REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 3516/18

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REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

JUDGE KUNY 28 DECEMBER 2022

In the matter between:

KEPU TRADING (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

KUNY J

1 This is a tariff appeal against a determination made by the respondent in 2016 in respect of the applicant's claims for refunds of excise duties and levies paid

on the purchase and supply of bunker fuel. The appeal is in terms of section 47(9)(e) of the Customs and Excise Act, 91 of 1964 ("the Customs Act").[1] The parties agree that it constitutes a reconsideration of the evidence and a rehearing of the merits of the dispute between the parties.

2 Between 15 April and 17 May 2016 the applicant submitted 19 claims for refunds of the excise duty and levies paid on the purchased fuel. On 31 October 2016 the respondent rejected all these claims. The applicant lodged an internal appeal against the decision to disallow the refunds. On 26 July 2017 the excise appeal committee disallowed the appeal and upheld the initial decision to refuse the refund.

3 The respondent counter-applied for declaratory relief. However, it does not persist with such application.

4 On 18 March 2016 the applicant was granted a licence in terms of section 64F of the Customs Act to operate as a licenced distributor of fuel. The claimed refunds are in terms of section 75(1)(d) of the Act read with Schedule 6. The fuel purchased by the applicant was sold as bunker to vessels. The refunds are claimed on the basis that the fuel was acquired for and exported to foreign-going vessels.

5 The applicant's case is the following:

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[1] A reference to the Customs and Excise Act in this judgment includes the Schedules, Rules, items and notes to the said Act.

5.1 The applicant supplied bunker fuel to smaller ocean going vessels, in particular fishing vessels, at Cape Town Harbour. It states that the main bunkering facilities at the harbour were not suited to supplying bunker fuel to smaller vessels and a need arose for an alternative method of supply.

5.2 During the period from 11 February to 13 April 2016 the applicant purchased eight bulk loads of bunker fuel [2] from Chevron South Africa (Pty) Ltd. Chevron is licenced as a customs and excise manufacturing warehouse ("manufacturing warehouse") in terms of section 19 of the Customs Act.

5.3 The applicant was invoiced and paid excise duty and levies in the amount of R11 837318,89 on the bulk loads when it purchased and took delivery of the fuel from Chevron.

5.4 The applicant was contractually obliged to purchase monthly a minimum of 2000 metric tonnes of fuel from Chevron. Each bulk purchase was for an amount of approximately 500 metric tonnes.

5.5 The applicant acquired the fuel from duty paid stock, specifically for export purposes namely, for supplies as stores of bunker fuel to foreign-going vessels.

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[2] In total 4 609 100 liters

5.6 Upon purchase, the fuel was transferred from Chevron's barge, the Southern Valour, to storage tanks leased by the applicant from FFS Refiners (Pty) Ltd ("FFS"). The storage tanks were situated at Cape Town Harbour's Eastern Mole dock. The fuel was then sold in smaller quantities (between 29 400 and 309 000 liters) according to the bunkering requirements of the receiving vessels.

5.7 The fuel was pumped from FFS' storage tanks directly into the vessel's bunker tanks through a pipeline connected to the vessel's flange

5.8 The applicant acquired ownership of the fuel once it was removed from the Southern Valour and pumped into FFS' tanks. It remained the owner until the fuel was delivered to the vessels and paid for by their owners.

5.9 It is standard industry practice in the supply of bunker fuel that it be sold through intermediaries as they have established relationships with the owners of vessels requiring supplies.

5.10 The process of supplying the bunker fuel to the vessels commenced with the intermediary sending the applicant a 'bunker fuel nomination' stating *inter alia,* the name and details of the vessel, the date of delivery and the volume and type of fuel required.

5.11 The applicant invoiced the intermediary who made payment for the fuel

in respect of each sale transaction on behalf of the vessel's proprietor. Notwithstanding the intervention of the intermediary, the applicant contends that at all relevant times, it was the owner and the exporter of the fuel and therefore, was entitled to a refund in terms of the Customs Act.

