Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 1901/2015

Before: The Hon. Mr Justice Binns-Ward

Hearing: 4 December 2015
Judgment delivered: 5 January 2016

In the matter between:

VAN DRIEL BOERDERY VENNOOTSKAP 2004 t/a

DIE GROENE OASE Applicant

And

THE COMMISSIONER, SOUTH AFRICAN

REVENUE SERVICE Respondent

JUDGMENT

BINNS-WARD J:

[1] This case arises from a dispute between the applicant and the Commissioner of the South African Revenue Service about the classification for customs duty purposes of certain goods imported into South Africa by the applicant. As in all such matters,

at the bottom of it is a question of money.[1] If the classification contended for by the applicant is correct no duty is payable. But if the Commissioner's determination were to be upheld, the applicant will have to pay an amount of at least R547 214,34 by way of duty, additional VAT, interest and penalties.

[2] Section 47(1) of the Customs and Excise Act 91 of 1964 ('the Act') provides that duty shall be paid for the benefit of the National Revenue Fund on all imported goods in accordance with the provisions of Schedule I to the Act. Part I of the Schedule consists of a comprehensive list of commodity groups. The list is compiled and maintained in accordance with the World Customs Organisation's Harmonized Commodity Description and Coding System, which is a nomenclatural system commonly referred to as the 'Harmonized System' ('HS'). It comprises 22 sections made up of 99 chapters, some of which have sub-chapters. As Trollip JA described in *Secretary for Customs & Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (A) at 675D-E, '*Within each chapter and sub-chapter the specific type of goods within the particular class is itemised by a description of the goods printed in bold type. That description is defined in the Schedule as a "heading". Under the heading appear sub-headings of the species of the goods in respect of which the duty payable is expressed. The Schedule itself and each section and chapter are headed by "notes", that is, rules for interpreting their provisions*'. Part I of the Schedule is preceded by an introductory section entitled 'General Notes', which include (as Item A) the 'General Rules for the Interpretation of this Schedule'. They are the part of the 'notes' mentioned by Trollip JA as heading the Schedule itself. I shall use the acronym 'GRI' when referring to the General Rules.

[3] Section 47(8)(a)(i) of the Act provides, insofar as relevant, that the interpretation of any tariff heading or tariff subheading in Part 1 of Schedule 1 'shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time'. The section and chapter notes are, as mentioned, part of the Schedule; the

[1] As noted with characteristic perspicacity by Schutz JA in the opening sentence of the judgment in *Commissioner for Customs and Excise v Capital Meats CC (In Liquidation) and Another* 1999 (1) SA 570 (SCA).

explanatory notes are not. GRI 1 [2] provides that 'the titles of Section, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the … provisions' of GRI 2-6.

[4] The character and role of the explanatory notes in the interpretation of Part I of the Schedule were described in *Thomas Barlow and Sons Ltd* supra, at 675F – 676D, as follows:

> It is clear that the … grouping and even the wording of the notes and the headings in Schedule I are very largely taken from the Nomenclature compiled and issued by the Customs Co-operation Council of Brussels. That is why the Legislature in sec. 47(8)*(a)* has given statutory recognition to the Council's Explanatory Notes to that Nomenclature. These Notes are issued from time to time by the Council obviously, as their name indicates, to explain the meaning and effect of the wording of the Nomenclature. By virtue of sec. 47(8)*(a)* they can be used for the same purpose in respect of the wording in Schedule I. It is of importance, however, to determine at the outset the correct approach to adopt in interpreting the provisions of the Schedule and in applying the explanations in the Brussels Notes.
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> Note VIII to Schedule I sets out the 'Rules for the Interpretation of this Schedule'. Para. 1 says:
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> > 'The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification (as between headings) shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise indicate, according to paras. (2) to (5) below.' [3]
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> That, I think, renders the relevant headings and section and chapter notes not only the first but the paramount consideration in determining which classification, as between headings, should apply in any particular case. Indeed, right at the beginning of the Brussels Notes, with reference to a similarly worded paragraph in the Nomenclature, that is made abundantly clear. It is there said:
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> > 'In the second provision, the expression 'provided such headings or Notes do not otherwise require' (that is the corresponding wording of the Nomenclature) is necessary to make it quite clear that the terms of the headings and any relative section or chapter notes are paramount, i.e., they are the first consideration in determining classification.'
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> It can be gathered from all the aforegoing that the primary task in classifying particular goods

[2] See Item A of the 'General Notes' to Schedule I. It essentially replicates the General Rules for the Interpretation of the Harmonised System.

