Customs Tariff Determination: The Inexact Science

By Gavin Brown
Bowman Gilfillan Attorneys

In the recent Supreme Court of Appeal matter of Distell Limited and Others v The Commissioner for the South African Revenue Service, the court made some observations relating to issues surrounding tariff determination which are of interest to anyone involved in this task.

Tariff rates are determined in accordance with the Customs and Excise Act 91 of 1964 and more particularly in accordance with the various tariff headings which outline descriptions of goods to which they apply. The tariff headings are constructed so as to be both as accurate as possible and also flexible in changing technological times. They are also constantly being amended to cater for new developments in various trading sectors. The result is, as described by Harms DP in his judgement in the Distell case, tariff headings which are "by no means sharply defined".

The task of determining the properly applicable tariff becomes even more difficult with respect to technically complicated goods. The reason for this is that tariff headings require an assessment of the characteristics and applications of a specific item or substance and then an assessment of which of the tariff headings most accurately encapsulates those characteristics and uses. It is often the case that more than one heading appears to be applicable. How does one then proceed?

More often than not the merchant, who will have to pay the tariff, decides the issue on the basis of choosing the heading under which the lower tariff will apply. It is not surprising then that this often contrasts with the heading which the Commissioner believes is applicable. It would seem that, rather than the technical attributes of the items, the deciding factor is how much the merchant will save on duty or how much the revenue service may make. As Harms DP stated in his judgement, "each side treats the vacillations as opportunism" although the learned judge did not believe that this necessarily reflected on the ethical conduct of either party.

The problem with the inexact science of determining the applicable tariff is that when a tariff is disputed by the Commissioner, things can quickly become expensive. In order to avoid this it is perhaps useful to consider the principles of tariff determination which have been

established by our courts over time.

The set of principles was first introduced by our courts in the 1970 appeal case of The Secretary for Customs and Excise v Thomas Barlow & Sons and was recently confirmed in Commissioner for South African Revenue Services v Colgate-Palmolive (Pty) Ltd. Essentially the court has stated that to properly determine the applicable tariff a three stage test should be applied.

Essentially the court has stated that the proper determination of the applicable tariff requires the application of the following three stage test:

1. Determining the meaning of the words contained in the relevant headings and section notes;
2. Considering the nature and characteristics of the goods themselves;
3. Determining which heading is most appropriate in encapsulating the technical properties and uses of the goods.

The dilemma which arises in applying the test is, to an extent, one of the chicken and the egg. The technical nature of the headings and words means that before identifying the correct headings one must first fully understand the relevant technical characteristics of the goods themselves. However, to determine the relevant technical specifications of the goods, it is necessary to have knowledge of the kinds of technical specifications to which the headings apply.

This is particularly so when one considers that a number of the headings contain highly complex technical descriptions referring, for example, to various chemicals which may make up a product as well as its primary and secondary uses.

What this dilemma exposes is the fact that the order in which the steps of the test should be applied is debatable. It has been suggested that when applying the test in practice the first two steps should be swopped around.

The dilemma also highlights the fact that proper classification, for the purposes of tariff determination, hinges on the technical aspects of the goods themselves. It is thus often advisable to have an appropriate expert prepare a report on the goods before attempting to determine the appropriate tariff. This may be more expensive in the short term but will undoubtedly save money in the long run - particularly if a dispute with the Commissioner

arises.

An expert report can also be helpful with respect to a merchant's discussions with his clearing agent. In practice merchants often simply rely on information given to them by their chosen clearing agents, who know less than they do about the technical make up of the goods, in order to identify the most appropriate tariff. A technical report is something that will assist the clearing agent in properly understanding and classifying the goods.

In many cases however determining the tariff will boil down to a choice between two or more descriptions which appear equally applicable depending on whether they are viewed through the eyes of the merchant / clearing agent or the Commissioner. It is perhaps inevitable that the merchant will lean towards a determination which will lead to a less expensive tariff rate.

The advice is to avoid resist the urge of always choosing the more favourable tariff as a matter of course. It is preferable to investigate fully and obtain the necessary legal and technical advice before launching into a prolonged and expensive dispute with the Commissioner.