

BORDER TIMBERS LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 5 July and 9 November 2005

Opposed Application

Mr T. *Biti*, for the applicant
Mr *A.B.C. Chinake*, for the respondent

HUNGWE J: This dispute concerns the classification for tariff purposes of the urea resin imported by the applicant. The respondent classified it under Commodity Code 35.06. The applicant argued that falls under 39.09 of the Customs and Excise (Tariff) Notice 2002 published on Statutory Instrument 245/02.

The dispute arose as follows.

Applicant, as its name suggests is a manufacture of wood products. The door manufacturing process called veneering consumes large quantities of glue. This glue is made from urea resin, water and a hardener. At importation the urea resin is in powder form. Applicant imports the urea resin from Dynea Wood and Speciality Adhesives of Norway and Saudi Arabia. The trade name for urea resin is Aerolite FFD when manufactured in Norway and Dynorit L-530 when manufactured in Saudi Arabia. Its chemical name is urea formaldehyde polymer. The chemical formula is expressed as $C-H_4-N_2-O.C-H_2O$. In simple language it is a polymer of urea formaldehyde in powder form. Its qualitative and quantitative composition is 90%-100% urea formaldehyde polymer.

The powder resin is used in the production of plywood and in veneering, gluing the ply sheets together in a hot press. To prepare the powder resin for use it is

mixed with water and a hardener as well as a filler to give the correct viscosity where required.

As I pointed out at the outset, the urea resin is imported in powder form.

Applicant contends that the correct classification is under Commodity Code 39.09. It has always been so classified until the chain of events leading to this dispute which culminated with respondent issuing four notices (or requests to amend) Form 45 on 16 February 2005. In the notice the customs officer intimated to the importer (applicant) that the commodity code given in the original bills of entry dated 2 February 2005 should have been 32.14 9000 instead of 39.09 1000 for the urea resin and 38.24 9090 for the hardener M59. It will be seen that there was a deliberate effort to classify the hardener apart from the three resins in that Annexures "B1" and "B2" to applicants founding affidavit relates to the urea resin whilst "B3" and "B4" relate to the hardener. In the correction by customs officer Kachidza on 16 February 2005 gave a globular classification of both the resin and hardener as 32.149000 by Request to Amend in D1 to D4. These were the subject of debate during the hearing.

It is important to note that whilst the respondent contended in the Notice/Request to Amend that the correct classification for urea resin was 32.14 9000, this contention was abandoned in the opposing affidavit in favour of 39.01-39.14. However this is also expressly abandoned by the respondent in its heads of argument preferring instead Commodity Code 35.06.

The contention by the respondent is that because the commodity in question is not a "plastic product" but "powder" it is therefore not urea resin in its primary form. According to the argument put forward by Mr *Chinake* for the respondent, as conceded in the letter annexed to applicant's founding papers being the letter from Rory Morrish, the commodity imported by the applicant is a urea formaldehyde polymer in powder form. It is used in the manufacture of plywood and in veneering.

Both the urea and formaldehyde go through a manufacturing process to produce a powder. This process takes place before importation. As such at importation it would have lost its primary form as a plastic. It would be powder. Having lost its primary form, so the contention goes, it falls into Code 3506 under which the following comment is found:-

“It is to be noted that certain of the products included in this heading are usable as glues or adhesives in the form in which they are sold while others must be dissolved or dispersed in water before use.”

Mr *Chinake* argued that under *Chapter 35* primary forms; heading 39.09 to 39.14 covers goods in primary forms only. He also relies on the following note in *Chapter 39*:-

“When as a result of the addition of certain substances, the resultant products answer to the description in a more specific heading elsewhere in the Nomenclature, they are excluded from Chapter 39; this is, for example, the case with;

(a) Prepared glues ...”.

The applicant’s contention is based as I understood it, on the reasoning that the acceptance of the commodity as a urea resin should lead to the unavoidable conclusion that it has been specifically catered for under heading 39.09 at page 185 of SI 245/02

Both counsel agreed that in interpreting the provisions of SI 245/02 the explanatory notes for each chapter are an important guide to interpretation.

The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning; and the second is that the phrases and sentences are to be construed according to the rules of grammar.

The Customs and Excise (Tariff) Notice 2002 provides in Part II for the general rules to be observed in the interpretation of the harmonized system.

In considering what the correct classification of urea resin is I have taken into account the rules of interpretation set out in the tariff itself.

According to its heading *Chapter 35* applies to Albuminoidal Substances, Modified Starches, Glues and Enzymes. Commodity Code 35.06 applies to –

“Prepared glues and other prepared adhesives not elsewhere specified or included; products suitable for use as glues or adhesives, put up for sale as glues or adhesives not exceeding a net weight of 1kg.”

Mr *Chinake* for the respondent, conceded that as commodity code 3506:1000 specifically refers to “products suitable for use as glues or adhesives put up for retail sale as glues and adhesives, not exceeding a net weight of 1kg” then the urea resin imported by applicant is not covered by this code. Code 3506.9100 covers adhesives based on polymers of headings 39.01 to 3913 or on rubber. It will be clear that these would have to be glues or adhesives put up for retail sale as glues or adhesives not exceeding a net weight of 1kg since they have already been provided for in the other code. The respondent argued therefore that because the urea resin is not in its primary form as is required under code 3901 then it falls under 3506.9900 under 1000 the “Other”.

In my view this cannot be correct. The notes at p 645 following code 3506 make this quite clear. Paragraph (A) and (B) provide that this heading (3506) covers products suitable for use as glues or adhesives and put up for retail sale as glues or adhesives, not exceeding a net weight of 1kg; or prepared glues and other prepared adhesives not covered by a more specific heading in the nomenclature.

The Code 3909 clearly and unambiguously covers amino resins, phenolic resins and polyurathanes in primary form.

The argument by the respondent against classifying the product imported by the applicant under this resin was that as the urea resin is a product of a chemical process, it is no longer in its primary form thus excluded by that state from qualification. In my view the fact of the matter is that urea resin has been specifically provided for. It cannot be reclassified without doing violence to the statute. The language used is plain and admits of no other meaning. I am fortified in the approach that I have adopted in this case by the remarks of COLMAN J in *African Oxygen Ltd v Secretary, Customs and Excise* 1969 (3) SA 391.

In conclusion therefore I observe that the respondents have previously classified this product under 3909. It has not shown good cause for this sudden departure from the classification. The evidence placed before me shows that that is the appropriate classification.

In the result it is ordered as follows:-

1. It is ordered that the classification for Urea formaldehyde polymer imported by the applicant as Urea resin, thiourea resin in primary forms Dynosol 9576 is Commodity Code 3909 1000 attracting duty at 5%.
2. Respondent is to pay costs.

Honey & Blanckenberg, applicant's legal practitioners.
Kantor and Immerman, respondents' legal practitioners.