THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 728/2012
Not Reportable

In the matter between

SMITH MINING EQUIPMENT (PTY) LTD **APPELLANT**

and

THE COMMISSIONER: SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Smith Mining Equipment (Pty) Ltd v The Commissioner: South African Revenue Service* (728/12) [2013] ZASCA 145 (01 October 2013)

Coram: Nugent, Lewis, Bosielo and Wallis JJA and Swain AJA

Heard: **17 September 2013**

Delivered: **01 October 2013**

Summary: **Customs and Excise Act 91 of 1964 – tariff determination – section 47(9)(*a*)(i)(*aa*) of the Act – Kubota RTV 900 Utility Vehicles – imported – whether tariff heading 8904.21.80 or tariff heading 8709.19 is the most appropriate classification for customs duty.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Prinsloo, Tolmay JJ and Van der Byl AJ sitting as a court of appeal):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

BOSIELO JA (NUGENT, LEWIS and WALLIS JJA and SWAIN AJA CONCURRING):

[1] This appeal concerns the correct classification for customs duty purposes of a vehicle known as a Kubota RTV Utility Vehicle. The Commissioner for the South African Revenue Service – the respondent in this appeal – classified the vehicles under TH 8704.21.80. The appellant – Smith Mining Equipment (Pty) Ltd – appealed against the determination to the North Gauteng High Court under s 47(9)(e) of the Customs and Excise Act 91 of 1964, seeking a declaration that it falls to be classified under TH 8709.19. That court (Bertelsmann J) upheld the appeal and granted the order. On appeal to the full court by the Commissioner those orders were set aside (Prinsloo and Tolmay JJ and Van der Byl AJ). This further appeal by Smith Mining is before us with the special leave of this court.

[2] The competing tariff headings in section XVII of Part 1 of Schedule 1 to the Act are headings 87.04 (subheading 8704.21.80) and 87.09 (subheading 8709.19), which read as follows:

'87.04: MOTOR VEHICLES FOR THE TRANSPORT OF GOODS

8704.21.80: Other, of a vehicle mass not exceeding 2 000 kg or a G.V.M. not exceeding 3 000 kg, or of a mass not exceeding 1 600 kg or a G.V.M. not exceeding 3 500 kg per chassis fitted with a cab.'

87.09: WORKS TRUCKS, SELF-PROPELLED, NOT FITTED WITH LIFTING OR HANDLING EQUIPMENT, OF THE TYPE USED IN FACTORIES, WAREHOUSES, DOCK AREAS OR AIRPORTS FOR SHORT DISTANCE TRANSPORT OF GOODS; TRACTORS OF THE TYPE USED ON RAILWAY STATION PLATFORMS; PARTS OF THE FOREGOING VEHICLES.

8709.19: Other'

Our task in choosing between these headings is simplified by the fact that, unless we are persuaded that heading 87.09 is the applicable heading, the classification by the Commissioner must stand.

[3] The proper approach to customs classification was set out in *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise,*[1] in which Nicholas AJA stated:

'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.'

[4] In *Secretary for Customs & Excise v Thomas Barlow and Sons Ltd,*[2] Trollip JA described the structure of Schedule 1 as follows:

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[1] *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) at 863F-G.

[2] *Secretary for Customs & Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (A) at 675D-675H.

'[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 appear sub-headings of the species of the 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.

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'.

[5] The approach to be adopted, generally, when applying the explanations in the Brussels notes, was explained by the learned judge as follows:[3]

'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

[3] At 676B-E.

construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes.'

[6] I do not think it is necessary to set out in full the explanatory notes that accompany the two tariff headings. It is sufficient to say that the explanatory notes to tariff heading 87.04 record, amongst other things, that 'the following features are indicative of the design characteristics generally applicable to the vehicles that fall under this heading', and then list various such characteristics. Similarly, the explanatory notes to tariff heading 87.09 'summarise the main features common to the vehicles of this heading which generally distinguish them from the vehicles of heading … 87.04'.

[7] In argument before us counsel for Smith Mining submitted that because the vehicle in question had the main distinguishing features summarised to in the explanatory notes to heading 87.09 – and I accept for present purposes that it did – that was indicative of the proper classification of the vehicle under that heading. As appears from the extract from *Thomas Barlow and Sons* above, that is not the correct approach. The primary question – in answer to which the explanatory notes might play a secondary role – is whether the vehicle falls under tariff heading 87.09.

[8] The central characteristic of vehicles falling under tariff heading 87.09 is not merely that they are used for the short transport of goods, but that they are 'of the type used in factories, warehouses, dock areas or airports' for that purpose. The starting point for the enquiry must then be to establish what vehicles are of that type, which is a factual question, to be established by evidence. No doubt there is a range of vehicles used for

that purpose in those locations, and it might be a matter of some difficulty determining what makes them 'typical', in which case the explanatory notes might be helpful, but a court is not in a position even to commence the enquiry without evidence of what those vehicles are.

[9] In this case there is no evidence at all of the type of vehicles used in those locations for the short transport of goods. Indeed, the only evidence advanced, which illustrated photographically vehicles used at airports, was struck out at the instance of Smith Mining. All that we know from the factual description of the vehicle is that it is capable of operating as a four-wheel drive vehicle, and all those imported are fitted with 'knobby' tyres suitable for hard-packed surfaces, wet turf and general usage, rather than heavy duty tyres suitable for asphalt, concrete and hard-packed surfaces. Whilst those features would not foreclose the use of the vehicles in factories, warehouses, dock areas and airports, they are unlikely to serve any purpose there and they also indicate that the vehicles are capable of being used in a wide range of other environments, such as on farms, golf courses or landscaping. That may well have the effect of removing them from being 'of the type used in factories, warehouses, dock areas or airports', but without evidence that question cannot be resolved.

[10] In the absence of such evidence it is not possible to find that the vehicle in issue is typical of such vehicles. In those circumstances the court below was correct to uphold the appeal and set aside the orders of Bertelsmann J.

[11] The appeal is dismissed with costs that include the costs of two counsel.

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L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	AP Joubert SC (with him CJ McAsslin) Instructed by: Ramsay Webber Inc., Johannesburg Lovius Block Attorneys, Bloemfontein
For Respondent	:	CE Puckrin SC (with him LG Kilmartin) Instructed by: State Attorney; Pretoria State Attorney, Bloemfontein