THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1330/2023

In the matter between:

JT INTERNATIONAL MANUFACTURING SOUTH AFRICA (PTY) LTD **APPELLANT**

and

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

Neutral citation: *JT International Manufacturing South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* (1330/2023) [2025] ZASCA 37 (4 April 2025)

Coram: ZONDI AP and SMITH and KOEN JJA and MUSI and PHATSOANE AJJA

Heard: 12 March 2025

Delivered: 4 April 2025

Summary: Interpretation: Customs and Excise Act 91 of 1964 – twelve imported consignments of cigarette tobacco entered under rebate code 460.24 not entered into SAD 500 ZRW forms as required by rule 19A.09(c) – whether the Commissioner for the South African Revenue Service has a discretion to exempt non-compliance with

the provisions of rule 19A.09(c) in terms of s 75(10)(*a*) of the Customs and Excise Act.

ORDER

On appeal from: Gauteng Division of the High Court**,** Pretoria (Flatela J, sitting as a court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following order:

'(a) It is declared that s 75(10)(*a*) of the Customs and Excise Act 91 of 1964 authorises the Commissioner of the South African Revenue Service (the respondent) to *ex post facto* exempt the applicant from compliance with the conditions prescribed by rule 19A.09(c);

(b) The respondent shall pay the applicant's costs pertaining to the separated issue.'

JUDGMENT

Zondi AP (Smith and Koen JJA and Musi and Phatshoane AJJA concurring):

Introduction

[1] The issue in this appeal is whether s 75(10)(*a*) of the Customs and Excise Act 91 of 1964 (the Act) authorises the respondent, the Commissioner for the South African Revenue Service (the Commissioner), *ex post facto* to exempt the appellant, JT International Manufacturing South Africa (Pty) Ltd, from compliance with the conditions prescribed by rule 19A.09(c). The appellant contends that the proviso to s 75(10)(*a*) does empower the Commissioner to exempt non-compliance with the rule. The Commissioner disagrees. He contends that the exemption powers granted to him by the proviso do not extend to condoning such non-compliance.

Background facts

[2] During the period 7 January 2011 to 25 July 2011, the appellant imported a total of 12 consignments of cigarette tobacco from Switzerland. It duly entered each consignment of the tobacco by completing and submitting the SAD 500 form to the Commissioner. The appellant declared and paid the 'ordinary' customs duty plus VAT

thereon, as reflected on the form. The SAD 500 form declared that the goods were imported under the rebate code 460.24. This is the rebate code relating to the excise duty on cigarette tobacco in Part 2A of Schedule 1 to the Act. After customs clearance, the tobacco was transported by road from the port of entry to the appellant's manufacturing warehouse in Wadeville, Germiston. The appellant, however, failed to complete or submit SAD 500 forms (ZRWs) in respect of the consignments prior to or upon delivery of the tobacco to the manufacturing warehouse, within 30 days after the entry of goods on SAD 500 forms, as required by rule 19A.09(c).

[3] The explanation for the default is that the appellant's employee, Mr Mahlalela, who was responsible for ensuring that the ZRWs were timeously completed and submitted to the Commissioner, failed to do so in respect of the relevant consignments. His job involved administering the movement of imported tobacco from the port of entry to the warehouse. He is no longer employed by the appellant and could not be contacted to obtain his explanation. His then manager, Ms Obermeyer, records that Mr Mahlalela had told her, after the failure to file the ZRWs became known to the appellant, that he had completed all the documents which he understood were required to be completed. Ms Obermeyer had not been aware of his failure at the time and believed that Mr Mahlalela, who had been employed for some considerable time and was in constant contact with the clearing agent, was aware of all the customs requirements and had complied with them.

[4] In the course of a post clearance audit conducted by the Commissioner in January 2012, it was discovered that ZRWs had not been completed or submitted for the shipments at the relevant time. The Commissioner gave notice of its intention to claim from the appellant the Part 2A excise duty in respect of the cigarette tobacco. In response, the appellant explained the failure and expressed regret for the error. It attached newly created ZRW declarations for the months in question, each dated 10 February 2012. It explained that it had full records of the import of dutiable goods and manufacturing of the final product and invited the Commissioner to inspect these. It averred that at no point was the revenue owing to the *fiscus* at risk, and that the appellant could account for its excise declarations. In conclusion, it asked among others, for absolution from payment of the Schedule 1 Part 2A duty. The Commissioner

turned down the appellant's request. It stated that the appellant was not entitled to the rebate because it had not complied with rule 19 A.09(*c*). It demanded payment.

