

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case No. 1/98 and 2/98

In the matter between:

THE COMMISSIONER FOR CUSTOMS

AND EXCISE First Appellant

FIRST GRAPHICS (PROPRIETARY)

LIMITED Second Appellant

and

KEMTEK IMAGING SYSTEMS

LIMITED Respondent

Coram: VAN HEERDEN DCJ, HEFER, HOWIE, SCOTT and STREICHER, JJA

Heard: 17 AUGUST 1999

Delivered: 6 SEPTEMBER 1999

Customs and Excise - Tariff headings 37.01 and 37.02 in Schedule 1 - Classification of lithographic plate in rolls

JUDGMENT

STREICHER JA/

STREICHER JA:

[1] Both the respondent and the second appellant supply sensitised aluminium lithographic printing plates to the printing industry. The plates which are supplied by the second appellant are manufactured in South Africa and those that are supplied by the respondent are cut from an imported product. In terms of s 47(9)(a)(i) of the Customs and Excise Act 91 of 1964 ("the Act") the first appellant determined that the imported product should be classified under tariff heading 37.01, Part 1 of Schedule 1 to the Act attracting a 15% customs duty. On appeal to the Transvaal Provincial Division, in terms of s 47(9)(e) of the Act, Mc Creath J set aside the first appellant's determination and declared that the imported product fell to be classified under tariff heading 37.02 attracting no duty. Mc Creath J granted the appellants leave to appeal to this court.

[2] The imported product consists of rolls of photosensitised emulsion on aluminium substrates 0,15 mm, 0,30 mm, 0,35 mm or 0,40 mm thick, up to 2 500 m long and 1 260 mm wide. It is used in the lithographic industry after it has been decurled, trimmed and cut in appropriately sized individual sensitised plates. A lithographic printing plate can then be produced by placing a negative or a positive film under vacuum in direct contact with the plate and exposing it to light. Exposing it to light changes the characteristics of the coating on the plate only where it has passed through the transparent portions of the film. This creates a positive image on the plate.

[3] In terms of s 47(1) of the Act duty is payable on all imported goods in accordance with the provisions of Schedule 1 to the Act. In Schedule 1 all goods generally handled in international trade are systematically grouped in sections, chapters, and sub-chapters, which are given titles indicating 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. (See in these respects *Secretary for Customs & Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 675D - F.) In addition, s 47(8)(a) provides that the interpretation of Part 1 of Schedule 1 shall be subject to the Explanatory Notes to the Harmonized System and to the Customs Co-operation Council Nomenclature issued by the Customs Co-operation Council, Brussels, from time to time.

[4] Chapter 37 bears the title "Photographic or Cinematographic Goods". In terms of the general rules for the interpretation of Schedule 1 the titles of sections, chapters and sub-chapters are provided for ease of reference only and classification should be determined according to the terms of the headings and relative section or chapter notes and, provided such headings or notes do not otherwise require, according to certain other provisions.

[5] Tariff heading 37.01 reads:

"Photographic plates and film in the flat, sensitised, unexposed, of any material other than paper, paperboard or textiles . . ."

Lithographic plates are specifically mentioned in some of the subheadings.

Tariff heading 37.02 reads:

"Photographic film in rolls, sensitised, unexposed, of any material other than paper, paperboard or textiles . . ."

[6] In terms of Chapter Note 2 "photographic" "relates to a process which permits the formation of visible images directly or indirectly by the action of light or other forms of radiation on sensitive surfaces". It follows and is common cause between the parties that the finished lithographic plates which the respondent and the second appellant supply to the printing industry would, if imported in that form, be classified as photographic plates under tariff heading 37.01. However, the court *quo* held that the imported product fell to be classified under tariff heading 37.02 because, in the opinion of the judge, the word "plates" connoted flat material; the same intrinsic products were covered by the two headings save that the form in which they were imported differed; there were indications that tariff heading 37.01 was intended to apply to goods which were end products; and the legislature did not intend to exclude plate material from the term "photographic film in rolls".