[3] Now Item A of the 'General Notes' to Schedule I (see note 2, above). GRI 1 now reads in relevant part as set out in para [3], above.

> is to ascertain the meaning of the relevant headings and section and chapter notes, but, in performing that task, one should also use the Brussels Notes for guidance especially in difficult and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them. They are manifestly not designed for the latter purpose, for they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. And, in any event, it is hardly likely that the Brussels Council intended that its Explanatory Notes should override or contradict its own Nomenclature. Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes.

[5] In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A), at 863G, the proper process of classification of goods in terms of Part I of Schedule I was expounded by Nicholas AJA, in a passage that has been applied consistently in the subsequent jurisprudence, as follows:

> Classification as between headings is a three-stage process: first, interpretation - the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.

In the current proceedings the applicant bears the onus of showing that the classification for which it contends – '*Prefabricated buildings*' in terms of TH 94.06[4] - is the correct one, failing which the Commissioner's determination stands; cf. *Smith Mining Equipment (Pty) Ltd v The Commissioner South African Revenue Service* [2013] ZASCA 145 (1 October 2013), at para 2. To an extent that makes the court's task easier than that of the customs officer or clearing agent who is required to make a quayside decision when the goods are presented.

[6] The applicant carries on business in the field of the propagation and sale of fresh produce, primarily peppers and cucumbers. It cultivates the plants in a controlled environment. During 2009, when it became apparent that extensive additional production space was required, the co-proprietor of the business, Mr Mark van Driel, made investigations and eventually determined on ordering what he describes as 'two greenhouses' from Alweco Scherminstallaties Int B.V. ('Alweco') in the Netherlands. The intended structures were to measure approximately 14400

[4] 'TH' denotes 'tariff heading'.

and 6480 square metres respectively. Alweco manufactured the required components according to the applicant's specifications. They were shipped to Cape Town in seven containers aboard the '*SAFMarine Nokwanda*' under a single bill of lading. Alweco's invoice, in a total amount of nearly €340 000, including transport costs, stated '*We hereby charge you for: The delivery of NEW materials for construction of 2 complete greenhouses as per order confirmation…*'. The bill of lading described the contents of the containers as '*Greenhouse Const. Parts*'.

[7] The consignment was cleared through customs by the applicant's clearing agent under TH 94.06, which pertains to 'prefabricated buildings'. Value added tax in the amount of R471 891,70 was incurred, but in accordance with the provisions of Part I to the Schedule, which reflect that the import of prefabricated buildings is duty-free, no duty was paid.

[8] The structures were thereafter erected on the applicant's property under the supervision of Mr van Driel and his father. The method of erection entailed assembling the components in accordance with detailed assembly drawings supplied by Alweco. A standard manual was provided in respect of the installation of the internal screening system that plays a role in the climate control operation. The erection process took just under a year to complete.

[9] Mr van Driel described the essential elements of the assembly process as comprising:

1. The joining together and securing of the disassembled pieces of prefabricated steel infrastructure removed from the containers.
2. The assembly of the electro-mechanical mechanisms required to operate the climate control functions of the structures.
3. The installation and fixing of pre-cut cloth coverings over frames which act as a kind of internal ceiling within the structures to reflect heat and reduce temperature in the structures [i.e. the internal screening system].
4. The installation and fixing of pre-cut lengths of plastic sheeting to cover the steel roof sections of the structures to protect against rain and wind and to assist with temperature control.

(I have used the word 'structures' instead of the description 'greenhouses' employed by Mr van Driel and the supplier - and adopted, without demur, by the Commissioner in correspondence. A 'greenhouse' is defined in the dictionaries as '*a glass building in which plants that need protection from cold weather are grown*'.[5] The structures in issue are not in any way constructed of glass. In my view, although it has to be acknowledged that the words are sometimes treated as synonyms, the more appropriate term for the structures is 'hothouse' - the dictionary definition of which includes '*an environment that encourages rapid growth or development, especially in a stifling or intense way*'.[6] The structures in issue are intended to provide such an environment. For convenience, however, because everyone involved in the matter has used the term, I shall hereinafter nevertheless refer to the structures as 'greenhouses' without wishing thereby to be understood to have recognised the correctness of the appellation.)