[5] On 16 April 2012, the appellant made a formal request for the Commissioner to exercise his discretion in terms of s 75(10)(a) of the Act to exempt the appellant retrospectively from the requirement to file the ZRWs. On 12 October 2012, the Commissioner rejected the exemption application on the ground that s 75(10)(*a*) found no application to the present circumstances, *i.e.* that the Commissioner was not empowered by that provision to grant the relief sought. On 22 November 2012, the appellant lodged an internal administrative appeal in terms of ss 77A to 77HA of the Customs Act against the Commissioner's decisions to claim excise duty and VAT amounting to R60 946 051.34, and to refuse to exercise the s 75(10)(*a*) power to exempt the appellant from compliance.

[6] On 10 September 2013, the Commissioner notified the appellant of the decision of the Customs and Excise National Appeal Committee (the National Appeal Committee) dismissing the appeal. The sole basis for this dismissal was that s 75(10) did not provide a legal basis for the claimed exemptions. The relevant part of the National Appeal Committee's decision reads:

'Section 75(10) does not provide for application for condonation for non- compliance. What is in issue here is a request for condonation for non-compliance and not an application for exemption from prior compliance as envisaged by s 75(10). As a result, the duty of the Commissioner to exercise a power in favour of [the Appellant] falls away. In the circumstances, duty and VAT remain due and payable.'

And further:

'In conclusion, based on the committee's interpretation of s 75(10), there is no legal basis for SARS to exercise its discretion in condoning non-compliance after importation, and the schedule must therefore stand. Your appeal is therefore disallowed.'

[7] After giving the requisite notice to the Commissioner, the appellant on 17 April 2014, brought an application in the Gauteng Division of the High Court, Pretoria (the high court) in which it, among others, sought the following relief:

''1 Declaring that (a) under s 75(1)(*b*) of the Customs and Excise Act 61 of 1964 ''(the Customs Act)'' the Applicant has a right to a rebate of the excise duty under tariff item

104.35.10 (sub-heading 2403.10.30) in Part 2A of Schedule 1 to the Customs Act on the consignments of tobacco which the applicant imported during the period January 2011 to July 2011, being those consignments reflected in the first three columns of the schedule, such excise duty (in sum of R53 461 449.02) being reflected under column 7 . . . and (b) the Applicant is not liable for the payment of the additional value-added tax ''(VAT)'' in terms of the Value-Added Tax Act 89 of 1991 (in the sum of R7 484 602.32) as reflected in column 9 . . .

2 Reviewing and setting aside the Respondent's decisions to:

(a) demand payment by the Applicant in respect of the said imports of additional excise duty of R53 461 449.02 and VAT of R7 484 602.32, amounting to R60 946 051.34 in total, and interest thereon; and

(b) refuse to exercise the discretion afforded to him in section 75(10)(*a*) of the Customs Act to exempt the Applicant from compliance with the conditions prescribed by Rule 19A.09(c) of the rules promulgated in terms of the Customs Act in relation to the entry of the said imports into a licensed manufacturing warehouse on a form SAD 500 (ZRW) within 30 days of the date of entry on form SAD 500 (GR)

and replacing the said decisions of the Respondent with an Order to the effect that:

(c) no such amounts as set out in (a) above are payable by the Applicant; or in the alternative,

(d) that the Applicant be exempted from compliance with the provisions of Rule 19A.09(c) referred to in (b) above;

or, in the event that this Court is not prepared to grant the relief in paragraphs (c) and/or (d) above, remitting the matter to the Respondent and directing him to make a fresh decision as to whether to claim the additional duty and VAT, and whether to exercise his discretion under section 75(10)(*a)* of the Customs Act, as requested by the applicant.'

