



IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO 279/2001

In the matter between

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

Appellant

and

**DELTA MOTOR CORPORATION (PROPRIETARY)
LIMITED**

Respondent

CORAM: **HOWIE, OLIVIER, BRAND, NUGENT JJA et LEWIS
AJA**

Date Heard: 27 Augustus 2002

Delivered: 23 September 2002

Customs duty - whether royalty part of price of goods or otherwise dutiable

J U D G M E N T

HOWIE JA

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[1] The respondent is a motor vehicle manufacturer and distributor.

Since 1987 it has imported vehicle parts in the form of what are known as

CKD (completely knocked down) kits on an ongoing basis from Adam Opel

Aktiengesellschaft, Germany ('Opel'). Having for years paid customs duty

calculated on the invoiced amount payable per kit, the respondent, in about

1997 was advised by a consultant that the invoiced amount had in the past

included not only the purchase price of the kit but also an unspecified charge

by Opel for engineering, styling and tooling ('EST'). Acting on this advice,

the respondent requested a refund of customs duty on the ground that the

EST charge was not part of the price payable for a kit but rather a non-

dutiable royalty. When the appellant refused a refund the respondent sought

and obtained in the High Court at Pretoria a declaratory order by Botha J

that the EST charges were not part of the value of the kits for customs duty purposes. With the necessary leave, the appellant appeals.

[2] The appellant's reaction to the refund request and the attitude he adopted in the litigation were very largely influenced by what he obviously regarded as considerations militating against the honesty and reliability of the respondent's crucial assertions. The EST charges were never separately invoiced and the invoices that pertained to the kits failed to specify either the fact or the amount of an EST charge. Nor for a long time did the written agreements that governed the respondent's contractual relationship with Opel refer to these charges. Only in 1998 was an amendment signed which purported to record their existence, nature and purpose. Understandably, perhaps, the essential allegations in the founding affidavit were met with a firmly enunciated expression of scepticism in the opposing affidavits.

[3] Be that as it may, the need for a detailed factual analysis and evaluation of the voluminous papers in order to resolve what I might call the credibility challenge is unnecessary. In the end the appellant possessed no evidence with which to counter that of the respondent and the main facts on which the respondent relied in the founding papers were substantiated by even further evidence in the replying affidavits. Faced with that situation when the matter came before the Court below, it was open to the appellant to request an oral hearing at which the respondent's relevant deponents could be cross-examined. That course he elected not to adopt. The challenge was not followed through. The omission to call for cross-examination is significant because subsequent to the refund request senior members of the appellant's staff visited the respondent's premises and had access to available relevant records including contemporary documentation containing references to EST charges. Having had that opportunity, the furthest that

the appellant's deponents were prepared to venture on the subject of these charges was that the documentation justified 'the impression' that they formed part and parcel of the purchase price payable for a kit. In other words their existence and nature, and their having been contractually due and paid from the outset, were not really open to dispute.

[4] In the circumstances there is no sound reason, in my view, to question the correctness of the finding by the learned Judge that, notwithstanding the criticisms advanced in the affidavits and arguments on behalf of the appellant, the matter had to be resolved on the facts presented by the evidence for the respondent.

[5] Briefly summarised, those facts are the following. The agreements referred to include three of relevance here. The first is an assembly and distribution (A and D) agreement; the second, a trademark licence agreement; and the third, a supply agreement. Respectively they relate to

the assembly, sale or servicing by the respondent of Opel motor vehicles in South Africa and neighbouring countries. Save for the amendment I have mentioned their provisions that are material in this case have remained the same since 1987.

[6] The A and D agreement licenses the respondent to effect or procure the local manufacture of parts, to use those parts with or without the imported kits in the assembly of complete vehicles, to sell and service such vehicles, to sell spare parts and accessories imported separately from the kits and to use Opel's technical information and technology in all these endeavours. In terms of this agreement a royalty is payable by the respondent to Opel for the right to carry on the stated activities. This royalty has to be determined 'by reference to' paragraph 4(c) of the supply agreement.

[7] The trademark licence agreement grants the respondent and its dealers the use of Opel trademarks in the marketing of vehicles and spares.

[8] The supply agreement is the one which governs the purchase of the kits and separately imported parts and accessories. In terms of paragraph 4(c), if no kits are imported a royalty is nevertheless payable in respect of each vehicle sold. The royalty is for the license to carry on the activities referred to in the A and D agreement and amounts to 'not less than 3% of the price of a CKD set representing the total vehicle'. (That position does not pertain to one particular model but this makes no difference for present purposes.) Accordingly, reading paragraph 4(c) of the supply agreement with the A and D agreement, liability for the royalty payable under the latter is triggered by the sale of every Opel vehicle which the respondent assembles.