6 The applicant claims that it qualifies for a refund on the excise duty and levies paid at source on the following basis:

6.1 The applicant admits that was not a licenced distributor of fuel when some of the bulk loads of fuel were acquired from Chevron (per invoices TX02056, TX 02057 and TX 02098). However, it contends it was registered as a licenced distributor of fuel at the time that the bunker fuel was sold and delivered to the respective vessels. As such, the applicant contends that it has met the conditions required to claim refunds.

6.2 The applicant purchased the fuel for export purposes from the duty paid stock of a licensee of a manufacturing warehouse ("Chevron"). It paid the applicable excise duty and fuel levies on the fuel acquired from Chevron.

6.3 Chevron entered (or was deemed to have entered) the fuel for home consumption and it paid the applicable excise duty and levies to the South African Revenue Services.

6.4 The applicant supplied the fuel as stores for foreign-going ships. The fuel was delivered from FFS' storage tanks into the bunker tanks of the foreign-going vessels. Accordingly, the fuel was wholly and directly exported as contemplated by the provisions of the Customs Act read with the relevant items thereto.

DUTY AT SOURCE

7 The excise duty and fuel levies claimed by the applicant are administered and collected at source in terms of the duty at source system ("DAS"). It operates in the following manner:

7.1 The taxes are imposed on fuel (also on alcohol and tobacco) in terms of the Customs Act. There are three components: excise duty, a fuel levy and the Road Accident Fund levy.

7.2 Under the deeming provisions of section 19A of the Customs Act read with Rule 19A, the obligation to pay the applicable excise duty and levies arises when the fuel is removed from the manufacturing warehouse.

7.3 The fuel is deemed to have been entered for home consumption regardless of whether it is intended for home consumption or export. The licensee of the manufacturing warehouse is responsible to enter the fuel and pay the applicable duties and levies to the South African Revenue

Services.

7.4 In terms of section 75(1)(d) a refund of the excise duty and levies actually paid can be claimed in the circumstances contemplated in the relevant items in Schedule 6, Part 1F and Part 3.

7.5 Rebate item 623.25 in Schedule 6/Part 1F to the Customs Act, read with note 10, relates to the refund of the excise duty on fuel supplied as stores for foreign-going ships.

7.6 Rebate item 671.09 in Schedule 6/Part 3 to the Customs Act, read with notes 5 and 11, relates to the refund of the fuel and road accident fund levies in respect of fuel supplied as stores for foreign-going ships.

7.7 The duty at source system operates on the principal of self-assessment, in the same way that the Income Tax Act and VAT Act operates.[3] It is said to be self-regulating. The onus is on the party liable to pay tax, duties, levies and the like, to prove procedural and substantive compliance with the relevant legislation.[4]

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3 Petroleum Oil & Gas Corporation of South Africa (Soc) Limited v The Commissioner for the South African Revenue Service 2018 JDR 2076 (GP), para 30

4 Canyon Resources (Pty) Ltd v The Commissioner for the South African Revenue Service Case No 68281/2016 GNP at paragraph 9.10, Petroleum Oil & Gas (supra) at paragraph 37.1

THE LEGISLATION

8 Section 64F of the Customs Act provides for the licensing of distributors of fuel as follows:

> **64F Licensing of distributors of fuels obtained from the licensee of a customs and excise manufacturing warehouse**
>
> (1) For the purposes of the Customs Act, unless the context otherwise indicates -
>
> **'licenced distributor'** means any person who-
>
> (a) is licenced in accordance with the provisions of section 60 and this section;
>
> (b) obtains at any place in the Republic for delivery to a purchaser in any other country of the common customs area for consumption in such country or for export (including supply as ships' or aircraft stores), fuel, which has been or is deemed to have been entered for payment of excise duty and fuel levy, from stocks of a licensee of a customs and excise manufacturing warehouse; and
>
> (c) is entitled to a refund of duty in terms of any provision of Schedule 6 in respect of such fuel which has been duly delivered or exported as contemplated in paragraph (b);

9 In terms of 64F(2)(a):

> (2)(a) No person, except a licensee of a customs and excise warehouse, who removes to any other country in the common customs area or exports any fuel, which has been entered or is deemed to have been entered shall be entitled to any refund of duty unless such person is a licenced distributor as contemplated in this section.

