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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

COMMISSIONER FOR INLAND REVENUE appellant

versus

DUNLOP SOUTH AFRICA LIMITED respondent

Coram: CORBETT, HOEXTER, BOTHA, GROSSKOPF, JJA, et
NICHOLAS, AJA.

Date heard: 20 March 1987

Judgment delivered: 26-3-1987

J U D G M E N T

CORBETT JA:

The respondent in this matter, Dunlop South Africa

/ Limited

Limited, which has its registered office in Durban, carries on business within the Republic of South Africa as a manufacturer and wholesale seller of pneumatic tyres, inner tubes and other rubber products. Since 11 July 1978 respondent has been registered as a vendor, in terms of sec. 12 of the Sales Tax Act 103 of 1978 ("the Act"), in respect of the enterprises of manufacturing and wholesale trading. In terms of the Act, which was promulgated on 28 June 1978, liability for sales tax commenced on 3 July 1978 (see definition of "commencement date" in sec. 1).

On 18 February 1983 appellant, the Commissioner for Inland Revenue, issued respondent with an additional assessment to sales tax in regard to the importation by respondent of what are termed "bladders" during the period 3 July 1978 to 4 May 1982. The taxable amount of these bladders was assessed in the sum of R1 898 622 and the amount of sales tax payable in the sum of R107 469,16. Originally

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penalties were also claimed, but these were later waived by the appellant. Respondent objected to this assessment, generally on the ground that the bladders in question were not subject to sales tax. Its objection having been disallowed by appellant, respondent, in terms of sec. 22 of the Act, appealed to the Special Court constituted for the hearing of income tax appeals. The appeal came before the Natal Income Tax Special Court, which allowed the appeal and set aside the assessment. Appellant now appeals to this Court against the whole of the judgment and order of the Special Court, the President of the Special Court having granted the necessary leave in terms of sec. 86 A(5) of the Income Tax Act 58 of 1962, as amended.

Before dealing with the merits of the appeal, I must make brief mention of two matters. The first, an application by appellant for the amendment of the grounds of appeal, was not opposed by respondent and was granted at the beginning of the hearing before us.

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The second was an application for condonation of the fact that, for reasons which I need not detail, the notice of appeal was lodged with respondent's attorney one day late. This application was also not opposed by respondent and in my view condonation should be granted. I turn now to the merits.

The essential facts of the matter are not in dispute. The bladders in question were imported by the respondent and used by it in the course of manufacturing tyres during the period for which the tax was levied; and indeed at the time of the trial the same type of bladder was currently in use. In the process of manufacture respondent uses fairly complex machines, which take in what is termed the "raw tyre", shape and cure (or vulcanize) it and produce the finished product. There are two types of such a curing (or vulcanizing) machine, the Bag-o-matic Press, which is only semi-automatic

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and requires several manual operations in its normal functioning, and the Autoform Press, which is completely automatic. Basically, however, these machines employ the same process. There are different machines for the manufacture of different sizes of tyre. They vary in cost from R733 000 for the machine used to make tyres for very large earth-moving machines to R41 500 for the machine used to make tyres for ordinary motor cars.

It is not necessary to describe the curing process in more than broad outline. The essential parts of the machine consist of a press and a mould. The mould is circular in form, is made of metal and comes in two halves. It is so shaped as to give the tyre its outward form, with its patterned tread, etc. At the commencement of the process the two halves of the mould are separated from one another, the lower section

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lying horizontal. In the centre of the lower section of the mould is placed the bladder. The bladder consists of a rubber cylinder which in its uninflated state appears to have a diameter approximately the same as the circular opening in the finished tyre into which the wheel will fit. The bladder is open at both ends. When the cylindrical bladder is placed upright in the mould a steel plate is affixed to the opening at each end. The lower plate is screwed into the base of the machine and lies at the same level as the bottom of the lower section of the mould. The raw tyre, which consists of a cylinder about the same height as the bladder, but of wider diameter, is then fitted over the bladder. Thereafter the upper plate affixed to the bladder is clamped to a central ram which can move vertically. By means of the ram the raw tyre is compressed from above until eventually the two halves of the metal mould are brought together.