[9] The subject of royalties has therefore been contractually provided for all along but the respondent's case is that the EST charges were never positively identifiable as the subject matter of any of the royalty provisions until the 1998 amendment already mentioned.

[10] In that amendment, allegedly formulated to bring the relevant royalty provisions into conformity with the factual situation, the EST charge was defined and explained. The essential question is whether the amendment correctly reflects the picture conveyed by the evidence comprising the respondent's affidavits and supporting documentation.

[11] What the 1998 amendment records in this regard is that the EST charge comprises an engineering and styling portion and a tooling portion, and that it is the engineering and styling portion that represents the royalty payable in terms of the A and D agreement (and, where, applicable payable under paragraph 4(c) of the supply agreement). The tooling charge, on the

other hand, 'covers the rebilling of a portion of the total component tooling investment incurred by Opel for a defined range of vehicles'. Nevertheless, as the agreement goes on to state, the tooling portion, together with the engineering and styling portion, is levied and payable whether or not the respondent orders kits from Opel, as long as assembled Opel vehicles are sold. In all these respects, so it seems to me, the agreement conforms to the factual position which the evidence establishes.

[12] From the evidence the following emerges. A kit does not contain all the component parts necessary for the assembly of a complete vehicle. In most cases the majority of the required components are locally manufactured. Opel's expenses in respect of the design, construction, development and tooling involved in the production of a new vehicle line are recovered by imposing a worldwide royalty in the form of the EST charge. This has been levied and paid by the respondent since 1987. It is paid, as

the A and D agreement provides, in consideration for the right to assemble, sell and service Opel vehicles, to manufacture and sell Opel parts and to use Opel trademarks and technology.

[13] It has remained relatively constant in amount and is not related to or calculated with reference to the cost, weight, number or value of the components in a kit. It is payable in respect of every assembled vehicle actually sold and it is payable even if an assembled vehicle should contain no components from an imported kit. Because it was always anticipated that every kit would be used in the assembly of a sold vehicle the EST charge was, as a matter of practical convenience (and because, until 1997, it was a matter of no moment to either Opel or the respondent) simply included in the invoiced amount pertaining to the imported kits and paid pursuant to such invoicing. Should an assembled vehicle not be sold, however, Opel would be obliged to refund the EST paid on such invoice.

Although this obligation is not expressed in any agreement it is plainly implicit - an EST charge would have been paid without having been due. In short, therefore, if a sold vehicle contains no kit components the EST charge is still payable. On the other hand, if a vehicle assembled from a kit is not sold, EST (ostensibly invoiced as part of the kit price) will be refundable.

[14] The EST charge is not payable either in respect of the Opel components that are imported separately from the kits or in respect of the right to sell such components.

[15] Nothing on record shows, or even implies, that the royalty payable under the A and D agreement has never been paid, nor, accepting that it always has been paid, that it was accounted for elsewhere in the respondent's records, quite separately from the EST charges. In other words there is no suggestion that this royalty is not truly part of the EST charge.

[16] Counsel for the appellant sought to discount the evidence concerning liability for the EST charge by contending that the written agreements, none of which made any mention of it prior to 1998, were unambiguous and in any event contained non-variation clauses. There are two answers. The first is that it was, generally speaking, for the contracting parties alone to enforce compliance, or sanction non-compliance, with their covenants. This case does not constitute an exceptional situation in which the appellant, an outsider, can complain and counsel did not suggest it was. The second answer is that the A and D agreement has always stipulated for a royalty and Opel has always levied and been paid the EST charge. The 1998 amendment and the evidence have done nothing more than achieve rectification by identifying the engineering and styling portion of the EST charge as being the royalty in question. So much for the facts.

[17] The relevant provisions of the Customs and Excise Act 91 of 1964 are s 41(4)(a) and ss 65, 66 and 67. What the last-mentioned three sections lay down (as applied to the present case) is that the value of imported goods for customs duty purposes is the transaction value, which in turn means the price actually paid or payable for the goods with the addition, if applicable, of any separate royalty or licence fee which, *inter alia* is payable in respect of the goods as a condition of their sale.

[18] Section 41(4)(a) requires an exporter to declare in a prescribed invoice all particulars in respect of the transaction value or any royalty and any information which bears upon the transaction value. Such particulars, except where the appellant determines otherwise, must 'relate to' the final amount of the transaction value or royalty. The appellant did not 'determine otherwise' in terms of this paragraph and accordingly the particulars declared 'related to' the transaction value. In so far as the

invoices issued by Opel failed to set out the prices payable for the kits separately from the EST charges the appellant was thus entitled, before the refund request, to assess duty on the invoiced amounts. However, nothing in that subsection prevented the respondent from afterwards establishing the correct state of affairs.