10 Section 60(1) provides:

> **60 Licence fees according to Schedule 8**

(1)(a) No person shall perform any act or be in possession of or use anything in respect of which a licence is prescribed in Schedule 8 unless such person has obtained the appropriate licence which shall not be issued unless the prescribed licence fee has been paid.

(b) The activities for which a licence is required, the persons who are required to licence, the procedures, conditions, which may include the furnishing of security, and any other requirements relating to such licence, if not prescribed elsewhere in this Act, may be prescribed in the Notes to the item in which such licence is specified in Schedule 8 and any rules made by the Commissioner under the provisions of this Act.

11 Section 64F(3)(a) applies the relevant Rules and items of Schedule No 6 to refunds:

3(a) In addition to any other provision of this Act relating to refunds of duty, any refund of duty contemplated in this section shall be subject to compliance with the requirements specified in the item of Schedule 6 providing for such refund and any rule prescribing any requirement in respect of the movement of such fuel to any such country or for export.

12 Section 75(1)(d) provides as follows:

75 Specific rebates, drawbacks and refunds of duty

(1) Subject to the provisions of this Act and to any conditions which the Commissioner may impose-

(a)-(c) .....

(d) in respect of any excisable goods or fuel levy goods manufactured in the Republic described in Schedule 6, a rebate of the excise duty specified in Part 2 of Schedule 1 or of the fuel levy and of the Road Accident Fund levy specified respectively in Part 5A and Part 5B of Schedule 1 in respect of such goods at the time of entry for home consumption thereof, or if duly entered for export and exported in accordance with such entry, or a refund of the excise duty, fuel levy or Road Accident Fund levy actually paid at the item of entry for home consumption shall be granted to the extent and in the circumstances stated in the item of Schedule 6 in which

such goods are specified, subject to compliance with the provisions of the said item and any refund under this paragraph may be paid to the person who paid the duty or any person indicated in the notes to the said Schedule 6:

Provided that any rebate, drawback or refund of Road Accident Fund levy as contemplated in paragraph (b), (c) or (d), shall only be granted as expressly provided in Schedule 4, 5 or 6 in respect of any item of such Schedule.

13 Rebate Item 623.25 of Schedule 6/Part 1F provides:

> Fuel liable to excise duty which, after entry or deemed entry for home consumption and payment of duty by a licensee of a customs and excise manufacturing warehouse contemplated in section 19A and its rules is obtained from stocks of such licensee and exported (including supply as stores for foreign-going ships), by a licenced distributor contemplated in section 64F, subject to compliance with Note 10 to this Section.

14 Rebate Item 671.09 of Schedule 6/Part 3 provides as follows:

> Goods liable to the fuel levy and Road Accident Fund levy as specified in Part SA and Part 58 As provided in Note 11 read of Schedule No.1 respectively, which, after entry or deemed entry for home consumption and with Note 13 payment of duty by a licensee of a customs and excise manufacturing warehouse as contemplated In section 19A and its rules is obtained from stocks of such licensee and exported (including supply as stores for foreign-going ships) by a licenced distributor contemplated in section 64F, subject to compliance with Note 11.

15 Note 10 to Item 623.25 provides as follows:

10 For the purposes of rebate item 623.25 the following:

(a) Definitions:

For the purposes of this item, these Notes and section 75(11A), unless the context otherwise indicates-

“BELN countries” or “any other country in the common customs area” as referred to in section 64F, means the Republic of Botswana, the Kingdom of Eswatini, the Kingdom of Lesotho, or the Republic of Namibia;

“fuel” means, as defined in section 64F, any goods classifiable in any Item of Section A of Part 2 of Schedule No 1 liable to excise duty, used as fuel;

“refund” means a refund of excise duty in respect of fuel.

(b) Requirements in respect of refunds:

(i) The refund provided for in this Item is subject to the provisions of section 75(11A).