[8] By agreement between the parties, the high court made a separation order in terms of rule 33(4) of the Uniform Rules of Court providing for the following issue to be adjudicated by the court separately (the separated issue):

'1 Whether section 75(10)(*a*) of the Customs and Excise Act, 91 of 1964 or the common law authorises the Respondent to *ex post facto* exempt the Applicant from compliance with the conditions prescribed by Rule 19A.09(*c*).

2 directing that all further proceedings be stayed until the separated issue has been disposed of . . .'.

The high court's findings

[9] The high court decided the separated issue in favour of the Commissioner. It held that the exemption power granted to the Commissioner under s 75(10)(*a*) applies exclusively to circumstances where goods had been duly imported under rebate of duty, but the importer/manufacturer later decided to use the goods in a different manner. It reasoned that if the Commissioner were to grant a concession using s 75(10)(*a*), it would lead to the floodgates for similar exemptions being opened. It accordingly dismissed the application and ordered each party to pay its own costs.

Submissions of the parties

[10] The appellant submitted that the provisions of s 75(10)(*a*) of the Act are wide enough to exempt compliance with rule 19A.09(c) in relation to the timeous submission of ZRWs for the twelve imported consignments of tobacco and that being so, there is no basis to justify the restrictive interpretation contended for by the Commissioner. The appellant argued that s 75(10) allows for the exemption of 'any such person' from 'the provisions of' the subsection. The proviso, so ran the argument, permits the Commissioner to decide that any one or more of those requirements need not be complied with, without endangering the entitlement to a rebate and this he can do before the entry in question, or after entry has already occurred. This was so, proceeded the argument, because 'entry' is not an event which only takes place when the goods land at the port of entry. It is a process which is completed 30 days after the completion of the ZRW, which is a condition to be met in order to get a rebate.

[11] In argument, the Commissioner submitted firstly, that the conditions in s 75(10)(*a*) must be met before goods are allowed to be entered under rebate of duty. He argued that the proviso to the subsection only gives him powers to exempt a person from the provisions of the subsection where the intended use of duly imported goods changes after the importation. It does not give him powers to condone non-compliance with the conditions. Secondly, the Commissioner submitted that the subsection has limited scope and does not authorise him to exempt an importer/manufacturer from non-compliance with the substantive requirements of a rebate item and those of any note or rule linked to it. In developing his argument, the Commissioner emphasised that the provisions of s 75 governing rebates, drawbacks

and refunds are subdivided into two categories. Some of these provisions such as s 75(1)(*b*) and its proviso, read with item 460.24 and rule 19A.09(c), deal with substantive requirements, in that they prescribe what, how and when it is to be done. On the other side of the coin are conditions which set out the preconditions for the goods to be eligible for treatment under a rebate or refund item.

[12] The Commissioner argued that rule 19A.09(c) constitutes a 'substantive requirement' and is not a condition that must be met before entry can be made as contemplated by s 75(10)(*a*). That being the case, the Commissioner argued, that he has no powers to exempt a person from its provisions. The Commissioner submitted that s 75(10)(*a*) is about preconditions which must be met before the goods are entered under rebate. It has no bearing on rule 19A.09(c) which he argued deals with the substantive requirement of rebate item 460.24, which regulates the process that only takes place after the entry of the goods under rebate.

[13] In support of this proposition the Commissioner cited H C Cronje, Custom and Excise Service, Commentary (vol 2) who states the following at 10-24:

'The requirements specified in subsection (10) are peremptory and must be complied with before the goods specified in the relevant item of Schedule 3, 4 or 6 may be entered or acquired under rebate of duty. These requirements include the furnishing of security as the Commissioner may require and other conditions such as registration or premises and plant, and so forth as may be prescribed by the rules for section 75 or the notes to any such Schedules and are applicable, for example, to Schedule 3, item 470.03 of Schedule 4 and certain items of Schedule 6. Furthermore, certain items also require approval by the Commissioner, for instance item 412.21 and 480.25, or approval of a formula (item 607.04), in which case such approval or permit must be obtained before the goods are entered or acquired under rebate of duty. ''Acquired'' could include entry on forms DA 32 and 33, DA 62, DA 510, DA 600 and DA 610.'[1]

The issues

[14] The dispute revolves around the correct interpretation of s 75(10)(*a*) of the Act read with rebate item 460.24 in which rule 19A.09(c) is listed as one of the requirements to be met to qualify for a rebate. The question is about the circumstances

[1] H C Cronje: Customs and Excise Service last updated September 2024.

in which the Commissioner may exercise his exemption powers under this subsection. The question is not whether the Commissioner should have exercised his discretion in favour of granting the rebate, but rather whether the Commissioner was correct to determine that he does not have powers to condone non-compliance with the relevant provisions.