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During the process of compression first steam and later hot water are introduced under pressure into the bladder, and also externally. The heat of the steam initially causes the rubber of the raw tyre to become sufficiently molten to flow and be moulded. And the hot water supplies the pressure and temperature required to cause the tyre, through the medium of the bladder, to assume the shape dictated by the mould. In this process the bladder inflates and expands and is contorted in such a way as to form a shape which applies the requisite pressure on the inside of the tyre. In that way it forces the tyre into and against the mould. Later when the curing process is complete cold water is introduced to cool everything down and the finished tyre is removed.

The curing time varies with different tyres, depending upon size. Thus, for example, with a very large tyre it could take $10\frac{1}{2}$ hours, compared with about

27 to 30 minutes for a small tyre. The bladder undergoes considerable stress during the curing process. It is subjected to stretching, contortion and contraction, and to high and low temperatures. After a time this stress tends to cause the bladder to crack round the periphery and to split longitudinally. Once this happens the bladder has to be replaced by a new one. The usable life of a bladder again depends upon size.

In the case of the bladder used for making the small type of tyre, its life is normally about 300 to 310 curing cycles (ie, on the basis of 27 minutes per curing cycle, about 135 to 140 hours). On the other hand, the bladder used for making the very large type of tyre usually lasts for about 8 cures (ie, a total of about 84 hours). Some bladders might last for a longer time; others for a shorter time. The span of time over which a bladder would remain in a machine would depend upon

how continuously the machine was operated. Thus working 8 hours a day and 5 days a week (which would not normally be done) the bladder used on the small machine would normally be replaced after $3\frac{1}{2}$ weeks. The cost of a bladder again varies, depending on size. In the case of the large machine earlier referred to, a bladder costs R9 800, ie. about 1,3% of the total cost of the machine; and in the case of the small one, the cost is R160, ie 0,4% of the total cost.

The only evidence led in the Court a quo was that of Mr L Rust, respondent's equipment engineer, who was called as a witness by respondent. The foregoing facts are gleaned mainly from his evidence. In addition, it would seem from what Rust stated that, when purchased, a curing machine does not come with a bladder attached. The bladder must be separately purchased. Whether the bladder, which is obviously designed to fit into the

/ machine,

machine, is produced by the manufacturer of the machine or by some other party is not clear. It also appears from Rust's evidence that a single machine may be designed to produce a range of different sizes of tyre, using different moulds. Some bladders will accommodate different sizes of tyre; in other instances the bladder has to be changed to fit a specific size of mould. Normally, however, the production programme would be so planned as to obviate as far as possible changes of the bladder on a particular machine. The operation of changing the bladder is entrusted to semi-skilled operators.

It is common cause that the importation of such a bladder by the respondent constitutes a transaction which would attract sales tax in terms of sec. 5 of the Act, unless it fell within one of the exemptions provided for by sec. 6(1) of the Act. In this connection paras. (c) and (t)(iii) of sec. 6(1) appear to be applicable.

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In each of these paragraphs an exemption is provided as regards goods (i) where the vendor is registered under sec. 12 in respect of an enterprise falling within a category of the enterprises mentioned in Schedule 2 to the Act, (ii) where the goods are goods described in that Schedule in relation to such category and (iii) where the goods are intended for use or utilization in such enterprise. To see whether either of these exemptions applies one must refer to Schedule 2 of the Act.

At this point it is relevant to note that the Act has been amended every year since its enactment. Some of the amendments have been given retrospective effect. Since the period over which sales tax was assessed in this case spans about 4 years it is necessary to consider what effect these amendments may have had from time to time on respondent's liability for sales tax.

/ Respondent.....

Respondent is registered under sec. 12 in respect of, inter alia, a manufacturing enterprise. Division 1 of Schedule 2 deals with manufacturing enterprises and sets forth the goods to which the exemption contained in sec. 6 applies. The relevant paragraph of Division 1 is para. 3. In its original form para. 3 consisted of a single sentence. In terms of sec. 20(1)(b) of the Sales Tax Amendment Act 111 of 1979, however, para. 3 was amended by the introduction of a new subpara. (b), the existing paragraph becoming subpara. (a), and by sec. 20(1)(c) of the same amending Act a proviso to par. 3 was added. Act 111 of 1979 was promulgated on 18 July 1979, but it was provided in sec. 20(2) that sec. 20(1)(b) should be deemed to have come into operation on 3 July 1978 - the commencement date for the payment of sales tax. There was no similar provision in regard to the proviso. The upshot is that for the period 3 July 1978 to 17 July 1979 para.