(ii) Any application for a refund of excise duty in terms of this item shall be subject to compliance with-

(aa) section 64F and its rules;

(bb) rule 19A4.04 mutatis mutandis and any other rule to which the item relates.

(iii)

(aa) Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly exported by the licenced distributor in order to be considered for a refund of duty;

(bb) A refund shall only be payable on quantities actually exported.

(iv) For the purposes of section 75(11A) the licenced distributor must produce in support of every refund claim proof from the licensee of the customs and excise manufacturing warehouse of the rate of duty paid in respect of the fuel obtained from such licensee for the purposes specified in this item.

(v) If the licenced distributor is unable to produce such proof, the duty on any quantity of goods so exported must be calculated at the rate of excise duty levied in terms of this Act on such goods during the month prior to the date on which any prescribed document was processed at the office of the Controller in respect of the removal of such goods from stocks of the licensee of the customs and excise manufacturing warehouse for export by the licenced distributor claiming a refund of duty under the provisions of this item.

16 Rule 38A.01 of the Rules defines a “foreign going ship” as including:

a) a ship at a seaport, harbour or other place in the Republic, if that ship-

(i) has arrived at that place in the course of a voyage from outside the common customs area to a destination or destinations inside the Republic, whether that place is that destination or one of those destinations or a stopover on its way to that or any of those destinations and is scheduled to depart from the Republic to a final destination outside the common customs area;

(ii) is scheduled to depart from that place in the course of a voyage to a final destination outside the common customs area, whether that place is its place of departure to that final destination or a stopover or one of several stopovers in the Republic or the common customs area from where it departs in the course of that voyage.

RESPONDENT’S OBJECTIONS TO THE REFUNDS

17 The respondent in its answering affidavit alleges the following requirements pertaining to the applicant’s claim for refunds were not met:

17.1 It must be shown that the fuel was locally manufactured by the licensee of a manufacturing warehouse (in this case Chevron).

17.2 The applicant must have been licenced as a distributor of fuel in terms of section 64F <u>at the time</u> of purchasing and obtaining the fuel from the manufacturing warehouse. It is not sufficient that it was licenced at the time the fuel was sold and exported.

17.3 The applicant must have purchased fuel directly from the manufacturing warehouse, from duty paid stock, entered or deemed to have been entered for home consumption.

17.4 The fuel must have been sold to a foreign-going vessel. The whole consignment of fuel acquired from the manufacturing warehouse must have been removed, supplied and loaded directly into the vessel. The Custom Act does not permit the applicant to purchase for export and store bulk quantities of fuel and thereafter, to supply it in smaller quantities to vessels.

17.5 The relevant documentation submitted to the Commissioner must have stated an identifiable foreign destination and the vessel must have left for the declared destination.

APPLICANT NOT LICENCED AT THE TIME OF ACQUISITION OF CERTAIN LOADS OF FUEL

18 The applicant made the following purchases of fuel from Chevron prior to obtaining its section 64F licence:

Date	Invoice	Metric tonnes	Liters
11/02/2016	TX02056	460.735	550 000
11/02/2016	TX02057	500.007	585 900
13/03/2016	TX02098	500.079	592 300

19 The above bulk orders were used to supply bunker fuel to vessels in respect of the applicant's refund claim numbers 1 to 8.[5]

20 The fuel in respect of Invoice TX02099 (of 535 000 litres) was purchased on 22 March 2016, after the applicant was licenced. However, the order in respect of claim no 8 was fulfilled partly from bulk orders TX02098 and TX02099. Given that there was a mixing of fuel in the storage tanks leased from FFS, it would be impossible to determine whether the supply of fuel in respect of claim no 8 was fulfilled from bulk fuel orders obtained obtain prior to or after the applicant was licenced.

21 It is common cause that when the applicant made bulk purchases of fuel from Chevron on 11 February and 13 March 2016 it was not a licenced distributor of fuel as contemplated in section 64F of the Customs Act.