[10] The Commissioner did not dispute the assembly process described by Mr van Driel, save to point out that the external structure of the roofs apparent in the photographs did not consist of 'a continuous covering but rather a number of dome shaped segments'. It was contended that this was 'irreconcilable with the [applicant's] submissions that no further workings took place'; in other words, the Commissioner implied that a further process of fabrication had been entailed. The applicant explained in its replying affidavit that the supplied roof structure comprises a series of long dome-shaped segments running parallel to one another. The long dome-shaped segments of the roofs are covered in pre-cut plastic supplied to fit by Alweco. The fitting or stretching of the supplied plastic is demonstrated in some of the photographs attached to the applicant's founding affidavit. It is apparent that the dome-shape is given by the configuration of the steel framework of the structure, over which the plastic sheeting roof material is stretched. The plastic roof covering supplied by Alweco was (subject to the exceptions described below) pre-cut to slightly exceed the dimensions of the areas to be covered. After installation, the excess material could be, and was, trimmed to give an improved aesthetic effect.

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[5] *Oxford Dictionary of English* (3 ed). The definitions in the *Oxford Shorter English Dictionary* (3 ed), the *Concise Oxford Dictionary* (5 ed) and *Merriam-Webster Dictionary* are essentially to the same effect.

[6] Oxford Dictionary of English (3 ed).

[11] Alweco had also supplied pre-cut plastic to cover the short ends of the segments, but the applicant had decided rather to use more durable corrugated fibreglass sheeting for that purpose instead. The plastic material that was supplied had a predicted durability of three to four years.[7] The applicant also decided to use the fibreglass as walling on two sides of the greenhouse structures and a flexible PVC-type material that could be rolled up to improve ventilation on the other sides. The substitution of materials did not detract from the fact that the imported goods presented for clearance had included pre-cut plastic ready for use in the areas in which the applicant later decided to use something else. Indeed, all the roofing and walling components of the structures were provided in pre-cut form with two exceptions.[8] One short roof section of 13,5 metres had to be covered using a 37-metre roll. An excess of approximately 22 metres had to be cut away after the roll was fitted. And for two other short roof sections of 18 metres each, a 37-metre sheet was used, which was cut in half for the purpose.

[12] The internal cloth hangings were assembled from 48 rolls of cloth cut in seven varying lengths. Their function is evident from the description by Mr van Driel quoted in paragraph [9].3, above. Although the standard installation manual refers to the possibility of the supplied cloth rolls having to be cut into two lengths, the Commissioner was not in a position to controvert the applicant's evidence that that had not been required in the assembly of the two greenhouses currently in issue. The assembly process required the lengths of cloth first to be fixed to the screens supplied for that purpose. It was explained that the cloth tends to be stretched in that process and that it subsequently shrinks back to size. Only when the material has stabilised is it fixed to the long sides of the roof frames. A flap (known as a 'cloth drop') is left hanging over the ends of the short sides of the frame. The flap is necessary to allow a measure of give as the material expands and contracts with changes in temperature.

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[7] I agree with the submission by the applicant's counsel that the comparatively limited durability of the plastic material is not a determinant criterion in the characterisation of the greenhouse structures as 'buildings'. If, upon assembly, the structures would have the essential character of a building, they fall to be characterised as such. Thus, structures such as igloos or ice hotels, which are built from ice and thus have limited durability because they melt when the weather warms up, are nonetheless, for so long as they exist, unmistakably buildings.

[8] The Commissioner requested a copy of the detailed design of the structures in his answering affidavit and indicated that he might on consideration thereof wish to deliver additional affidavits. The applicant duly provided the Commissioner with an electronic copy of the design documents. The Commissioner did not seek to raise anything arising out of his consideration of the drawings in a further set of affidavits.

A drop of at least 50cm must be provided. Any excess is sealed or cut off. Weights are attached to the cloth drops to ensure that the fixed cloth is kept taut.

[13] In 2012 the Commissioner conducted an audit of the bill of entry in terms of which the components for the greenhouse structures were imported. The Commissioner informed the applicant by letter, dated 3 May 2012, that he considered that that the imported goods had been incorrectly classified for import duty purposes. On 3 June 2013 a letter of demand was issued for payment of duties, additional VAT, penalties and interest as foreshadowed in the Commissioner's earlier letter. The letter of demand amounted to a tariff determination by the Commissioner in terms of s 47(9)(a) of the Act.

