.

[16] Section 47(8) reads as follows

*(8) (a) The interpretation of-*

*(i) any tariff heading or tariff subheading in Part 1 of Schedule 1;*

*(ii) (aa) any tariff item or fuel levy item or item specified in Part 2, 5 or 6 of the said Schedule, and*

*(bb) any item specified in Schedule 2, 3, 4, 5 or 6;*

*(iii) the general rules for the interpretation of Schedule 1; and*

*(iv) every section note and chapter note in Part 1 of Schedule 1, shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to 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: Provided that where the application of any part of such Notes or any addendum thereto or any explanation thereof is optional the application of such part, addendum or explanation shall be in the discretion of the Commissioner.*

*(b) The Commissioner shall obtain and keep in his office two copies of such Explanatory Notes and shall effect thereto any amendment of which he is notified by the said Council from time to time and*

*shall record the date of effecting each such amendment and any such amendment shall, for the purposes of this Act, be effective from the date so recorded.*

*(c) Whenever in any legal proceedings any question arises as to the contents of such Explanatory Notes or as to the date upon which any amendment thereto was effected, a copy of such Explanatory Notes as amended in terms of this subsection shall be accepted as sufficient evidence of the contents thereof and of the effective date of any amendment thereto."*

[17] In terms of Section 47(9)(a) of the Act the Commissioner may in writing determine the tariff headings, tariff subheadings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified.

[18] South Africa is a party to the Harmonized System Convention and a member of the WCO, as such Part 1 of Schedule 1 of the Act comprises of Section and Chapter Notes as well as the General Rules of Interpretation (the GRI") of the harmonized system and the tariff headings.

The following GRI are relevant and I deem it fit to quote them here

[18.1] *RULE 1: the titles of sections, chapters and subchapters 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.*

[18.2] RULE 3: *When by application of Rule 2(b) or for any other reason, goods are prima facie, classifiable under two or more headings, classification shall be effected as follows:*

*(a) The headings which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.*

*(c) When goods cannot be classified by reference to 3(a) or 3(b) , they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.*

*[18.3] RULE 6: For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.*

**The relevant tariff heading**

[19] In terms of Schedule I ("the tariff book"), the goods in question fall under Chapter 84 of Part 1 / Section XVI Chapter 84.

[19.1] Before the amendment it read as follows;

| | |
|---|---|
| **84.15** | **Air conditioning machines, comprising a motor – driven fan and elements for changing the temperature and humidity, including those machines in which the humidity cannot be separately regulated:** |
| **8415.10** | **Window or wall types, self-contained or 'split-system'** |

| | |
|---|---|
| 8415.10.40 | Compressor operated, having a rated cooling capacity not exceeding 8.8 kW |
| 8415.10.90 | Other |
| **8415.8** | **Other** |
| ..... | |
| 8415.83 | Not incorporating a refrigerating unit |
| **8415.90** | **Parts:** |
| 8415.90.10 | Other parts identifiable for use solely or principally with the machines of subheading 8415.10.40 |
| 8415.90.90 | Other |

[19.2] The tariff heading currently reads as follows:

| | |
|---|---|
| **84.15** | **Air conditioning machines, comprising a motor –driven fan and elements for changing the temperature and humidity, including those machines in which the humidity cannot be separately regulated:** |
| **8415.10** | **Window or wall types, self-contained or 'split-system'** |
| **8415.8** | **Other:** |
| 8415.10.10 | Of a kind used for buildings, compressor operated, having a rated cooling capacity not exceeding 8.8 kW |
| 8415.10.20 | Of a kind used for buildings, NOT compressor |

| | |
|---|---|
| | operated, having a rated cooling capacity not exceeding 8.8 kW |
| ------ | |
| **8415.83** | **Not incorporating a refrigerating unit:** |
| 8415.83.10 | Of a kind used for buildings, having a rated cooling capacity not exceeding 8.8 kW |
| ------ | |
| **8415.90** | **Parts** |
| 8415.90.05 | Indoor units and outdoor units for machines of subheadings 8415.10.10 and 8415.10.20 |
| 8415.90.20 | Other parts identifiable for use solely or principally with compressor operated machines of subheading 8415.10 having a rated cooling capacity not exceeding 8.8 kW |
| 8415.90.90 | Other |

**Subheading explanatory Notes of heading 8415.10**

[20] Before the amendment by the WCO on 17 December 2012, they read as follows:

> *"This subheading covers air conditioning machines of window or wall types, self-contained or 'split system'.*

*The self-contained type air conditioners are in the form of single units encompassing all the required elements and being self-contained.*

*The 'split system' type air conditioners are ductless and utilize a separate evaporator for each area to be conditioned (e.g., each room)".*

[20.1] After the amendment, the following new sentence was inserted as a second sentence in paragraph 3 ;

*" The indoor heat exchanger unit may be mounted in various locations, for example, in a wall or window , or ceiling."*

**THE DISPUTE AND ISSUES FOR DECISION**

[21] The dispute between the parties turns into two issues; (a) the nature and characteristics of the goods, and (b) the correct interpretation of the relevant tariff heading subheading 8415.10.