22 In my view, the applicant is not entitled to claim a refund on fuel obtained for export unless at the time such fuel was purchased it was licenced in terms of section 64F. A licenced distributor of fuel is required in terms of section 64F(1)(a) to be licenced in terms of Section 60. The latter section provides that *"no person shall perform any act or be in possession of or use anything in respect of which a licence is prescribed in Schedule 8 unless such person has obtained the appropriate licence".*

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5 See schedule marked Annexure LD 5 at Caselines 005-121

23 It is clear from the Customs Act that the process for the export of fuel commences when the stocks are obtained from the manufacturing warehouse. The applicant was not licenced when the first three bulk orders were obtained. The applicant did not meet all the conditions established by Customs Act in order to be eligible for refunds.[6] In my view, the applicant's contention that it was entitled to claim a refund provided only that it was licensed at the time the bunker fuel was supplied to the vessels in question cannot be sustained. Accordingly, on this basis I would dismiss the applicant's claims for refunds under claim numbers 1 to 8.

WHOLLY AND DIRECTLY EXPORTED

24 As far as I can establish, the expression "wholly and directly exported" is used only in relation to the procedures for the export of fuel to a BLNS [7] country or to another foreign destination. I can find no other instances where this expression has been used in Customs Act in regard to the export of other goods.

25 Rule 64F.06(d) provides as follows:

> (d) Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery to a BLNS country or exported, as the case may be, in order to be considered for a refund of duty. [underlining added]

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6 Petroleum Oil and Gas Corporation of South Africa (Soc) Limited v The Commissioner for the South African Revenue Service (supra) at paras 32, 33, 35 and 37

7 "BLNS country in the Rules is the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia or the Kingdom of Swaziland.

26 Note 10, subsection (b)(iii)(aa) provides:

> Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly exported by the licenced distributor in order to be considered for a refund of duty. [underlining added]

27 Neither party referred in argument to any decided cases in which the expression "wholly and directly" is discussed or ruled upon by another court.

28 The applicant argues that the fuel acquired from Chevron will inevitably be temporarily retained in some form of receptacle prior to its delivery for export. It argues that it does not matter whether the receptacle is a road tanker, a pipeline or a storage tank. The applicant advanced the argument that because it retained ownership of the fuel throughout the process until it was pumped into the bunker tanks of the vessels concerned and paid for, it met the requirement that the fuel be wholly and directly exported.

29 The applicant referred to *South African Revenue Service (Customs and Excise) v Desmonds Clearing and Forwarding Agents* [8] ("*SARS v Desmonds*"). The case dealt with goods in bond that were being hauled on a licenced trailer that had broken down and had been kept in an un-bonded warehouse pending the repair of the vehicle. The question was whether such goods had been diverted as contemplated in section 18(13) of the Customs Act. The court held there was no diversion and stated the following:

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8 CC 2006 (4) SA 284 (SCA)

> A driver who, while transporting goods in bond, deviates from the normal route between, say, Durban and Harare, for whatever reason, but who intends to continue with his journey, does not make himself guilty of a contravention of section 18(13). His intended destination has not changed. Of course the extent of the detour would be one of the factors which would be taken into account in deciding whether the section had been contravened, but it cannot be concluded, merely by reason of the deviation, that the goods have been diverted to a destination other than that declared on entry for removal in bond.

30 The applicant also relies on an interpretation of section 38(3)(b) of the Customs Act to the effect that the fuel is deemed to have been exported at the time when it is delivered to the master of the ship concerned. It is implied that the whole and direct export occurs only when each load of fuel is pumped from FFS' storage tanks into the vessels' bunkers.

31 The following definition in the Shorter Oxford English dictionary (5th edition, 1993) is attributable to the word "directly":

> in a straight line; without deviation, without an intermediary;
> by a direct process.

32 "Wholly" is defined in the following terms:

> as a whole, in its entirety, in full .... all together, in a body,
> completely, entirely; without limitation or diminution

33 The respondent contends as follows:

33.1 The use of the word "load" in the Rules and Schedule 6 in conjunction with the phrase "wholly and directly" is of the utmost importance.

33.2 In order to obtain a refund of the duty and levies paid, the entire load of fuel obtained for export from the manufacturing warehouse must be delivered directly to the consignee.

