REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED

CASE NO.: 11696/18

24/10/2019

In the matter between:

GLENCORE OPERATIONS SA (PTY) LIMITED **Applicant**

and

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

JUDGMENT

VAN DER WESTHUIZEN, J

[1] This is an appeal against the decision by the respondent to refuse an internal appeal lodged by the applicant against a determination by the Commissioner not to allow certain rebates in respect of distillate diesel fuel purchased and used in mining operations conducted by the appellant.

[2] The appeal to this court lies in terms of the provisions of section 47(9)(*e*) of the Customs and Excise Act, 91 of 1964 (the Act).

[3] The determination made by the Commissioner in the present instance was made in terms of the provisions of section 47[1] of the Act, and relates to whether goods (diesel) classified under items of Schedule 6 have been used as provided for in the relevant item of Schedule 6.

[4] The Commissioner determined that certain diesel fuel used by the applicant in relation to its mining operations, during the period August 2011 to October 2014, had not been used in accordance with the notes to rebated item 670.04. The Commissioner held that the applicant did not qualify for a rebate, and hence a refund, in that regard.

[5] A preliminary issue requires determination before the appeal is to be considered. It relates to the time period within which this appeal is to be lodged. Section 96(1) of the Act stipulates that an appeal such as the present one, is to be instituted within one year from the date of determination by the Commissioner, and after conclusion of alternative dispute resolutions procedures contemplated in the Act, have not resulted in an agreement. Should that period be insufficient, the Commissioner may, on good cause shown, grant an extension for the institution of such appeal.

[6] In the event that the Commissioner refuses to grant an extension of the time period, a litigant may, on application, approach the court for such extension of the period. The relevant date before which this appeal was to have been instituted, was 7 December 2017. The applicant launched this appeal on 20 February 2018. The relief sought in prayer 1 of the notice of motion is aimed at the extension to be granted by this court.

[7] The applicant has in its founding affidavit fully explained the delay in launching this appeal. The respondent has not pied any prejudice in respect of the delay, moreover in a letter stated that it abides by the court's decision in that regard. The respondent, in oral argument, did not divert from the clear indication in the answering affidavit, nor in the said letter. The requested extension is to be granted in the interest of justice.[2]

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1 Section 47(9)(*a*)(i)(*bb*) of the Customs and Excise Act, 91, 1964.

2 *Aurecon* SA *(Ply) Ltd v Cape Town City* 2016(2) SA 199 (SCA) [17].

[8] During 2001 the Minister of Finance introduced in his budget speech levies for fuel and the Road Accident Fund payable by consumers, including such as the applicant, in respect of the consumption of distillate diesel fuel.[3] Pursuant to the speech of the Finance Minister, refunds were introduced in respect of the said levies to encourage international competitiveness of mining on land as a primary production sector. The refunds are governed exclusively by the Act. However, for practical purposes, the refunds are paid by means of the system in operation for the refunding of Value Added Tax, as sanctioned by the provisions of section 75(1A)(*d*) of the Act.

[9] The dispute between the parties encompasses whether the distillate diesel fuel, in respect of the refunds that are sought, was used by the applicant in its mining operations for *"primary production activities in mining".*

[10] In that regard, the crux of the dispute relates to whether the applicant used the diesel fuel in the manner intended in note 6(*f*) of Schedule 6, (Schedule) part 3 of the Act.

[11] Under PART 3 of the Schedule, the heading reads "REBATES AND REFUNDS OF FUEL LEVY AND ROAD ACCIDENT FUND FIDELITY" and note 6 thereof provides as follows:

> *"6. For the purposes of item 670.04 read with the provisions of section* 75*(1A) and (4A):*
>
> *(a) Definitions*
>
> *For the purposes of these Notes, except if the context otherwise indicates -*
>
> *(i) "distillate fuel" means -*
>
> *(aa)*
>
> *(A) distillate fuel, and*
>
> *(B) biodiesel as contemplated in section 378(2)(a)(ii)*
>
> *In respect of which* a *fuel levy and Road Accident Fund levy is prescribed in Part* 5A *and Part* 58 *of Schedule*

[3] The levies are imposed in terms of Part 5A and 5B of Schedule 1 to the Act.

No. 1 respectively, and which has been duly entered for home consumption or which is deemed to have been duly entered for home consumption, whether or not such distillate fuel and biodiesel have been mixed; and

(bb) excludes the following:

(A) "smokeless diesel", a *mixture of kerosene and* a *lubricity agent, normally used in underground mines:*

(B) any mixture of distillate fuel with kerosene or any other substance except biodiesel;

(C) any distillate fuel entered for export or ships stores or in terms of any other procedure except for home consumption or on which the levies are not paid as contemplated in subparagraphs (a)(i)(aa) and (a)(i)(bb), respectively.

…

(f) Mining on land: Refund of levies on eligible purchases for distillate fuel for mining as specified in paragraph (b)(i) to this Note.