[22] The applicant contends that there is no scope for inclusion of ceiling type air conditioners and that the use of the word "type" cannot lead to

an extended meaning to include ceiling type split air conditioners under this subheading.

[23] There is consensus with regard to the nature and characteristics of the goods and as such I am not required to make a decision in that regard. Therefore the only issue for decision is the second part of the dispute, namely, the correct interpretation of tariff subheading 8415.10.

It is common cause that the applicant imports two types of air conditioning units, namely, indoor units that are of the type to be installed in or under ceilings and outdoor units that are not wall or window types but placed or mounted outside the building on the floor, ground or roof. The outdoor units cannot be fitted against the wall because there must be space between it and the wall for it to function properly.
The applicant explained further that the outdoor units do not contain bars and that the products are classified as presented upon importation. The respondent's response in the answering affidavit in this regard was a bare denial.

[24] The classification process was described in the well-known case of **International Business Machines SA (Pty) Ltd v CSARS 1985(40) SA 852 (A)** at paragraph 836g as follows:

*"Classification as between headings is a three-stage process: first, interpretation-the ascertainment of the meaning of the words used in the headings (and 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"*

[25] The correct approach in interpretation of the Harmonized System contained in Schedule 1 and in particular the value of the Explanatory Notes was described in the matter of **Secretary for Customs and Excise v Thomas Barlow & Sons 1970 (2) SA 660 (A).** ("the Barlow matter ")

[25.1] Trolilp JA had this to say about the Schedule (highlighted for emphasis) , its purpose, the correct approach to interpretation of the Schedule and how to resolve a conflict between the Explanatory Notes and the tariff headings and chapter notes.

" *The Schedule itself and each section and chapter are headed by 'notes', that is, rules for interpreting their provisions. It is clear that the above grouping and even the wording of the notes and the headings in Schedule 1 are very largely*

*taken from the Nomenclature compiled and issued by the Customs Co-operation Council of Brussels. That is why* ***the Legislature in sec. 47 (8) (a) has given statutory recognition to the Council's Explanatory Notes to that Nomenclature.*** *These Notes are issued from time to time by the Council obviously, as their name indicates,* ***to explain the meaning and effect of the wording of the Nomenclature. By virtue of sec. 47 (8) (a) they can be used for the same purpose in respect of the wording in Schedule 1. It is of importance, however, to determine at the outset the correct approach to adopt in interpreting the provisions of the Schedule and in applying the explanations in the Brussels Notes.***

*Note VIII to Schedule 1 sets out the 'Rules for the Interpretation of this Schedule'. Para. 1 says:*

> *"The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification (as between headings) 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 indicate, according to paras. (2) to (5) below.'*

***That, I think, renders the relevant headings and section and chapter notes not only the first but the paramount consideration in determining which classification, as between headings, should apply in any particular case.*** *Indeed, right at the beginning of the Brussels Notes, with reference to a similarly worded paragraph in the Nomenclature, that is made abundantly clear. It is there said:*

> *'In the second provision, the expression 'provided such headings or Notes do not otherwise require' (that is the corresponding wording of the Nomenclature) is necessary to make it quite clear that the terms of the headings and any relative section or chapter notes are paramount, i.e., they are the first consideration in determining classification.'*

*It can be gathered from all the aforegoing that the primary task in classifying particular goods is to* ***ascertain the meaning of the relevant headings and section and chapter notes,*** *but, in performing that task, one should* ***also use the Brussels Notes for guidance especially in difficult and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them. They are***

***manifestly not designed for the latter purpose, for they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. And, in any event, it is hardly likely that the Brussels Council intended that its Explanatory Notes should override or contradict its own Nomenclature. Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes. If an irreconcilable conflict between the two should arise, which in my view is not the case here, then possibly the meaning of the headings and notes should prevail, because, although sec. 47 (8) (a) of the Act says that the interpretation of the Schedule 'shall be subject to' the Brussels Notes, the latter themselves say in effect that the headings and notes are paramount, that is, they must prevail. But it is not necessary to express a firm or final view on that aspect"***

[26] Counsel for the both parties relied on this dicta and one of Miller AJA in the same judgment to advance their respective arguments with regard to the value of the Explanatory Notes ("EN's") and in particular

how to resolve a conflict between them and the headings, chapter and section notes..