33.3 SARS' directive provides that where applicable, the particulars of the foreign consignee are to be provided at the time when the fuel is obtained from the licensee. This, so it is argued, supports the contention that each load obtained from the manufacturing warehouse must be immediately and directly delivered to the identified consignee and cannot be stored for later delivery.

33.4 The legislation pertaining to DAS envisages as regards certain activities, that there will be a need for fuel to be bought in bulk and stored and thereafter be distributed in smaller quantities. The respondent refers to the notes to rebate Item 670.04 dealing with refunds on purchases of fuel that may be claimed by persons or entities undertaking activities such as mining, farming and fishing.

33.5 The respondent contends that the absence of any similar provision (relating to fuel storage) in regard to rebate Items 623.25 and 671.09 demonstrates that the storage of the fuel by a licenced distributor prior to export to foreign-going vessels is not contemplated in the Customs Act.

33.6 FFS was licenced as a manufacturing warehouse in respect of residual

fuel oil, being a non-dutiable product. However, it was not licenced in terms of the Customs Act to store the duty paid stock acquired from Chevron, either for its own account or on behalf of the applicant.

34 The respondent relied on section 20(4) and section 20(4)bis of the Customs Act. These sections provide:

> 20(4) Subject to section 19A, no goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry for any of the following purposes-
>
> (a)-(c) .....
>
> (d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft.)
>
> 20(4) bis No person shall, without the written permission of the Controller, divert any goods entered for removal from or delivery to a customs and excise warehouse, except goods entered for payment of the duty due thereon, to a destination other than the destination declared on entry of such goods or deliver or cause such goods to be delivered in the Republic except in accordance with the provisions of this Act.

35 Section 19 of the Customs Act provides that customs and excise warehouses are licenced either for manufacture or for the storage of dutiable goods. The respondent may licence a storage and manufacturing warehouse on the same premises provided they are separated in a manner approved by him.

36 The Rules to the Customs Act permit the removal of fuel levy goods from one

manufacturing warehouse to another.[9] However, stringent conditions and procedures are prescribed. Rule 19.04 provides that any customs and excise warehouse licenced for the storage or manufacture of any particular commodity or article shall not be used for any other purpose, except with the written permission of the Controller.

37 It is common cause that FFS was not licenced as a manufacturing warehouse in respect of the type of fuel purchased and supplied by the applicant. There is no indication that it was licensed as a customs and excise storage warehouse. Furthermore, there is no evidence that the prescribed procedures for the removal of fuel from one customs and excise warehouse to another were followed or that the permission of the Controller was sought to store the fuel acquired by the applicant for export in the FFS storage tanks.

38 The applicant adopted its own method of accounting for the movement of the fuel by employing, Saybolt, an independent inspection company. Saybolt was contracted to verify the quality and quantity of the fuel and oversee the loading of the fuel from the Southern Valour to the FFS' tanks and thereafter to the recipient vessels.

39 *SARS v Desmonds* dealt with goods in bond that were being transported by road to another country. The storage of goods in a warehouse en route to their destination resulted from the breakdown of a truck. *In casu* the Customs Act

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9 See Rule 19A4.06

required the loads of fuel removed from the manufacturing warehouse to be wholly and directly exported. *SARS v Desmonds* is distinguishable both on the facts and the law.

40 In my view, the removal of the fuel (after purchase) to a storage facility not licenced for that purpose and the mixing of loads of fuel in the storage tanks prior smaller quantities being supplied vessels, was not permitted in terms of the Customs Act. As such, the storage of fuel in the FFS tanks constituted a form of diversion of goods contrary to the provisions of section 18A(9)(a) and/or 20(4)bis.

41 There are inherent problems with the employment of a method of supply that permits the mixing in a storage tank of different loads of fuel purchased for export. It is not inconceivable that the dutiable rate could change between the purchase and storage of separate loads of fuel. A situation could arise where there was a mixing of fuel on which different rates of duty and levies had been imposed. In these circumstances, the parties to the transaction would not be able to determine the rates of the duty and levies on a particular supply of fuel for export.