[15] The proper approach to statutory interpretation is well established. The interpretation of s 75(10)(*a*) requires the examination of the text, the context and the purpose of its provisions. They must be considered holistically.[2]

The applicable statutory provisions

[16] Section 75 is located in Chapter X of the Act, which deals with '*Rebates, refunds and drawbacks of duty*.' It regulates specific exceptions to the ordinary rules pertaining to duty, whereby the person, who is otherwise responsible for the duty need not pay it from the outset (a rebate) or having paid it, may recover it from the *fiscus* (a refund or drawback).

[17] The starting point in undertaking this interpretive exercise is s 75(1). It provides as follows:

'**Specific rebates, drawbacks and refunds of duty**

(1) Subject to the provisions of this Act and to any conditions which the Commissioner may impose-

(a)…

(*b*) any imported goods described in Schedule 4 shall be admitted under rebate of any customs duties, excise duty . . . applicable in respect of such goods at the time of entry for home consumption thereof, or if duly entered for export and exported in accordance with such entry, to the extent stated in, and subject to compliance with the provisions of the item of Schedule 4 in which such goods are specified;

(*c*)...

(*d*)…

Provided that any rebate, drawback or refund . . ., shall only be granted as expressly provided in Schedule 4, 5 or 6 in respect of any item of such Schedule'.

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 2 ALL SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[18] Section 75 and its Schedules 3,4,5 and 6 in respect of rebates, refunds and drawbacks of duty relate to the duty payable or paid under Schedule 1. Part 1 and Part 2A of Schedule 1 to the Act govern customs duty payable on certain imported goods. Payment of excise duty on locally manufactured goods is governed by Part 2 of Schedule 1.

[19] Imported cigarette tobacco is classifiable in tariff heading 2403.19.30 of Part 1 of Schedule 1 to the Act and liable to customs duty, payable on importation thereof. VAT is also payable on the imported tobacco in terms of s 7(1)(*b*) read with s 13(2)(*a*) of the Value Added Tax Act 89 of 1991. Completed cigarettes containing tobacco are themselves subject to the payment of the specific excise duty prescribed by item 104.35.05 of Part 2A of Schedule 1.

[20] Section 75(1)(*b*) concerns the entitlement to a rebate, refund or drawback and the question whether a person is so entitled, is determined by the provisions of the item of the Schedule in which goods subject to such rebate, refund or drawback are specified. In this case the entitlement to a rebate, refund or drawback is subject to compliance with the provisions of the rebate item 460.24 of Schedule 4, Part 2, in which the imported cigarette tobacco is specified.

[21] Section 75(10)(*a*) sets out the requirements that must be complied with before the goods specified in the relevant item of Schedule 3, 4 or 6 may be entered or acquired under rebate of duty. It provides:

‘No goods may be entered or acquired under rebate of duty until the person so entering or acquiring them has furnished such security as the Commissioner may require and has complied with such other conditions (including registration with the Commissioner of his premises and plant) as may be prescribed by rule or in the notes to Schedule 3, 4, or 6 in respect of any goods specified in any item of such Schedule: Provided that the Commissioner may, subject to such conditions as he may in each case impose, exempt with or without retrospective effect, any such person from the provisions of this subsection.’

[22] Non-compliance with the requirements of the relevant provisions of the section is not fatal as the Commissioner may, subject to such conditions as he may in each

case impose, exempt with or without retrospective effect, any such person, from the provisions of subsection 10(*a*).

[23] The goods under consideration in this matter are listed in Schedule 1 Part 2A. The appellant entered them in SAD 500 under rebate of duty item 460.24. Rebate item 460.24 is listed in Schedule 4 Part 2. To qualify for a rebate under item 460.24 the following requirements must be met:

(a) the provisions of rule 19A.09(c) must be complied with;

(b) all other provisions of the Customs and Excise Act pertaining to locally manufactured excisable goods must be complied with;

(c) the goods must have been imported by a licensed manufacturer into a storage (OS) or manufacturing warehouse; and

(d) the goods must be removed by such licensed manufacturer or a licensed remover as contemplated in rule 64D.