The bottom line though is that these dicta were followed in subsequent decisions of the SCA and applied in various high courts decisions to support the principle that the Explanatory Notes serve only as a guide.

[26.1] In the matter of **CSARS v The Baking Tin [2007] SCA 100 (RSA)**, **Lewis JA** reaffirmed the principle that EN's are ot peremptory but guidelines in interpretation of tariff headings.:

> *"[6] The explanatory notes are not, however, peremptory injunctions. In Secretary for Customs and Excise v Thomas Barlow & Sons Ltd2 Trollip JA said that 'they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations'. See also Lewis Stores (Pty) Ltd v Minister of Finance.3"*[1]

**APPLICANT'S SUBMISSIONS**

[27] The case for the applicant is premised on two main arguments, namely,

[1] Footnotes omitted from the quotation

(a) that the wording of subheading 8415.10 leaves no scope for inclusion of ceiling air conditioners and;

(b) The amendment that seeks to include ceiling air conditioners in this subheading has created a conflict or contradiction between the terms of the headings and the relevant Explanatory Notes. In this regard, the applicant's argument is that the emphasis on EN's is misplaced. The terms of the headings, so the argument goes, should take precedence over the EN's.

Interpretation of subheading 8415.10

[28] Mr Vorster SC argued that the words to be interpreted are "window or wall types, self- contained or 'split system'.
The meaning is accordingly self-evident and cannot include ceiling type air conditioners or outdoor air conditioning units.

Furthermore, the use of the word "or" between "self-contained " and "split system" indicates that for the machine to fall under tariff heading 8415.10 the machine can either be a window or wall type which is self-contained or a window or wall type which is a split system.

[29] He relied on the dictionary meaning of the words window, wall and ceiling to advance the argument that ceiling air conditioners are not included in subheading 8415.10.

The Collins Concise English Dictionary , HarperCollins, Eighth Edition, 20212 describe these three words as follows:

> *"Window: A light framework, made of timber, metal or plastic, that contains glass or glazed opening frames and is placed in a wall or roof to let in light or air or to see through .."*
>
> *Wall: A vertical construction made of stone , brick, wood, etc, with a length and height much greater than its thickness, used to enclose, divide or support.."; and*
>
> *Ceiling: The inner upper surface of a room..."*

[30] It was further contended on behalf of the applicant that taking into account the undisputed characteristics of the goods and the wording of TH8415, the correct subheading is 8415.90.90.

The insertion of the amendment

[31] With regard to respondent's reliance on the amendment of 17 December 2012, Mr Vorster SC argued that the insertion was not done by the South African Legislature but by the WCO and affect the Explanatory

Notes. If the Chapter Notes had been amended, it would be a different situation.

[32] Reliance on this insertion is wrong for the following reasons;

(a) Even if the Commissioner is correct in the submission that ceiling air conditioners are included in subheading 8415.10 , there is no defence with regard to the inclusion of outdoor units.

(b) Prior to December 2012, there is no way that subheading 8415.10 could have referred to ceiling air conditioners. No retrospective effect was intended by the WCO amendment.
I was referred to the matter of **CSARS v Coltrade International CC**[2]

(c) The approach of the Commissioner is consistent with the obiter of Miller AJA in the Barlow judgment when he referred to the effect of specific inclusions and exclusions in the Explanatory Notes and stated the following *"in such a case, despite the paramouncy of the headings and the section and chapter notes, it might be that an express inclusion or exclusion in the Explanatory Notes would prevail, on the ground that failure to obey it would be to disregard*

[2] (54/2015) [2016] ZASCA 53 (1 April 2016]

*the statutory injunction to interpret the headings 'subject to' the Explanatory Notes.*

[d] The current situation though is as stated in the judgment of Lewis JA in the Baking Tin matter.

**RESPONDENT'S (COMMISSIONER) SUBMISSIONS**

[33] On behalf of the Commissioner, Mr Meyer SC and Mr. Mothibe submitted (as I have already stated above) that the dispute turns on the interpretation of subheading 8415.10. The Commissioner is in agreement with the applicant with regard to the value and importance of Explanatory Notes but denied that the Commissioner is placing too much emphasis on them.