42 In my view, the postulated situation demonstrates that procedures employed by the applicant that resulted in the mixing of loads of fuel destined for export, are not envisaged by the Customs Act. The rebate system is contingent on all the export criteria having been met in respect of the supply of each load of fuel. In

my view, the phrase “wholly and directly” must be interpreted in this context.

43 It follows in my view, that the movement and storage of the fuel in FFS storage tanks, prior to export, was contrary to the Customs Act read with the Rules and the rebate items in Schedule 6. In the circumstances, I find that the fuel supplied by the applicant in respect of all the claims was not wholly and directly exported.

FOREIGN-GOING SHIPS

44 Both parties referred to the definition of foreign-going ships in Rule 38A.01. They accept that in the supply of bunker fuel to vessels, said to have been exported, each vessel must have been scheduled to depart from the Republic to a final destination outside the common customs area. [10]

45 In *De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (5) SA 136 (SCA), the court dealt with the export of bunker fuel to a ship sailing on the high seas. The court stated the following in regard to the meaning of the word “export”:

> [5] ..... There can be little doubt that, while ‘export’ in a general sense may mean ‘to carry away’ or ‘remove’, in a narrower commercial sense it bears one of the meanings attributed to it in Black’s Law Dictionary (7th ed): ‘to transport (merchandise) from one country to another in the course of trade’. That connotation is supportive of the Commissioner’s case since it is likely that

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10 The SACU is the Southern African Customs Union between Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of eSwatini

> the Legislature had its ordinary commercial meaning in mind when using the word in a commercial context, and the supply in this case was not to another country. Even so, and like the Court *a quo*, I am hesitant to regard a meaning extracted from a miscellany of dictionary definitions as conclusive of the entire issue (cf Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer 1997 (1) SA 710 (A)). The better approach, so it seems to me, is to bear that meaning in mind when examining the provisions of the Act itself in order to determine whether there is anything in the context in which the word is used that adds to or detracts from its ordinary commercial meaning.

Further on at paragraph 8 the court stated:

> [8] The true antithesis of 'home consumption' is 'foreign consumption'. Foreign consumption (and hence 'export') has two sequential elements: (a) physical removal from South Africa; and (b) use or consumption not in South Africa. Foreign use or consumption postulates a foreign destination for further delivery of the goods taken from the warehouse in South Africa. The foreign destination will as a matter of probability mostly be a foreign country but there is nothing in the actual wording of the Customs Act that ordains the introduction of such a further refinement to bring it in line with the ordinary commercial meaning of 'export' referred to in para [5]; and counsel for the Commissioner conceded in argument that 'a foreign-going ship' to which bunker fuel is supplied on the high seas, for use or consumption outside South Africa, either as cargo or as stores, cannot be ruled out as a foreign destination.

46 The parties did not address argument on what is meant by "high seas". The best explanation I could find is as follows:

> **high seas**, in maritime law, all parts of the mass of saltwater surrounding the globe that are not part of the territorial sea or internal waters of a state.....The doctrine that the high seas in time of peace are open to all nations and may not be subjected to national sovereignty (freedom of the seas) was proposed by the Dutch jurist Hugo Grotius as early as 1609.....Freedom of the high seas is now recognised to include freedom of navigation, fishing, the laying of submarine cables and pipelines, and overflight of

aircraft.[11]

47 In terms of section 2 of the Territorial Waters Act 81 of 1963, the territorial waters of the Republic constitute the sea within a distance of twelve nautical miles[12] from the low-water mark.

48 Section 3 of the above Act provides for a fishing zone as follows:

> **3 Fishing Zone**
>
> The sea outside the territorial waters of the Republic, but within a distance of two hundred nautical miles from low-water mark, shall constitute a fishing zone in respect of which the Republic shall in relation to fish and the catching of fish have and exercise the same rights and powers as in respect of its territorial waters as defined in section 2.