[14] The Commissioner determined that the goods fell to be classified under various headings in accordance with the character of the constituent parts; viz TH 7308.90.90(9) for 'the steel structures', TH 3920.10.00(1) for 'the plastic covers' and TH 5407.20.00(3) for 'the cloth' used in the interior hangings. As already noted, the applicant contends that they fall to be classified under heading 94.06: 'Prefabricated buildings'.

[15] The Commissioner's reasons for contending that the goods should have been entered under the aforementioned tariff headings were set out in a letter to the applicant's attorneys, dated 14 August 2014, as follows:

> 1. That the goods imported does (sic) not constitute complete (sic) two greenhouses as declared under [the bill of entry] but steel structures of a greenhouse/s and rolls of plastic and rolls of cloth…
> 2. That the rolls of plastic and rolls of cloth imported with the steel structures for the greenhouses does (sic) not meet the requirement of General Rule 2(a) of the General Rules for the Interpretation of the Harmonised System as they require further working operations for completion into a finished state.
> 3. We have been advised that since the rolls of plastic and rolls of cloth cannot be said to constitute the unassembled walls and roof respectively of a greenhouse, the goods were correctly classified by SARS in the letter of 03 June 2013.

[16] The applicant claimed the following substantive relief in its notice of motion:

i. A declaration that the goods imported by it under the relevant bill of entry dated 19 July 2010 fall to be classified as 'prefabricated buildings' under tariff heading 9406.00;

ii. A declaration that the said goods did not attract ordinary customs duty on importation;

iii. An order setting aside, to the extent necessary, the Commissioner's letter of findings, dated 3 May 2012, and the letter of demand issued pursuant thereto, dated 3 July 2013, including the customs duty, penalties on customs duty, and value added tax on both customs duty and penalties, as imposed under the said communications.

The application is thus in essence an appeal against the Commissioner's determination. Provision for such an appeal to the High Court is made in terms of s 47(9)(e) of the Act. The Commissioner agreed [9] to an extension of the period within which the Act requires an appeal to be prosecuted.

[17] It is not necessary to consider the classifications contended for by the Commissioner if the imported goods fall to be classified as 'prefabricated buildings'. If they do not, it must follow, on the basis of the principle mentioned earlier[10] and in the absence of any contention to the contrary, that the goods should be classified according to the imported constituent parts of the greenhouse structures.[11]

[18] The applicant has categorised the structures as 'buildings' by virtue of their character as structures with roofs and walls. The Oxford Dictionary of English defines 'building' as '*a structure with a roof and walls, such as a house or factory*'. In the Commissioner's answering affidavit something is made in passing of the fact that Chapter Note 4 to Chapter 94 gives the following examples of prefabricated buildings: '*housing or work site accommodation, offices, schools, shops, sheds, garages or similar buildings*', which all usually have hard or solid walls, to suggest that a structure with soft plastic walls does not qualify. However, any such contention

[9] In terms of s 96(1)(c)(i) of the Act.
[10] In para [5], with reference to *Smith Mining Equipment* at para 2.
[11] TH 73.08, which is one of the tariff headings applied by the Commissioner, expressly excludes structures that are 'prefabricated buildings of heading 94.06'. In *Costco Wholesale Canada Ltd v President of the Canada Border Services Agency*, 2013 CanLII 77317 (CA CITT), the Canadian International Trade Tribunal held, correctly in my view, that 'when there is a single relevant exclusion that precludes the *prima facie* classification of goods in both headings at issue in an appeal, the analysis should begin with the heading to which the exclusionary note does not apply'.

seems to be negated by the explanatory notes to TH 94.06, which state '*This heading covers prefabricated buildings also known as "industrialised buildings", of all materials*' (underlining supplied for emphasis).[12] In any event, I do not read the Commissioner's answering affidavit to have pertinently raised the contention that the structures do not qualify as buildings. As noted, the reference to prefabricated buildings ordinarily having solid walls was in the nature of a comment *en passant*. It was not taken to any conclusion.