(iii) Own primary production activities in mining include the following:

(aa) The exploration or prospecting for minerals.

(bb) The removal of over burden and other activities undertaken in the preparation of a *site to enable the commencement of mining for minerals.*

(cc) Operations for the recovery of minerals being mining for those minerals including the recovery of salts but not including any post-recovery of post-mining processing of those minerals.

(dd) Searching for ground water solely for use in a *mining operation or the construction or maintenance of facilities for the extraction of such water.*

(ee) The pumping of water solely for use in a *mining operation if the pumping occurs at the place where the mining operation is carried on or at* a *place adjacent to that place.*

(ff) The supply of water solely to the place where the mining operation is carried on, from such place or a *place adjacent to that place.*

(gg) *The construction or maintenance of private access roads at the place where the mining operation is carried on.*

(hh) *The construction or maintenance of -*

(A) *tailings, dams for use in* a *mining operation;*

(B) *dams, or other works, to store or contain water that* has *been used in, or obtained in the course of carrying on* a *mining operation.*

(jj) *The construction or maintenance of dams, at the place where the mining operation* is *carried on, for the storage of uncontaminated water for use in* a *mining operation.*

(kk) *The construction or maintenance of buildings, plant or equipment for use in* a *mining operation.*

(II) *The construction or maintenance of power stations or power lines solely for use in* a *mining operation.*

(mm) *Coal stockpiling for the prevention of the spontaneous combustion of coal* as *part of primary mining operations.*

(nn) *The reactivation of carbon for use in the processing of ores containing gold if the reactivation occurs at the place where mining for gold is carried on.*

(oo) *The removal of waste products of a mining operation and the disposal thereof, from the place where the mining operation is carried on.*

(pp) *The transporting by vehicle, locomotive or other equipment on the mining site of ores or other substances containing minerals for processing in operations for recovery of minerals.*

(qq) *The service, maintenance or repair of vehicles, plant or equipment by the person who carries on the mining operation solely for use in a mining operation, at the place where the mining operation is carried on.*

(rr) *The service, maintenance or repair of transport networks for use in a mining operation, to the extent that the service, maintenance or repair is performed at the place where a mining operation is carried on.*

(ss) *Quarrying activities necessary solely for obtaining, extracting and removing minerals from the quarry, but excluding any secondary activities to work or process such minerals (including crushing, sorting and washing) whether in the quarry or at the place where the mining operation is carried on.*

(tt) *The transport of ores or other substances containing minerals from the mining site to the nearest railway siding.*

(uu) The following equipment and vehicles are regarded as forming an integral part of the mining process;

(A) Agitators.

(B) Drilling rigs.

(C) Hammer mills.

(D) Smelters.

(E) Tunnelling machines.

(F) Specially manufactured underground equipment.

(G) Front-end loaders.

(H) Excavators.

(I) Locomotives for carriage by rail of minerals or equipment.

(vv) Rehabilitation required by an environmental management programme or plan approved in terms of the Mineral and Petroleum Resources Development Act, 2002, but excluding such activities performed beyond the place where the mining operations are carried on or after a *closure certificate has been issued in terms of the Mineral and Petroleum Resources Development Act, 2002."*

[12] It is conceded by the Commissioner in his answering affidavit that any contention that an activity cannot qualify as an own primary production activity in mining, because it is not one of the activities listed in note 6(*f*)(iii) of the Schedule, is flawed. In this regard, the Commissioner nevertheless contends that paragraphs (aa) to (vv) can be *"additional to the core definition of mining".* Such contention flies in the face of the express inclusion of operations for the recovery of minerals being mined for as stipulated in paragraph (*cc*) of note 6(*f*)(iii) of the Schedule. However, the Commissioner is of the view that the word *"include"* is to be afforded a narrow interpretation.

[13] In respect of the mining activities conducted by the applicant on the mining site, as set out in the founding affidavit and for which the refunds are sought, are common cause between the parties. The only issue is whether those activities fall within the scope of note 6(*f*)(iii) of the Schedule.

[14] Further in this regard, the narrow dispute relates to the interpretation to be afforded to the word *"include"* in the said note.

[15] The applicant contends that activities in respect of which the diesel fuel refund is claimed, relate to:

a. the "transport of coal ore as envisaged in paragraphs (*pp*) and (*tt*) of note 6(*f*)(iii);
b. maintenance type activities on property, plant and equipment as envisaged in paragraph (*qq*) of note 6(*f*)(iii);
c. the making of roadbuilding material for the construction of roads referred to in paragraph (*gg*) of note 6(*f*)(iii);
d. the removal of waste products as intended in paragraph (*oo*) of note 6(*f*)(iii);
e. the stockpiling of coal as envisaged in paragraph (*mm*) of note 6(*f*)(iii).