/ 3(a)

3(a) and (b), as amended, but without the proviso, applies; whereas as from 18 July 1979 para. 3(a) and (b) must be read with the proviso.

I now quote para. 3, as amended by sec. 20(1) of Act 111 of 1979:

- "3. (a) Any repair or maintenance service in respect of machinery or plant used directly in the manufacture, assembly or processing of goods for sale, and parts purchased for incorporation in or attachment to such machinery or plant in order to effect such service.
- (b) Parts purchased for incorporation in or attachment to such machinery or plant for the purpose of the repair or maintenance thereof by the vendor carrying on the enterprise concerned.

Provided that for the purposes of this paragraph, parts purchased shall not include any goods described in this Division under the heading of non-qualifying goods."

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In addition to the amendments already referred to, sec. 20(1) of Act 111 of 1979 also added at the end of Division I of Schedule 2 a list of the "non-qualifying goods" referred to in the proviso to para. 3. Two items in this list are relevant:

"Detachable machine tools,
Cutting, forming, honing and moulding
tools."

The Sales Tax Amendment Act 105 of 1980 (promulgated on 1 August 1980) effected some minor amendments to para. 3. Two need be noted. Firstly the paragraph was altered to include "materials" as well as "parts"; and, secondly, the concluding words of subpara (a) were altered to read —

"..... in order to have such service
effected."

Finally, by sec. 9(1)(b) of the Second Sales Tax Amendment Act, 90 of 1982 (promulgated on 16 June

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1982) the list of non-qualifying goods was amended by the addition of the following new item:

"(19) Curing bags, bladders and airbags."

It is common cause that the bladders in issue fall under this item, with the result that as from 16 June 1982 respondent was unquestionably obliged to pay sales tax on all bladders imported by it. The dispute between the parties is thus confined to the position prior to 16 June 1982.

It was agreed by counsel that subpara. 3(b), rather than subpara. 3(a), was the relevant statutory provision in this matter, since 3(a) relates to a repair or maintenance service provided by some third party, as opposed to 3(b), which relates to repair or maintenance executed by the vendor himself. This is certainly clear from para. 3(a), as amended in 1980, whatever the position may have been before then; and I shall proceed on the

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basis that 3(b) is the relevant subparagraph. And, reverting for a moment to the requirements of sec. 6(1)(c) and sec. 6(1)(t)(iii), it is further common cause that the bladders were intended to be used or utilized in respondent's enterprise.

Accordingly, the issues may be summed up as follows:

- (1) Did the bladders in question constitute parts purchased for incorporation in or attachment to the curing machines for "the repair or maintenance thereof" by respondent, the vendor carrying on the enterprise in question?

If the answer be in the negative, then clearly the bladders were not exempt from sales tax and the appeal to this Court must succeed, irrespective of what answer might be given to the question posed under (2) below.

/ If.....

If the answer be in the affirmative, then clearly for the period 3 July 1978 to 17 July 1979 the bladders were exempt from sales tax and to that extent the appeal must fail; and, in addition, the further issue under (2) below must be addressed.

(2) Did the bladders in question constitute either —

(a) detachable machine tools, or

(b) cutting, forming, honing or moulding tools?

If the answer be in the affirmative, then for the period 18 July 1979 to 15 June 1982 the bladders were not exempt from sales tax and the appeal succeeds in respect of bladders imported during this period.

If the answer be in the negative, then the appeal must fail in its entirety.

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As to the first of these issues, I have no doubt that the bladders constituted parts purchased for "attachment to", and possibly also "incorporation in", the curing machines by respondent. It is clear from the evidence that the bladder plays an essential role in the functioning of the curing machine and in the production of the finished tyre. Indeed, without the bladder the machine cannot function at all. The bladder itself is specially designed and manufactured to fit into the machine and apart from the role which it plays in the functioning of the machine it has no other purpose or function whatever. When in use, the bladder is firmly affixed to portions of the machine and connected up with those parts which fill it with steam and hot water. It is unquestionably a part of the machine.

I am also of the view that the purpose of such attachment (and possibly incorporation) is the "repair"

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or "maintenance" of the machine by respondent. There were quoted to us a number of decisions, of both South African and English courts, dealing, in various contexts, with the meaning of the words "repair" and "maintenance"; and my own researches have revealed a few more. I do not propose to review these decisions. "Repair" and "maintenance" are not words bearing precise meanings and much depends upon the context in which they are used (see eg. the discussion in the House of Lords decision of London and North Eastern Railway Company v Berriman 1946 AC 278 at pp. 291-2, 294-5, 299-301, 307-8, 314-15).

English

The Oxford/Dictionary defines "repair", as a noun and in the sense presently relevant, as —

"Restoration of some material thing or structure by the renewal of decayed or worn out parts, by refixing what has become loose or detached, etc; the result of this."

/ Webster's

Webster's Third New International Dictionary gives the following relevant meanings for "repair" as verb and noun:

"To restore by replacing a part or putting together what is torn or broken: FIX, MEND"

and

"the act or process of repairing: restoration to a state of soundness, efficiency or health".

The relevant meaning given for "maintenance" in the Oxford English Dictionary is —

"The action of keeping in effective condition, in working order, in repair, etc.;
....."

And the corresponding definition in Webster's work is —

"The labor of keeping something (as buildings or equipment) in a state of repair or efficiency".

Generally speaking, "maintenance" would cover acts of keeping in effective condition, etc. which fall

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short of actual repair; but in certain areas the two concepts may well overlap and maintenance could include particular acts of repair; and vice versa. Since both words are used in the alternative in para. 3(b) it is not necessary to attempt to draw a dividing line between "repair" and "maintenance". Nor is it necessary to delimit their outer reaches for, in my view, the act of replacing a worn or damaged bladder in one of respondent's curing machines clearly amounts to repair or maintenance of the machine in question, probably both repair and maintenance. It involves the renewal of a worn out part and may also be described as the action of keeping the machine in effective condition and working order.

In argument appellant's counsel laid stress on the following facts: (i) that the curing machine is purchased without a bladder and the bladder is purchased separately; (ii) that, when necessary in order to accom-

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moderate different sizes of tyre, the bladder is removed from the machine and a different-sized bladder substituted; and (iii) that the bladder is designed to be attached and detached by a semi-skilled operator. From this counsel argued that the bladders were separate and replaceable parts analogous to the replaceable bit of a power drill; and that the attachment of a bladder to the machine did not amount to the repair or maintenance of the machine.

It is true that the bladder is purchased separately from the machine, but, as I have indicated, it is nevertheless from the functional point of view an integral part of the machine. And I do not think that the fact that it can be attached or removed by a semi-skilled operator detracts from this. One can visualize many parts of different kinds of machine, eg. a spark-plug in a petrol-driven lawnmower, which are as readily replaceable / and.....

and yet unquestionably form integral parts of the machines in question. And here it may be noted that para. 3(b)

itself speaks of "incorporation in or attachment to".

It is true that on occasion the bladder may be removed before it is worn out in order to adjust the machine to a different size of tyre, but this is apparently not the norm and I cannot see why it should make any difference.

The analogy of the bit and the power tool is, to my mind,

not a valid one. As one well knows, the power tool

is an integral whole in itself. It supplies a source

of motor power in the form of a shaft revolving at high

speed, to which various tools, such as, for example,

a drilling bit, may be attached to perform different

types of function. This is a far cry from the curing

press, which performs only one function, that of shaping

and vulcanizing tyres, and of which the bladder is a

vital and integral part. Without the bladder the machine

/ will.....

will not work. The ^{chuck} power tool will revolve quite happily [?]
without any attachment.

Appellant's counsel also emphasized the relatively short life of a bladder and described it as "expendable or consumable". The former epithet seems to be more appropriate than the latter, but, in any event, I am not sure that such a description takes the matter any further. In the course of argument the hypothetical case was postulated of a bladder which was designed to last for only one curing cycle and which then had to be replaced. In such a case there might be problems in asserting that the bladder was a part of the machine or that the replacement thereof constituted repair or maintenance, but those are not the facts in this case. The bladders in question are not so short-lived and, although they do for good reason wear out relatively quickly, I do not think that this takes them out of the category of

/ parts.....

parts which are incorporated in or attached to the machine for the purpose of repair or maintenance.

For these reasons the appellant, in my view, fails on the first issue.

As to the second issue, I shall consider first the question as to whether the bladders constitute "detachable machine tools". A "machine tool" is defined in the Oxford/Dictionary as —

"a machine for cutting or shaping wood, metals, etc. by means of a tool, esp. one designed for use in a machine shop"

and the same dictionary defines a "machine shop" as —

"a workshop for making or repairing machines or parts of machines."