[7] The meanings of the words "plates" and "film" are not defined in Schedule 1. The words therefore have to be given their ordinary meaning in the context in which they appear unless an indication to the contrary is given.

[8] Dictionaries distinguish between plates and film in the context of photography. The Oxford Dictionary contains the following definitions:

"(*Film*) a thin pellicle or coating of collodion, gelatin, etc. spread on photographic paper or plates, or used by itself instead of a plate. Now esp. a thin, flexible, transparent material consisting essentially of a plastic base or support (formerly of celluloid, now commonly of cellulose acetate) coated on one side with one or more layers of emulsion and sold as a rolled strip and as separate sheets; . . ."

"(*Plate*) a thin sheet of metal, porcelain, or (now usually) glass, coated with a film sensitive to light, on which photographs are taken."

In terms of the above definition of the word "film" the coating as such or the coating together with its substrate may constitute a film.

Webster's Third New International Dictionary contains similar definitions of film and plate in the context of photography. They read:

"(*Film*) a thin flexible transparent sheet of cellulose acetate, cellulose nitrate, or other plastic material that is used for taking photographs and that is coated with a light-sensitive emulsion which when exposed and developed contains negative or positive images in black, silver or in color."

"(*Plate*) a sheet of glass, metal, porcelain, or other material coated with a light-sensitive photographic emulsion; . . ."

[9] According to these dictionary definitions rigidity would seem to be a distinguishing feature between film and plates. In tariff heading 37.01 the legislature also distinguished between photographic plates and photographic film. There would have been no need for the legislature to do so if it considered them to be the same product intrinsically. Like the dictionary definitions the distinguishing feature the legislature possibly had in mind was the rigidity of the substrate but the essential difference is uncertain. In this case it need not be determined. It is common cause

between the parties, correctly so, that the imported product, once it has been decurled, trimmed and cut in appropriately sized individual sensitised plates, is a lithographic plate and, in the terminology of tariff heading 37.01, a photographic plate.

[10] Having distinguished between photographic plates and photographic film in tariff heading 37.01 one would have expected a reference to photographic plates in tariff heading 37.02 if the legislature intended photographic plate or plates in coil form to fall under tariff heading 37.02. I disagree with the contention that, because the word "plates" generally connotes flat material, one would not speak of plate or plates in rolls. A flat sheet of the imported product which can be cut into a number of lithographic plates is itself a lithographic plate and by coiling such a lithographic plate for delivery or storage purposes the character of that lithographic plate is not changed. It remains a lithographic plate and can be described as a lithographic plate in a roll, or, more pertinently, as a photographic plate in a roll. In the respondent's own founding affidavit its chairman speaks of "a technique that had been developed for manufacturing sensitized lithographic plate in lengthy coils or rolls". Furthermore, in one of the respondent's brochures it is stated that "Polychrome GmbH has perfected the ability to ship high quality coated rolls of lithographic plate thus enabling Kemtek to finish these rolls to the size requirements of the local market and Kemtek's export market". If lithographic plates are coiled two at a time it would in my view be correct to describe them as photographic plates in rolls. In terms of s 6 of the Interpretation Act 33 of 1957 words in the plural include the singular. It follows that if the legislature intended photographic plate or plates in rolls to fall under tariff heading 37.02 there was no reason for it not to mention photographic plate or plates in rolls under that heading. The fact that the legislature did not is in my view a strong indication that it did not intend the phrase "in the flat" in tariff heading 37.01 to qualify film as well as plates and did not intend rolls of lithographic plate or plates to fall under tariff heading 37.02.