[19] The verb 'prefabricate', from which the adjective 'prefabricated' derives, is defined in the Oxford Dictionary of English as 'manufacture sections of (a building or piece of furniture) to enable quick assembly on site: *prefabricated homes*'.[13] In the current matter it can hardly be said that the imported components of the greenhouse structures were such as to enable 'quick assembly on site'. In my view, however, that difficulty is addressed in terms of the applicable general rules of interpretation and the explanatory notes thereto. The definition in chapter note 4 to chapter 94, which, by virtue of GRI 1, trumps any dictionary definition, appears to address the qualification. It provides: '*For the purposes of heading 94.06, the expression "prefabricated buildings" means buildings which are finished in the factory or put up as elements, presented together, to be assembled on site, such as housing or worksite*

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[12] Interestingly, in ruling HQ 958001, dated 6 February 1996, by the Tariff Classification Appeals Division of the then US Customs Service, it was determined that a so-called '*Aluminum Hall*' described as follows:

> '*…pre-engineered, freespan, modular fabric tension structures that are designed to withstand high winds, shed snow, and provide durable, safe, and economical temporary shelter where speed of installation or relocation is essential. The structural frame (which accounts for approximately 80 percent of the total cost) is composed of extruded aluminum box beams with an integrated channel system. The roofing membrane is composed of a polyester fabric that is visibly coated on both sides with polyvinyl chloride (PVC). The roofing membrane is inserted in the integrated channel system and tensioned between each frame. The sidewalls of the structures are typically manufactured of rigid panels (said to be composed of fiberglass) that measure approximately 3 feet in width by 9 feet in height*'

was a 'prefabricated building' for the purpose of TH94:06 notwithstanding its soft roofing material. The ruling contained the following observation in that regard:

> *The fact that the roof of the subject merchandise is not made of a hard substance is not relevant for classification purposes so long as it is capable of providing cover from the elements of the weather*.

(The ruling was accessed on 27 December 2015 at - https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi2-pH63_vJAhVJbxQKHcqKCBgQFggaMAA&url=http%3A%2F%2Frulings.cbp.gov%2Fhq%2F1996%2F958001.doc&usg=AFQjCNEM9Oen9FlHIrs0uOk91EK9z1eCnw&bvm=bv.110151844,d.ZWU .)

[13] Counsel for the Commissioner also cited the Collins and MacMillans Dictionaries, which similarly include mention of rapidity or ease of assembly of the completed article as an inherent object of prefabrication.

accommodation, offices, schools, shops, sheds, garages or similar buildings'.[14] 'Quick assembly' does not form part of the chapter note definition. Were it to be accepted that the imported goods made up the constituent parts of the structures that merely required assembly, the unassembled article would fall to be characterised for the purposes of classification in accordance with the second part of GRI 2(a). GRI 2(a) provides:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), unassembled or disassembled.

Explanatory Note (VII) to GRI 2(a) provides:

> For the purposes of this Rule, "articles presented unassembled or disassembled" means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts etc.) or by riveting or welding, for example, **provided** only assembly operations are involved.
>
> No account is to be taken in that regard of the complexity of the assembly method. However the components shall not be subjected to any further working operation for completion into the finished state.

The indication that no account is to be taken of the complexity of the assembly method also detracts from the notion that rapidity or ease of assembly should play a determinative role in the characterisation of prefabricated buildings. Ease and rapidity of assembly in any event do not strike me as necessarily inherent aspects of the meaning of the term. Its essence is that the structural components of the building are made off-site and the building is erected by merely assembling those components on-site.[15]

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[14] Counsel for the Commissioner argued that it had been incumbent on the applicant to adduce evidence to establish what a prefabricated building is. They relied in this regard on what was said in *Smith Mining Equipment* supra, concerning the application of TH 87.09 – '*Works Trucks, Self-Propelled, not fitted with lifting or handling equipment, of the type used in Factories, Warehouses, Dock Areas or Airports for short distance transport of Goods*'. The court in that matter held (at para 10) that factual evidence was required to establish that the imported vehicle in issue there was of the type used in factories, warehouses, dock area or airports for the short distance of transport of goods. Absent such evidence, it simply was 'not possible to find that the vehicle in issue [was] typical of such vehicles'. However, I agree with the submission by the applicant's counsel that the current matter is quite distinguishable. In the current matter a court is able to determine what a 'prefabricated building' is by reference to chapter note 4 and the relevant dictionary definitions read with the applicable explanatory notes. That was not the position in *Smith Mining Equipment*.

[15] Section XX, in which chapter 94 resorts, does not contain any section notes.