[34] The Commissioner agrees with the principles in the Barlow matter that interpretation starts with considering the nature of the Notes. Some are general and some are more specific. The process starts with considering the specific type of goods. In this case it is air conditioners. In the subheadings it become more specific. In this case one only need to concern oneself with the subheading, 8415.10.

[35] It is correct that the 2012 amendment was an amendment to the EN's. The purpose of the EN's is to explain and if they are not clear, amendments are done. What was to be interpreted before and after the amendment is the same.

[36] Section 47(8)(a) of the Act says that interpretation "must" and not "may " be done subject to the Hamonized System .

He referred to paragraph [15] of the Coltrade matter where Leach JA expressed the importance of the explanatory note under consideration in that matter. The EN was not ignored. It was considered and only at the end it was held not to support the commissioner's contention.

[37] On the correct classification on the goods, Mr. Meyer SC referred to the affidavit of the expert consultant of the applicant, Mr. Theys dated 23 September 2014 where he stated the following *'"Firstly, the term , 'through –the –wall-unit' , i.e "window type", is restricted to self-contained air conditioners in which the evaporator unit and the condensing unit are integrated in a single housing; the self-contained unit is mounted in a specially made hole in the wall or window frame with the evaporator facing the inside of the room, and the condenser facing the outside of the building. The machines at issue are of a split type, and are clearly distinguishable from the afore-mentioned "window types"*

Mr Meyer SC's understands this part of Theys's affidavit to mean that the applicant's contention is that it is not possible to have a window type as a split system. Theys is alleged to support the respondent's contentions.
The reference to Theys's affidavit quoted above was intended to show what Mr Meyer referred to as " the absurdity" of the applicant's argument that the use of the word "or" between "self-contained " and "split-system" indicates that in order to fall within tariff subheading 8415.10, the machine can be either a window or a wall type machine which is self-contained or a window or wall type which is a split system .

I was referred to two cases[3] to support the contention that one must guard against a literal interpretation of words where it is clear that it will lead to absurd results.

Mr. Vorster SC dealt with this issue in reply by referring to paragraph [18] of the judgment of Wallis JA in the matter of **Natal Joint Municipal Pension Fund v Endumeni Municipality**[4] I will deal with this issue in more detail later in this judgment.

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[3] Hanekom v Builders Market Klerksdorp (Pty) Ltd and Others 2007 (3) SA 95,
Poswa v MEC for Economic Affairs, , ETC, Eastern Cape 2001 (3) SA 582
[4] (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012

[38] Mr. Meyer SC submitted further that subheading 8415.10 provides for "windows or wall types, self-contained or split system.

Therefore, what needs to be interpreted is the common denominator or characteristic of window or wall. The fact that the word "or" was used means that what is referred to is a "type" of group of things.

The Commissioner's argument here is that a ceiling air conditioner is one of the types of air conditioners such as a wall or window type.

**DISCUSSION AND POSSIBLE ORDERS**

[39] At the conclusion of the hearing, the parties agreed to submit possible draft orders based on the evidence presented and findings that I would make with regard to their respective arguments. Three possible orders were identified.

[39.1] The first one is premised on the applicant's argument that on a proper interpretation of tariff sub-heading 8415.10 it covers window or wall types which are self-contained or split-system (i.e. that split-systems which are not window or wall types are not covered by the tariff subheading).

If this interpretation is upheld then the appropriate order would be;

*"That the Respondent's tariff determination (annexed to the founding affidavit as Annexure "NS8"), determining the products under issue under tariff heading 8415.90.05 and tariff heading 8415.10 be set aside and replaced with a tariff determination under tariff heading 8415.90.90.*

[39.2] The Commissioner's argument is that on a proper interpretation of tariff heading 8415.10 it covers all types of split-system air conditioners. If that interpretation is upheld then the appropriate order would be ; " *The application is dismissed with costs, such costs to include the costs of two counsel.*

[39.3] The Commissioner contends , which contention is disputed by the applicant, that if the applicant's argument above is accepted, it would only be entitled to an order in terms of prayer 2 ( the alternative to the main relief) of its notice of motion, and in this regard the order would be ; *"That the Respondent's tariff determination be set aside and replaced with a determination that until 17 December 2012 the products are classified under tariff heading 8415.90.90 and thereafter under tariff heading 8415.90.05 or 8415.90.10 as the case may be.*

[40] The applicant does not agree with the third proposed draft in paragraph [39.3] above. The reason being that it has always maintained that the explanatory note which was inserted on 17 December 2012, and which refers to a ceiling, is in conflict with the wording of the tariff subheading.