[24] Non-compliance with the rebate item 460.24 consisted of a failure to enter the goods in ZRW as required by rule 19A.09 (c). This rule provides that 'the liability for duty in terms of Section A of Part 2 of Schedule 1, cleared in terms of the provisions of rebate item 460.24 by a licensed manufacturer or a licensed supplier (SOS warehouse licensed for denaturing of spirits) on Form SAD 500(GR or X GR) shall cease upon entering the goods into a licensed warehouse for locally manufactured goods on a Form ZRW within 30 days from the entering on a Form SAD 500.'

[25] As regards the text of the section, it is significant to note that the exercise of the exemption power conferred on the Commissioner by the proviso to s 75(10)(*a*) does not depend on whether the relevant conduct constitutes a failure to comply with a 'pre-condition' or a 'substantive requirement' of the provisions governing rebates as contended by the Commissioner. The section does not draw this distinction. It simply stipulates that 'the Commissioner may, subject to such conditions as he may in each case impose, exempt with or without retrospective effect any such persons from the provisions of this subsection.'

[26] Section 75(10)(*a*), properly interpreted, affords the Commissioner powers to exempt an importer/manufacturer, who has failed to comply with the requirements of

rule 19A.09(c), from complying with its provisions. The non-compliance relates to the consignments of tobacco that were already entered under rebate of duty. The imported tobacco was entered on the SAD 500 form under rebate of duty. What was omitted was their entry into the RWZ within the period prescribed by rule 19A.09(c). 'Entry' is not an event. It is a process happening in various stages of the import duty and excise duty ecosystem. I do not find any indication in s 75 that non-compliance with rule 19A.09 was intended to be excluded from its operation. If that was the case, it would result in an importer/manufacturer being deprived of a right to claim a rebate. That this is not the intention of s 75 is not surprising, because the purpose of introducing rebate item 460.24 as stated in the Explanatory Memorandum was to avoid double taxation. Section 75(10)(*a*) provides a mechanism through which double taxation may be avoided. To interpret s 75(10)(a) as contended by the Commissioner runs counter to the purpose for which rebate provision was enacted.

[27] The ambit of the subsection is much wider, and the Commissioner is not restricted to granting exemptions only in instances where the intended use of duly imported goods has changed after importation. Instances of non-compliance referred to in s 75(10)(*a*) may include failures to furnish security that may be required by the Commissioner, and to comply with other conditions as may be prescribed by the rule or in the notes to Schedule 3, 4 or 6 in respect of any goods specified in any item of such Schedule.

[28] The subsection covers the nature of the appellant's non-compliance, namely, its failure to have complied with the requirements of a rebate item 460.24 in so far as it relates to rule 19A.09(c) appearing in Schedule 4 Part 2.

[29] The proviso to s 75(10)(*a*) permits the Commissioner to decide that any one or more of the requirements that are set out in the main provisions of s 75(10)(*a*) need not be complied with, with or without depriving the appellant of its right to claim a rebate. The Commissioner may do so before the entry in question, or after it has already occurred. The determination that the Commissioner has a discretion under the proviso to s 75(10)(*a*) to exempt non-compliance does not mean that he is compelled to grant exemption. He may exercise his discretion in favour of, or against, granting exemption.

Order

[30] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following order:

‘(a) It is declared that s 75(10)(*a*) of the Customs and Excise Act 91 of 1964 authorises the Commissioner of the South African Revenue Service (the respondent) to *ex post facto* exempt the applicant from compliance with the conditions prescribed by rule 19A.09(c);

(b) The respondent shall pay the applicant’s costs pertaining to the separated issue.’

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D H ZONDI

ACTING PRESIDENT

Appearances

For the appellant:	MW Janisch SC
Instructed by:	Webber Wentzel Attorneys, Johannesburg
	Honey Attorneys, Bloemfontein
For the respondent:	JA Meyer SC and LG Kilmartin SC
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein