

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 528/09

In the matter between:

No precedential significance

**COMMISSIONER FOR SOUTH AFRICAN
REVENUE SERVICES**

Appellant

and

COLGATE-PALMOLIVE (PROPRIETARY) LIMITED

Respondent

Neutral citation: CSARS v Colgate-Palmolive (Pty) Ltd **(528/09) [2010]**
ZASCA 98 (3 September 2010)

Coram: Harms DP, Lewis, Cachalia and Shongwe JJA and K Pillay AJA

Heard: 26 August 2010

Delivered 3 September 2010

Summary: Tariff determination under Customs and Excise Act 91 of 1964: tetranyl, an ingredient of a fabric softener and conditioner, imported from Spain, not dutiable under tariff heading 3402.12 of the Schedule to the Act: classifiable under heading 3809.91.

ORDER

On appeal from KwaZulu-Natal High Court (Pietermaritzburg) (Combrink J sitting as the court of first instance).

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

JUDGMENT

LEWIS JA (HARMS DP, CACHALIA AND SHONGWE JJA AND K PILLAY AJA concurring)

[1] The respondent, Colgate-Palmolive (Pty) Ltd (Colgate), imports a product known as tetranyl L1-905 (tetranyl) from Spain. Tetranyl is used in making a fabric softener and conditioner, StaSoft. It is imported in paste form mixed with isoproponal, the sole purpose of which is to facilitate handling and transport. The appellant, to whom I shall refer as the Commissioner, contends that customs duty is payable on tetranyl in terms of the Customs and Excise Act 91 of 1964. He has claimed payment of arrear duties and penalties in the sum of R3 377 732. Colgate contends that no duty is payable.

[2] In an appeal to the KwaZulu-Natal High Court (Pietermaritzburg), in terms of s 47(9)(e) of the Act against a tariff determination made by the Commissioner (that tetranyl is dutiable under tariff heading 3402.12 of the Schedule to the Act), Colgate contended that tetranyl falls under tariff heading 3809.91, and is not dutiable. The high court found for Colgate and set aside the Commissioner's determination. It ordered that tetranyl be classified under tariff heading 3809.91. Thus no arrear duties were payable. The Commissioner's appeal to this court is with the leave of the high court.

[3] The high court dealt comprehensively with the principles of tariff determination and considered expert evidence on the properties of tetranyl.

The principles are trite and I shall not repeat them here. In so far as the evidence before the court is concerned, there was a perceived conflict in the affidavits in Colgate's appeal against the determination as to whether tetranyl constitutes a preparation. For this – and other reasons – the judge who first heard the appeal referred the matter to oral evidence and experts in chemistry for each party produced expert reports and testified before Combrink J. It became common cause that tetranyl is regarded as a preparation. Much of the other evidence was also undisputed. It is necessary, however, to set out the respective headings for which the parties contend and to consider briefly the nature and functions of tetranyl.

The Commissioner's determination: 3402.12

[4] Chapter 34 of the Schedule deals inter alia with soap, 'organic surface-active agents' and washing preparations. Tariff heading 3402 reads: 'Organic Surface-active Agents (Excluding Soap); *Surface-active Preparations*, Washing Preparations (including Auxiliary Washing Preparations) and Cleaning Preparations, whether or not Containing Soap . . . [my emphasis]

. . .

3402.12 = Cationic

. . .'

The relevant explanatory note states that organic surface-active agents are cationic in that they 'ionise in aqueous solution to produce positively charged organic ions responsible for the surface activity'.

Colgate's contention: 3809.91

[5] Chapter 38 governs 'miscellaneous chemical products'. Tariff heading 3809 covers 'Finishing agents, Dye Carriers to Accelerate the Dyeing or Fixing of Dyestuffs and Other Products and Preparations . . . of a Kind Used in the Textile, Paper, Leather or Like Industries, *Not Elsewhere Specified or Included*: [my emphasis].

. . .

3809.91 1= Of a kind used in the textile or like industries . . .'

The explanatory notes to the heading state that the items include 'preparations to modify the feel of products' and refer to 'softening agents'.

Approach to classification

[6] As stated by the high court (relying on *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (A) and *IBM SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A)) classification entails a three-stage process: ascertaining the meaning of the words in the headings and section notes; considering the nature and characteristics of the goods; and determining which heading is most appropriate. I shall start with the nature and characteristics of tetranyl which are not self-evident.

The nature and characteristics of tetranyl

[7] Both parties are agreed on the following: tetranyl is a finishing agent used in the textile industry, but is confined to domestic use; it is not a separate chemical compound but combines triethanolime (which is a separate chemically defined compound) with 'partially hydrogenated tallow acid' obtained from animal fat. Tetranyl is a 'quaternary ammonium compound' mixed with isopropanalol to form a paste. Its main function is to improve the softness of fabrics and to this end it is added to the rinse when fabrics have been washed.

[8] The use of tetranyl conditions fabrics and softens them; it reduces the build-up of static electricity in fabric and also reduces wrinkling. Tetranyl also has water repellent properties which make drying times faster. There was an apparent dispute between the experts as to whether it has surface-active properties: one maintained that it accumulated next to the fabric and the other that it adsorbs to it – it attaches to the fabric. They were agreed, however, that tetranyl is cationic in that it has a positive molecular charge. The high court concluded that surfactancy (having a surface-active function), while it may occur together with adsorption, was not a prerequisite to adsorption. The court in any event preferred the views of the expert for Colgate that surfactancy is not the main function of tetranyl. The Commissioner was not able to show, in this court, that this finding was wrong.

The correct classification

[9] Colgate argued – and the court below found – that tetranyl is covered by tariff heading 3809: it is a finishing agent. The Commissioner contended, however, that it falls also under 3402 as an organic surface-active agent. It will be recalled that 3809 has an exclusionary proviso: even if the product fits the description it cannot be classified under the heading if it is ‘elsewhere specified’. The Commissioner argued, thus, that tetranyl, because it is an organic surface-active agent, must be classified under 3402 and is therefore excluded by 3809.

[10] But this argument fails to take into account the explanatory note to 3402, which itself excludes certain products. The note states that the heading does not cover ‘Preparations, containing surface-active agents where the surface-active function is either not required or *is only subsidiary to the main function of the preparation. . .*’ (my emphasis). This raises the question whether tetranyl’s surface-active function is subsidiary to its main functions, which have been described above – the softening and conditioning of fabric after washing.

[11] There is no contention by the Commissioner that the main function of tetranyl is its surfactancy – the reduction of surface tension, foaming, emulsifying, or wetting (see the explanatory note to 3402). That being so, tetranyl must be excluded from tariff heading 3402, surfactancy being only a subsidiary function. This conclusion is borne out by the explanatory notes to 3809 which state that the heading covers preparations of the kind used during finishing of fabrics, which include softening agents. In my view, therefore, the order of the high court was correct.

[12] The appeal is dismissed with costs including those of two counsel.

C H Lewis
Judge of Appeal

APPEARANCES

APPELLANTS:

C J Pammenter SC

Instructed by the State Attorney,

Durban

The State Attorney , Bloemfontein.

RESPONDENTS:

A Joubert SC (with him C McAslin)

Instructed by Bowman Gilfillan Attorneys,

Johannesburg

Honey Attorneys Inc, Bloemfontein.