[20] Indeed, the deponent to the answering affidavit acknowledges that the nub of the Commissioner's rejection of the classification of the goods in terms of TH 94.06 lies in the contention that the components were subject to further working operations to bring the greenhouses into their finished state.[16] The contention is founded on the exclusionary effect of an explanatory note to GRI 2(a). Its consideration necessitates a close examination of the evidence. As the applicant seeks final relief on motion, the evidence must be assessed applying the approach set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.[17]

[21] The Commissioner, having not taken issue, after his consideration of the detailed design drawings, with the applicant's averments that the plastic rolls and cloth supplied were, with two exceptions, pre-cut to fit, in the places indicated, over or onto the steel frameworks of the greenhouses, contends that classification of the goods supplied under TH 94.06 is precluded because the plastic and cloth components required further working to bring the greenhouses into their finished state. The difference between the parties thus turns not on any dispute of fact, but on the contesting conclusions they have made based on facts that are common ground.

[22] It is not in dispute that the pre-cut plastic was uniformly cut in larger pieces than actually required, which resulted in a slight excess of material being apparent after assembly of the components had been effected. The excess material did not compromise the character or effectiveness of the greenhouses, but a better aesthetic effect was achieved by trimming it away, which the applicant did. In addition, as already mentioned, there was the matter of the roof section of 13,5 metres which had to be covered using a 37-metre roll and two other 18-metre roof sections for which a 37-metre sheet had to cut in half. The Commissioner contends that the working of the plastic sheeting supplied in these respects constituted 'further working operation[s] for completion into the finished state' within the meaning of the exclusion provided in Explanatory Note (VII) to GRI 2(a).[18]

[23] It is evident from the provisions of GRI 2(a) that it is not the article (in this case the greenhouse) that must be complete or in a finished state. So, if the imported

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[16] Answering affidavit at para 6.3.
[17] Cf. *L G Electronics SA (Pty Ltd v Commissioner for the South African Revenue Service* [2009] ZAGPHC 12 (30 January 2009), at para 6, for an illustration of the application of the *Plascon-Evans* rule in the context of appeals in terms of s 47(9)(e) of the Act.
[18] Quoted in para [19], above.

article had the essential character of a completed example of the type in issue, the fact that it required completion would not operate to exclude it from classification as if it were the complete or finished article referred to in the tariff heading. Explanatory Note (VII) to GRI 2(a), quoted above, goes to the character of *the components* of an unassembled or disassembled article; not the article itself. The effect of the explanatory note is to disqualify an article from being treated as an unassembled or disassembled exemplar of that referred to in the tariff heading under consideration – in this case '*prefabricated buildings*' – if the presented components require further working in order to be made amenable to assembly into something that has the essential character of the article referred to in the tariff heading.

[24] On the facts in the current case it is apparent that the components – namely the sheets of plastic and cuts of cloth – did not require further working for the purposes of assembling the greenhouses. The trimming that took place *after* the assembly of the components was, moreover, not directed at making the buildings what they are, but solely at improving their aesthetic effect. Thus, save as concerns the three aforementioned areas of roofing, in respect of which ready-for-use pre-cut sheets of plastic were not supplied, I am satisfied that the imported goods comprised the components of two prefabricated buildings in a disassembled state.

[25] Assuming that the structures in issue qualify for classification in terms of TH 94.06, it seems to me that the cloth ceilings would fall to be regarded either as integral components of the prefabricated buildings or as built-in equipment of the sort contemplated in terms of the explanatory note to TH 94.06.[19] Mr Deon van Rooyen, an agricultural engineer with wide experience in the marketing, sale and construction of greenhouses, testified in a supporting affidavit that the cloth hangings are not an essential part of a greenhouse structure. They are, he said, supplied to 'enhance the climate control functions and performance of the greenhouse'. In any event, if the pieces of cloth are to be treated as elements of the buildings, the trimming of the cloth drops described earlier appears to be covered by the following part of the explanatory note to TH 94.06:

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[19] The relevant part of the explanatory note to TH 94.06 provides:

> *The buildings of this heading may or may not be equipped. However, only built-in equipment normally supplied is to be classified with the buildings. This includes electrical fittings (wiring, sockets, switches, circuit-breakers, bells etc.), heating and air conditioning equipment (boilers, radiators air conditioners etc.), sanitary equipment (baths, showers, water heaters etc.), kitchen equipment (sinks, hoods, cookers etc.) and items of furniture which are built in or designed to be built in (cupboards, etc.).*

> *In the case of buildings presented unassembled, the necessary elements may be presented partially assembled (for example, walls, trusses) or cut to size (beams, joists, in particular) or, in some cases, in indeterminate or random lengths for cutting on site (sills, insulation, etc.).*

[26] What then is to be made of the fact that two of the sheets of plastic supplied required further working to create three roofing components for the purpose of completing the greenhouses? Two questions suggest themselves. Does it for classification purposes negate the character of the goods as unassembled prefabricated buildings? If it does, the case must be decided adversely to the applicant. If not, do the plastic sheets that were not finished prefabricated components fall to be classified separately?