It is applicant's view that if such an order is granted, it is entitled to costs as it would have been substantially successful.

**LEGAL PRINCIPLES, ANALYSIS OF EVIDENCE AND FINDINGS ON THE MOST APPROPRIATE SUBHEADING**

[41] The question is whether the words "split system " is restricted to air conditioners that are capable of being mounted in the window or wall as the first part says or they include split system air conditioners that can also be mounted in the ceiling.

As I understand the Commissioner's version, the operative term here is "type" and as such, all types of air conditioners are included in this subheading, irrespective of where they are mounted. The reference to "window or wall" is just but an example of areas where air conditioners are mounted.

On the other hand, the applicant contends that "split system " as it appears in this subheading refers to air conditioners that are mounted on the window or wall.

[42] We already know that the Commissioner was of the view that the subheading is restrictive, hence an informal opinion was sought in 2002 with regard to whether ceiling mounted air conditioners can be included in this subheading.

The rationale for inclusion of the ceiling air conditioners is that the "wall and window " are just examples of places where the air conditioner may be mounted..

[43] In the matter of **Fundtrust (Pty) Ltd (in liquidation) v Van Deventer**[5] it was said that *"Recourse to authoritative dictionaries is a permissible and often helpful method available to the courts to ascertain the ordinary meaning of words in a statute. But judicial interpretation cannot be undertaken by "excessive peering at the language to be interpreted without sufficient attention to the contextual scene". The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears. As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however it is not"* (at 726H-727B)

*"A departure from the plain words of a statute on account of anomalous results is only justified when the court is satisfied that such results were not*

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[5] 1997(1) SA 710 (A).

*intended. Similarly, where a statute is capable of more than one interpretation the fact that a particular construction would lead to an anomaly is not necessarily a conclusive indication that that construction was not intended. A construction leading to an anomalous result should accordingly only be rejected if the conclusion is justified that the result could not have been intended. Of course, if anomalies arise in more or less equal degree on either construction, they may be discarded as factors in the interpretation"* at 733G-734B)

[44] In the matter of **Rashavha V Van Rensburg**[6] the Appeal Court said that there is no need to resort to an interpretation of a section, generous, purposive or otherwise, where there is no uncertainty as to its meaning.

[45] **Wallis JA** in the Natal Joint Municipal Pension Fund[7] matter on the approach to interpretation

> *[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.*[13] *It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant*

[6] (2004) 1 ALLSA 168 (SCA)
[7] supra. Footnotes not reproduced.

*authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.*[14] ***The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.***[15] ***The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.*** *In a contractual*

*context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',[16] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. (highlighted for emphasis)*

*[19] All this is consistent with the 'emerging trend in statutory construction'.[17] It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Dönges NO and another,[18] namely* ***that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.*** *The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:*

> *'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from*

*their context.* ***The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'***[19]

[46] There relevant EN's read as follows; (own numbering)

[46.1] The first paragraph :

*"This subheading covers air conditioning machines of window or wall types, self-contained or 'split system'.*

[46.2] The second paragraph :

*The self-contained type air conditioners are in the form of single units encompassing all the required elements and being self-contained.*

[46.3] The third paragraph :

*"The 'split system' type air conditioners are ductless and utilize a separate evaporator for each area to be conditioned (e.g., each room)".*

[46.3.1] A second sentence was inserted in this paragraph by the amendment of 2012 and reads as follows:

> ***" The indoor heat exchanger unit may be mounted in various locations, for example, in a wall or window , or ceiling."***

[47] In my view, paragraphs 2 and 3 gave context to the first one. They explain what 'self-contained' and 'split system' means with reference to the identified type of air conditioners.

[48] If the meaning that the Commissioner seeks to ascribe to the first paragraph is correct, then there would have been no need to further breakdown and make provision for the type of air conditioners (8415.8) identified as "Other" in the subheadings.

This is a clear indication that the words "types" were not intended to give examples of air conditioners but to restrict the meaning to the two mentioned by name.

[49] What I am illustrating here is consistent with the common cause schematic arrangement of the subheadings. They starts by being general and as they go down, become more specific.

[50] As indicated above, the amendment to the EN's was published on 17 December 2012 and reads as follows " *The indoor heat exchanger unit may be mounted in various locations, for example, in a wall or window , or on a ceiling".*

Whilst the first paragraph deals with the type of air conditioners, this amendment deals with the locations where "indoor heat exchangers" may be mounted.