49 The destinations of the vessels to which bunker was supplied are declared in the DA 3 Forms. This form constituted a certificate of clearance for a ships for a destination outside of the Republic. The declaration requires a statement regarding where the ship has come from and where it is bound. The destinations of the vessels to which the applicant supplied bunker fuel were as follows:

49.1 Claims 1 to 4 - Uruguay and Rio de Janeiro.

49.2 Claims 6 - no destination listed.

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11 https://www.britannica.com/topic/high-seas

12 a nautical miles is 1 852 metres.

49.3 Claims 7, 8, 12, 13 and 19 - High Seas.

49.4 Claims 9, 10, 11 and 14 - Fishing Grounds.

49.5 Claim 15 - Durban.

49.6 Claims 16 and 17 - Nacala (Mozambique) listed.

49.7 Claim 18 - both high seas and fishing grounds.

50 Save for claims 1 - 4 and 16 and 17, in my view, there is doubt as to whether the vessels relating to the claims satisfy the requirement that they are foreign-going vessels.

51 I cannot conclude in respect of the declared destinations “high seas” and “fishing grounds”, that the respective vessels were scheduled to depart from the Republic to a final destination outside the common customs area. In a number of instances where the ship is bound for fishing grounds or the high seas, this is also the declared place that it has come from. The applicant accepts that in all probability the smaller vessels that were refueled were fishing vessels.

52 It is possible that the high seas and fishing grounds are either in the territorial waters or the fishing zones of the Republic of South Africa. I do not accept, without more being said, that it is contemplated that these are final foreign

destinations for the purposes of determining whether the supply of bunker fuel to the relevant vessels was exported in terms of the Customs Act.

53 In the circumstances, save for claims 1, 2, 3, 4, 16 and 17, I would reject the applicant's claims for refunds on the basis that it has not been proven that the fuel was supplied by the applicant to foreign-going vessels.

54 In *Petroleum SA* (supra) it was held that only once both the substantive and procedural prescripts and requirements of the relevant rebate item and the provisions governing the payment of refunds have been complied with, does the participant become entitled to the refund of duty.[13] In relation to compliance with statutory regulations, it was held in *Maharaj v Rampersad* [14] as follows:

> The enquiry, I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance.

55 For the reasons set out above, I concluded that the applicant has not established an entitlement to a refund in terms of in terms of section 75(1)(d) of the Customs

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13 Petroleum Oil & Gas Corporation of South Africa (Soc) Limited (supra) para 37.2

14 1964 (4) SA 638 (A) at p646

and Excise Act, 91 of 1964 read with the relevant rebate items of Schedule 6, Part 1F and Part 3.

56 The applicant annexed to its founding affidavit a newspaper report dated 31 October 2015 discussing the problems caused by a breakdown of the refueling pipeline system at Cape Town Harbour. Vessels had to be refueled by road tankers that had to reverse down the quayside, pull up alongside vessel and pump the bunker fuel directly into its storage tank.

57 The respondent is adamant that bunker fuel supplied for export can only be supplied to vessels either by a pipeline directly from the manufacturing warehouse or by means of a road tanker using the above procedure.

58 The road tanker method of refueling was said to create supply problems and also carry health and safety risks. Mention was also made of the fact that a different grade of fuel is used by ships and this required that road tankers be cleaned when the bunker fuel was transported. This was said to carry additional costs.

59 There appears to be a need for supplying bunker fuel for export at Cape Town Harbour to smaller foreign-going vessels, other than by road tanker. As I have found, the method employed by the applicant precludes refunds being claimed on the export of fuel. The respondent should give consideration to a scheme that permits licenced distributors of fuel to supply bunker fuel by pipeline to smaller

vessels, in a manner that will enable duty free exports to take place. This may involve amendments to the Rules to the Customs Act.

60 In the circumstances I make the following order:

1 The appeal is dismissed.

2 The applicant is ordered to pay the respondent's costs of the appeal, such costs to include the employment of two counsel.

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JUDGE S KUNY

JUDGE OF THE HIGH COURT
NORTH GAUTENG DIVISION

Date of hearing: 7 February 2022, 25 & 26 April 2022

Date of judgment: 28 December 2022

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