[27] I think that GRI 2(a) provides the answer to the first question. If upon presentation the incomplete article has the essential character of the complete article, it falls to be classified as if it were the complete article. That much seems to follow when GRI 2(a) is read with Explanatory Notes (I)[20] and (VI).[21]. Indeed, consistently with that conclusion, the deponent to the Commissioner's answering affidavit averred '…if components that constitute the essence of a prefabricated building are imported, and those components only require assembly and therefore warrant classification under TH 94.06, then it does not matter what other components / elements are also imported in the consignment, and whether or not such other components / elements require further working'.[22] In the current matter the imported components that did not require further working and thus qualified for classification purposes as components of the prefabricated greenhouses would, upon assembly, manifest largely completed articles. Assembling those goods would result in two completely walled and substantially roofed greenhouses. The absence of three relatively small sections of roofing would not detract from the essential character of the assembled components as being that of the completed articles – that is two prefabricated buildings.

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[20] Explanatory Note (I) to GRI 2(a) provides:

> *The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.*

[21] Explanatory Note (VI) to GRI 2(a) provides (s.v. '***Articles presented unassembled or disassembled***'):

> *This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.*

[22] Para 6.10 of the answering affidavit.

[28] As to the second question, it seems to me that the two 37- metre rolls of plastic that were not pre-cut components and required further working for the purpose of being used in the assembly of the building fall to be classified separately. There has been no challenge to the Commissioner's classification of the plastic rolls as separate items under TH 39.20. The weight and value for duty purposes of the two rolls of plastic are not apparent on the evidence and the matter will therefore have to be referred back to the Commissioner to make an appropriate assessment in that regard.

[29] It follows that the applicant's appeal has been substantially successful. The measure of its success makes it appropriate that it should be granted its costs of suit. Both sides employed two counsel. In the context of the relative complexity of the issues involved that seems to me to have been reasonable. The costs awarded shall therefore include the costs of two counsel.

[30] The Commissioner applied for the striking out of the parts of the applicant's founding papers identified below on the grounds that they were irrelevant and/or constituted inadmissible hearsay evidence. Irrelevant evidence will be struck out only if the party seeking its striking would be prejudiced if it were not stuck out.

[31] The content of paragraphs 12 and 13 of the founding affidavit is not irrelevant. It describes the background to the importation of the goods in general and, in particular, how they came to be manufactured in accordance with the specifications provided by the applicant. The Commissioner's case would in any event not be prejudiced were the paragraphs not struck out.

[32] Paragraphs 36-38 of the founding affidavit treat of the depiction in various photographs annexed to the affidavit of aspects of the assembly of the greenhouses and their appearance upon completion. They also referred to a screenshot from the well-known Google Earth program depicting an aerial view of the structures in issue and a number of adjoining structures on the applicant's property. For the reasons given below, I do not consider that the photographs constitute hearsay evidence. In any event the allegedly hearsay nature of the photographic evidence has been addressed by the introduction, without objection, of an affidavit by the photographer. The photographs can hardly be said to be irrelevant. That much is confirmed by the Commissioner's use of them for the purposes of his answering affidavit.