[19] Reverting to the matter of the price actually paid or payable, this phrase is defined in s 65(9) to mean 'the total payment made or to be made, either directly or indirectly, by the buyer to or for the benefit of the seller for the goods, but does not include ... payments passing from the buyer to the seller which do not directly relate to the goods'.

[20] There is undeniable logical force in the submission made on behalf of the appellant that a commercially accepted and realistic way for a manufacturer to recover design and development costs would be to include appropriate recoupment into the selling price of its manufactured articles.

But that is what any buyer of manufactured goods must expect to pay for.

The situation depicted by the evidence in this case has a crucial additional feature. The manufacturer - Opel - was giving the buyer - the respondent - the rights spelt out in the A and D agreement. Those rights empowered the respondent, under licence, itself to assemble Opel vehicles and sell them for its own account when it had incurred none of the expenses of the kind for which the EST charges are intended to compensate. Apart from that, the respondent was at liberty to obtain all necessary parts from sources other than Opel and if it did buy kits from Opel it was free to specify that they contain only a relatively low percentage of the total components that were necessary for an entire vehicle. The respondent was accordingly entitled by the licence to use Opel's technology even if it used few Opel components or none. For such rights it is commercially realistic, and common practice,

that the manufacturer be paid a royalty over and above the price of the goods.

[21] Every royalty, moreover, whether payable under the A and D agreement or, in the event of no kit importation, under paragraph 4(c) of the supply agreement, is by reason of the specific terms of that paragraph, in addition to, and therefore not part of, the price of the kit. The engineering and styling components of the EST charge are consequently clearly excluded from the price of the kit. Although the tooling portion is not expressly said to be a royalty it is just as separate from the price payable as are the engineering and styling portions.

[22] On the facts of this case, therefore, I consider that the EST charges did not directly relate to the kits and they were accordingly not part of the price, actually paid or payable, of the imported goods.

[23] The remaining issue is whether they constituted royalties or licence fees within the meaning of s 67(1)(c) of the Act, namely -

'royalties and licence fees in respect of the imported goods, including payments for patents, trade marks and copyright and for the right to distribute or resell the goods, due by the buyer, directly or indirectly, as a condition of sale of the goods for export to the Republic, to the extent that such royalties and fees are not included in the price actually paid or payable ...'

For paragraph (c) of s 67(1) to render a royalty or licence fee dutiable all the constituent elements of the paragraph must be present. Absent any one, the provision is inapplicable.

[24] For the appellant, reliance was placed on the decision of the court of first instance in *Samcor Manufacturing (Pty) Ltd v The Commissioner for the South African Revenue Service*, an unreported judgment of the Transvaal Provincial Division in case 22655/98. The judgment went off on a point not decided when the matter later went on appeal. (The appeal judgment is reported as *Samcor Manufacturing (Pty) Ltd v Commissioner, South African*

Revenue Service 2002 (4) SA 823 (SCA).) Essentially on the contents of the agreements involved in that case it was held by the High Court that the payments in dispute there were at least indirectly due as a condition of sale. According to the relevant contractual provisions in that case payment of a royalty was required 'for each set of [imported] CKD parts'. Here, by contrast, payment of a royalty is required 'in respect of each vehicle sold'. The *Samcor* case is therefore clearly distinguishable and of no assistance to the appellant.

[25] In the present matter the sale of kits to the respondent is regulated by the supply agreement. Nothing in that agreement makes the charges now in dispute payable as a condition of sale. The engineering and styling charges constitute the royalty payable, not in terms of the supply agreement but the A and D agreement. As for the tooling charges (assuming they amount to royalties or licence fees) they, too, are not payable pursuant to anything

contained in the supply agreement. The EST charges are consequently not payable 'as a condition of sale'. On the contrary, in so far as the supply agreement does apply to these charges it makes them payable even if no kits are sold (so long, of course, as assembled vehicles are sold).

[26] It follows further from what has been said already that the EST charges are paid "in respect of" assembled vehicles sold and not "in respect of" the imported kits.

[27] The terms of s 67(1)(c) are accordingly inapplicable and in consequence the EST charges were not dutiable.

[28] The appeal is dismissed, with costs, including the costs of two counsel.

CT HOWIE
JUDGE OF APPEAL

CONCUR:
OLIVIER JA
BRAND JA
NUGENT JA
LEWIS AJA