This does not detract from the fact that the subheading covers the type of air conditioners identified in the first paragraph. In my view it is not a clarification of the first paragraph as contended by the Commissioner.

[51] I do not agree with the Commissioner's contentions that any other type of air conditioner but the ones identified by name fall in this subheading.

[52] I agree with the applicant's contention that the Commissioner was wrong to determine its products as falling *under tariff heading 8415.90.05.* The correct tariff heading heading is 8415.90.90.

[53] The next issue that I need to consider is whether, as contended by the Commissioner, the applicant should only get relief in terms of prayer 2 of its notice of motion.

Prayer 2 reads as follows

> " *Alternatively to the above, that the tariff determination be set aside and replaced with a determination that until 17 December 2012 the products are classified under TH8415.90.90 and thereafter under TH8415.90.05 as the case may be*".

[54] I have set out the circumstances that preceded the WCO opinion of 12 December 2012 in the introductory parts of this judgment . What is important to note is the fact that the reason for the informal referral for an opinion to the WCO in 2002 was because of the concern that subheading 8415.10 was restrictive in that it excludes ceiling air conditioners. The reaction (underlined for identification) of the Commissioner to the informal opinion ( which is basically the same as the formal one of 2012) was amongst others as follows;

> *" In addition , there are two statement in the Secretariat's reply that have generated some concern.*

*Firstly, "...the Secretariat considers that the inclusion of the word "types" (window or wall types") makes this a non-exhaustive statement of the locations where the air conditioners at issue can be fitted..." South Africa therefore wonders whether this is a contradiction in terms?*

*Secondly, and very much in the same vein "Consequently the Secretariat takes the view that machines of this kind should be classified here even if they are not intended to be fitted to a wall or to a window..." South Africa is of the opinion that this is not in line with the wording of the item.*

[55] Although these proceedings are not an appeal against the WCO opinion, it is common cause now as I have stated above that the dicta in the Barlow matter about the status of the Harmonized System has now been confirmed and the law as it is now is that they are merely guidelines.

[56] The opposition of this appeal was built on the WCO opinion. Without deciding on its validity, I do not think that the applicant should only be entitled to relief up to the publication of that opinion.

[57] It may be best to reproduce what I have stated in an earlier paragraph in this judgment to illustrate the unfairness against the applicant if it were to obtain the relief in terms of Prayer 2.

> *"[11] The internal appeal was submitted on 17 June 2011. It was referred to the Tariff Policy Section which in turn and by agreement with the applicant referred it to the World Customs Organization ("WCO") for a formal opinion. The WCO's decision was made during March 2012 and was duly published in its website on 17 December 2012 in the form of a generic classification opinion and an amendment to the Explanatory Notes.*
>
> ***[11.1] The internal appeal was decided on 31 July 2012 against the applicant . The applicant was however only notified on 21 February 2014.***
>
> *The goods were determined to be classifiable under tariff heading 8415.90.05."*

[58] Therefore, I am not inclined to grant an order in terms of Prayer 2 as the Commissioner has contended. Firstly, as stated above, the WCO opinion is not law. If it was so, there would be no need to interpret the subheading. Secondly, as stated above, the WCO opinion and a

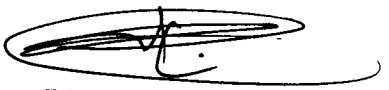
decision on the internal appeal were issued in March and July 2012, but the applicant was only notified in February 2014.

**ORDER**

[59] The appeal succeeds, and I make the following order:

*[59.1] the Respondent's tariff determination (annexed to the founding affidavit as Annexure "NS8"), determining the products under issue under tariff heading 8415.90.05 and tariff heading 8415.10 be set aside and replaced with a tariff determination under tariff heading 8415.90.90.*

*[59.2] The respondent is ordered to pay costs of this application.*



**TAN MAKHUBELE**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

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|---|---|
| **Applicant:** | **J P VORSTER SC** |
| Instructed by | Shepstone & wylie |
| | c/o: Clarinda Kugel Attorneys |
| | Pretoria |

| | |
|---|---|
| **Respondent:** | **J A MEYER SC ( with W N MOTHIBE )** |
| Instructed by: | The State Attorney, Pretoria |
| Date heard: | 19 May 2016 |
| | (Draft orders and submissions in this regard submitted on 30 May & 01 June 2016 ) |