[33] The Google Earth screenshot is a satellite image of the applicant's property; it is in essence nothing other than an aerial photograph. Its character as such speaks for itself when it is viewed. A photograph is admissible as real evidence. If the photographer does not testify as to its accuracy, there must, in general, be evidence that the photograph is a true depiction of the items shown in it.[23] In the current case, Mr van Driel, who is obviously very familiar with the applicant's farm, identified the photograph as depicting the greenhouses in their finished state. I do not consider the aerial depiction of the structures to be irrelevant. It assists in the second stage of the classification exercise defined in *International Business Machines* supra. But even if it were irrelevant, the Commissioner has not been prejudiced by its production. The objection, on hearsay and irrelevance grounds,[24] to the admissibility of the Google Earth photograph is thus without merit.[25]

[34] The Commissioner also sought to have the aforementioned supporting affidavit of Deon Van Rooyen struck out on the grounds that its content is irrelevant and contains inadmissible evidence. The essential import of Mr Van Rooyen's evidence is to confirm the context in which the post-installation trimming of sections of fitted plastic and cloth occurs. The evidence is plainly relevant to address the point taken by the Commissioner that the trimming constituted further working to the component parts. There is no substance in the Commissioner's criticism of the witness's qualifications to give the evidence.

[35] In the result the application to strike out will be dismissed.

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[23] PJ Schwikkard et al, *Principles of Evidence* (revised 3rd ed) §19.5 at p.400. See also *S v W* 1975 (3) SA 841 (T) at 843A and *S v Fuhri* 1994 (2) SACR 829 (A) at 832-834E.

[24] There was no challenge to the authenticity of the screenshot.

[25] Google Earth imagery is used so frequently in evidence these days that it might be thought surprising that its admissibility has not yet been discussed in any of the reported cases as far as I could determine. This might be because it is such a commonly used reference tool, and of such readily demonstrable and generally accepted reliability (cf. *S v Mthimkulu* 1975 (4) SA 759 (A) at 764E-G, *S v Fuhri* supra, at 835B-G, and *Trustees for the time being of the Delsheray Trust and Others v ABSA Bank Limited* [2014] 4 All SA 748 (WCC) at para 37-43) that its imagery is routinely introduced without objection. In *U.S. v. Lizarraga-Tirado* – F.3d – (9th Cir. 2015), 2015 WL 3772772 (9th Cir. June 18, 2015), the Ninth Circuit of the US Court of Appeals rejected an objection on hearsay grounds to the admissibility of a Google Earth image in a matter in which there was no testimony about the generation of the image. The image had been used by an agent of the US Border Patrol who had arrested the appellant to show where, in relation to the border, she had effected the arrest. The court held *'…a photograph merely depicts a scene as it existed at a particular time. The same is true of a Google Earth satellite image. Such images are produced by high-resolution imaging satellites, and though the cameras are more powerful, the result is the same: a snapshot of the world as it existed when the satellite passed overhead. Because a satellite image, like a photograph, makes no assertion, it isn't hearsay'*. That analysis, although it was predicated on the Federal Rules of Evidence, appears to me consistent with the admissibility of photographs as real evidence in our law.

[36] The following orders are made:

1. The respondent's application to strike out parts of the applicant's founding papers is refused.

2. Save as provided in paragraph 4, below, the tariff determination by the respondent in terms of s 47(9)(a) of the Customs and Excise Act 91 of 1964 ('the Act') in the letter of demand addressed to the applicant, dated 3 June 2013 (annexure 'AA1' to the answering affidavit), is set aside, including the customs duty, penalties on customs duty, and value added tax on both customs duty and penalties imposed in terms of the said letter.

3. It is declared that, save as provided in paragraph 4, below, the goods imported by the applicant under Bill of Entry number 9098, dated 19 July 2010, fell to be classified as 'prefabricated buildings' under tariff heading 9406.00 (in Chapter 94) in Part I of Schedule I to the Act, and accordingly, in terms of s 47(1) of the Act read with the applicable provisions of the said Part of the said Schedule, did not attract ordinary customs duty on importation.

4. The provisions of paragraphs 2 and 3 of this order shall not apply in respect of two of the 106 37-metre rolls of plastic sheeting imported under the aforementioned Bill of Entry, in respect of which the respondent's tariff determination under tariff heading 3920.10.00(1) (in Chapter 39) in Part I of Schedule I to the Act is upheld.

5. The matter is remitted to the respondent for reassessment in accordance with the provisions of paragraph 4, above.

6. The respondent shall be liable for the applicant's costs of suit, including the costs of two counsel and the costs of the respondent's application to strike out.

A.G. BINNS-WARD

Judge of the High Court

Before:	**Binns-Ward J**
Applicant's counsel:	**M.W. Janisch SC** **D. West**
Applicant's attorneys:	**Werksmans** **Cape Town**
Respondent's counsel:	**C.E. Puckrin SC** **L.G. Kilmartin**
Respondent's attorneys:	**State Attorney** **Cape Town**