Webster's Third New International Dictionary states the meaning of "machine tool" to be —

"a usu. power-driven machine designed for shaping solid work by tooling either by removing material (as in a / lathe....."

lathe or milling machine) or by subjecting to deformation (as in a punch press)".

The word "tool" itself is defined by the Oxford English Dictionary as follows:

"a mechanical implement for working upon something, as by cutting, striking, rubbing or other process in any manual art or industry; usually one held and operated directly by the hand (or fixed in a position, as in a lathe), but also including certain simple machines, as the lathe; sometimes extended to simple instruments of other kinds".

Among the illustrative examples given is a quotation from a dictionary of mechanical terms (published 1877) reading —

"Of late it has become usual to embrace in the general term machine tools such machines as the lathe, plane, slotting machine, and others employed in the manufacture of machinery".

Turning again to Webster's Third New International Dictionary, one finds the following relevant meanings given for the

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word "tool" —

"1a: an instrument (as a hammer or saw) used or worked by hand: an instrument used by a handicraftsman or laborer in his work: IMPLEMENT b(1) the cutting or shaping part in a machine or machine tool (2) a machine for shaping metal: MACHINE TOOL".

And Webster's New 20th Century Dictionary 2nd ed. gives the following relevant meanings of "tool"—

- "1. any implement, instrument, or utensil held in the hand and used for cutting, hitting, digging, rubbing, etc.: knives, saws, hammers, shovels, rakes, etc. are tools.
2. (a) any similar instrument that is the working part of a power-driven machine, as a drill, band-saw blade, etc;
- (b) the whole machine; a machine tool."

It is not necessary or advisable to attempt to define the term "detachable machine tools" with any precision. These dictionary definitions do, however, give a broad indication of the general characteristics

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of a machine tool. Bearing in mind that Division I of Schedule 2 is concerned generally with the manufacturing industry, it seems to me that broadly speaking a machine tool in this context refers to a tool, ie. an instrument or implement used for working on objects consisting of metal or wood or other similar material, eg. by cutting, drilling, striking or rubbing, which is connected to a machine which supplies the mechanical power required to operate the tool. The precise significance in this context of the word "detachable" is not clear. Possibly what the Legislature had in mind was that portion of the machine tool constituting the tool (as opposed to the source of power), where such tool was detachable from the machine itself. It is not necessary, however, to decide this point, since in my opinion the bladder in question, by its very nature, cannot be regarded as an implement or instrument in the nature of a tool; nor would one regard the curing press as

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a machine providing mechanical power. Moreover, as was rightly stressed by counsel for respondent, a tool has a certain integrity as a functional unit. Its component parts combine to perform its intended functions. None of those parts would by itself constitute the tool; nor would one say that an object which by itself did not, and could not, perform the function was a tool. By itself the bladder cannot perform any function; and even when attached to the curing press it performs its function (which includes both heating the raw tyre and helping to mould it) not as a mechanically driven tool, but as a component part operating in conjunction with other parts in a fairly complex machine. Accordingly, in my opinion, respondent's bladders do not fall under that category of non-qualifying goods defined as "detachable machine tools".

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In argument before the Court a quo it was conceded on behalf of the appellant that the bladders did not fall under the other suggested category of non-qualifying goods, viz. "cutting, forming, honing and moulding tools". Before us appellant's counsel (who did not appear in the Court below) withdrew this concession and argued that the bladders constituted either forming or moulding tools. It may be that forming tools and moulding tools are terms of art in the manufacturing trade and that expert evidence would have been admissible to establish this meaning (see Central Press Photos Ltd v Department of Employment and Productivity [1970] 3 All ER 775 (CA), at pp 781-2, 783, 784; R v Lipschitz 1945 CPD 278, at pp 279-80; R v Eastern Transvaal Industries Ltd 1955 (1) SA 122 (T), at pp 124-5). No such evidence was, however, led. In view of appellant's concession respondent can hardly be blamed for this. At all events,

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for the reasons already elaborated I do not think that the bladders in question can be regarded as falling within the ordinary meaning of the word "tool" and, therefore, a fortiori, they cannot fall under the descriptions "forming tools" and "moulding tools". Moreover, it seems most unlikely that expert evidence from the trade would lead one to any different a conclusion.

Consequently the appellant fails on the second issue as well.

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

M M CORBETT

HOEXTER JA)
BOTHJA JA)
GROSSKOPF JA) CONCUR.
NICHOLAS AJA)