THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Commissioner, South African Revenue Service v Glencore Operations (Pty) Ltd (Case no 462/2020) [2021] ZASCA 111 (10 August 2021)

The Supreme Court of Appeal (the SCA) today upheld an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (the high court) (per Van der Westhuizen J). The respondent in the appeal, Glencore, used diesel in connection with its coal-mining operations in the district of Middleburg, Mpumalanga. In terms of Parts 5A and 5B of Schedule 1 to the Customs and Excise Act 91 of 1964, such diesel was subject to the fuel levy and Road Accident Fund levy imposed by the Act. In terms of item 670.04 of Part 3 of Schedule 6 read with s 75(1A) of the Act, a user of diesel is in specified circumstances entitled to a rebate of the said duties. One of those circumstances is the use of diesel in 'own primary production activities in mining' in accordance with the conditions specified in Note 6 forming part of Part 3 of Schedule 6. Note 6(f)(iii) provided at the material time that 'own primary production activities in mining' 'include[d]' the activities listed in items (aa) to (uu) of Note 6(f)(iii).

Glencore brought proceedings in the high court to establish its entitlement to a rebate in accordance with the foregoing provisions. Glencore contended that all its diesel-using activities fell within one or other of the items in the list. In the alternative, Glencore contended that to the extent that any of its activities were not covered by the list, the word 'include' was not exhaustive, and that its activities should thus nevertheless be held to be part of 'own primary production activities in mining'.

The high court found in Glencore's favour, holding that the list of activities was not exhaustive. The SCA unanimously reversed the high court's decision, holding that Glencore's application should have been dismissed with costs. In a majority judgment, Petse DP (with Mbha and Mabindla-Boqwana JJA concurring) held that the list of activities in Note 6(f)(iii) plainly included activities which fell outside the ordinary meaning of 'primary production activities' but that Glencore had adduced insufficient evidence to bring its activities within the scope of the items in the list. As to Glencore's alternative contention, Petse DP held that the list was an exhaustive

definition. Because Glencore's activities had not been shown to fall within the exhaustive list, its application in the high court should have been dismissed.

In a judgment concurring in the result, Rogers AJA (with Gorven J concurring) held that 'own primary production activities' was plainly intended to exclude 'secondary' mining activities. In the context of Note 6(f)(iii) as a whole, 'primary production activities' were activities associated with extracting minerals from the ground, whereas 'secondary' activities were mining activities taking place after the extraction of the minerals. All of the items in the list could, in Rogers AJA's view, be construed consistently with this meaning. Glencore's diesel-using activities were all performed after the mineral in question (coal) had been extracted from the ground. Those activities did not fall within the listed activities, properly interpreted. Although Rogers AJA was inclined to agree that the listed activities were an exhaustive definition, he did not find it necessary to finally decide this question, because even if the list was not exhaustive, Glencore's diesel-using activities did not fall within the ordinary meaning of 'primary production activities', rather being 'secondary' mining activities.

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