[11] The respondent submits that the reference by the legislature in tariff heading 37.01 to X-ray plates and in the explanatory notes to tariff heading 37.02 to X-ray film in rolls support its argument that photographic plates and photographic film, within the meaning of those words in tariff headings 37.01 and 37.02, are intrinsically the same product and that the difference between the articles falling under tariff heading 37.01 and tariff heading 37.02 is the form in which they are imported. I do not agree. The legislature not only distinguished between photographic plates and film in rolls but distinguished between photographic plates, film in the flat, and film in rolls. This is borne out by the fact that "fluorographic plates and film in the flat" for X-rays are specifically mentioned under tariff heading 37.01 while it is stated in the explanatory notes to tariff heading 37.02 that X-ray film in rolls is generally sensitised on both sides. There is no indication to be found in the schedule that when the legislature spoke of X-ray film in rolls it had in mind X-ray plate material in rolls or an article destined to be used as X-ray film in the flat. The reference to X-ray plates, X-ray film in the flat and X-ray film in rolls therefore do not indicate that the essential difference between tariff headings 37.01 and 37.02 lay in the form in which the article in question was being imported.

[12] In the explanatory note to tariff heading 37.02 it is stated that the film referred to in that heading may be used, like the photographic plates of tariff heading 37.01, for amateur, professional photomechanical, scientific, radiographic, etc., purposes. Contrary to the submission that one can deduce from this statement that the same intrinsic product was intended to be covered save in respect of the form in which the product was imported, I am of the view that the statement indicates that two different products were intended. If the same intrinsic product was intended it would have been unnecessary to say that the film of tariff heading 37.02 may be used for the same purposes as the photographic plates of tariff heading 37.01. This is self-evidently the reason why no reference to film in the flat is made in this portion of the note.

[13] I also do not agree with the finding of the judge *a quo* and the submission by the respondent that there are clear indications in chapter 37 that tariff heading 37.01 was intended to apply to goods which were ready for use, end-products. Fluorographic plates, film in the flat, instant print

film of paperboard, offset duplicating masters and lithographic plates are categorised under tariff heading 37.01 and in some cases the sub-categories are based on the thickness of the plate or film. In the explanatory note to tariff heading 37.02 it is said that photographic film not cut to usable sizes remains classifiable in this heading. The respondent submits that the implication is that tariff heading 37.01 was intended primarily to cover plates and film cut to usable sizes. However, there can be no doubt that a flat sheet of lithographic plate which still has to be cut in usable sizes should be classified under tariff heading 37.01. The inference contended for can therefore not be drawn.

[14] Another indication that photographic plate material is classifiable under tariff heading 37.02 is, according to the respondent, to be found in the explanatory note to tariff heading 37.02 to the effect that the heading does not cover "unexposed photographic plates and film in the flat". The reference to photographic plates would according to the respondent not have been necessary if plates or plate material was intended to be excluded from the term "photographic film in rolls". There is no merit in this contention. On this basis it can be argued that the exclusion of "film in the flat" is an indication that it would have qualified as "film in rolls" had it not been for the exclusion. The note simply states a fact which is self-evident.

[15] The respondent concedes, as it is bound to do, that for it to succeed a wider meaning has to be given to the word "film" in tariff heading 37.02 than in tariff heading 37.01. There is however a well known presumption that where the legislature uses the same word in the same enactment it would intend the word to be understood, where no clear indication to the contrary is given, in the same sense throughout the enactment. This would apply with even greater force where the word is used in two tariff headings the one following upon the other (see *Minister of the Interior v Machadodorp Investments (Pty) Ltd* 1957 (2) SA 395 (A) at 404 D-E).

[16] In my view there are no indications in Schedule 1 that the legislature intended to include rolls of lithographic plate or plates to fall under "film in rolls". The omission of any reference to photographic plates in tariff heading 37.02 after having mentioned them together with film in the flat in tariff heading 37.01 therefore justifies an inference to the contrary.

[17] The articles in question are lithographic plates and the first respondent correctly determined that they should be classified as photographic plates under tariff heading 37.01. The court *a quo* erred in upholding the appeal against such determination.

[18] In the result the appeal is upheld with costs including the costs of two counsel. The order by the court *a quo* is set aside and the following order is substituted therefor:

"The appellant's appeal is dismissed with costs including the costs of two counsel."

P E STREICHER

JUDGE OF APPEAL

AGREE:

VAN HEERDEN DCJ

HEFER JA

HOWIE JA

SCOTT JA