[16] Further in this regard, it is submitted on behalf of the applicant that in so far as the activities conducted by the applicant as set out above, do not fit exactly within any of the mentioned paragraphs of note 6(*f*)(iii) of the Schedule, those activities are an integral part of the kind of operations which the legislature intended to include in the concept of primary activities in mining. Hence the debate of the interpretation to be afforded to the word *"include"* in note 6(*f*)(iii).

[17] It is contended by the Commissioner that the activities listed above, i.e. those that the applicant submits form an integral part of its mining activities, are *"post-mining processing"* as stated in paragraphs 1.4 and 3.4 of the determination that is the subject of this appeal.

[18] In paragraph 1.4 of the said determination, the Commissioner contends that the applicant has claimed a refund of diesel fuel *"in respect of crushing, screening, processing and beneficiation of the ROM (run of mine) coal at its various sites".*

[19] The Commissioner's contention mentioned in the foregoing paragraph, is disputed by the applicant. It is common cause that the applicant's equipment that is directly involved in the crushing, screening and washing of coal does not utilise diesel fuel. That equipment is powered by electricity, which is accepted by the Commissioner.

[20] It is further the Commissioner's contention, as set out in paragraph 3.4 of the said determination, that in principle the so-called *"post-mining processing"* is excluded for the concept of *"primary production activities in mining".*

[21] The appeal committee, who dealt with the internal appeal procedure, has adopted a similar reasoning as the Commissioner. The appeal committee determined that the concept "primary activity in mining" ends when the coal or mineral is extracted from the ground. Thus, any subsequent activities, including the construction and maintenance of the plant, are regarded as secondary activities which do not qualify for a refund of diesel fuel.

[22] It is common cause that the activities in respect of which diesel fuel refunds were claimed are depicted in a presentation prepared by the applicant and contained on a memory stick included in the papers filed by the applicant. The only dispute being, whether those activities include what the respondent contends are post-mining activities which fall outside the concession in respect of diesel fuel levies.

[23] In this regard, the respondent contends that the question to be decided in this appeal is, whether in the context in which the word *"include"* is used, activities not falling within the confines of *"own primary production activities in mining"* qualify for a refund.

[24] The canons of construction of documents, of whatever kind, are clearly set. The principles of interpretation are trite. They behove no reconsideration or restatement. Furthermore, in the present case, notes are provided by the legislature in respect of the interpretation of the various provisions of the Schedule. In so far as the note may be ambiguous, the trite principles of interpretation assist.

[25] The ordinary grammatical, and for that matter dictionary, meaning of the word *"include"* has a broad meaning, i.e. one of non- exhaustiveness. That is the interpretation that the applicant contends should be applied. The respondent contends for a narrower meaning, i.e. one of exhaustiveness, should be given thereto.

[26] It is the respondent's contention that when considering the issue of interpretation in the present instance, the purpose of the Act is an important factor to take into consideration. In this regard, the respondent relies on the long title of the Act and submits in its heads of argument: *"That the purpose of the Act is 'the levying of customs and excise duties and a surcharge ... a fuel levy ... a Road Accident Fund levy .. . etc'."* The respondent submits that the purpose of the Act is to collect revenue for the *fiscus.*

[27] In amplification of the foregoing, the respondent submits and relies upon the budget speech in 2001 (a copy of which was appended to the papers) which gave rise to the diesel refund system where the purpose of the fuel taxes was said to be:

> *"Fuel taxes serve a variety of purposes. First, they are a significant source of general Government revenue. Second, they play an important role in limiting demand for fuel products which has important environmental balance of payment benefits."*

[28] The foregoing quotations by the respondent should be read in the context in which they were made in the 2001 Budget Speech. In this regard, the Finance Minister commenced the issue of fuel levies as follows:

> *"Fuel prices have increased considerably of the past 2 years. Government is aware of the pressure this has placed on disposable income of household and business budgets."*

Then the quote relating to the purpose of fuel taxes follow and the speech continues as follows:

> *"Given that the fuel levy is* a *specific excise tax, it is imperative for the sake of consistent tax policy that it be reviewed in the annual Budget, in line with macroeconomic projections of the inflation rate. In this context and recognising the impact of rising fuel prices on the economy, we are proposing to raise the fuel levy by less than inflation."*

[29] The Budget Speech continues and deals with the issue of Diesel fuel concession for primary production as follows:

> *"In the 2000 Budget,* a *diesel fuel concession was reintroduced for fishing and coastal shipping. Government committed itself to explore the possibility of extending this to other primary producers, contingent on developing an administration regime to minimise the risk of fraud; and ensuring the concession is affordable within the broader fiscal framework.*
>
> *The bulk of diesel fuel used in farming, forestry and mining is used off road. Given this, and to encourage the international competitiveness of especially our farmers, foresters and miners, the following diesel fuel concessions are proposed:* ..."

[30] Although the purpose of a fuel levy is to increase revenue, the purpose of the concessions is to ameliorate the increase of the fuel price in specific economic areas of business, i.e. the farming, forestry and mining industry to enable them to compete internationally. It is gleaned further from, in particular the last-mentioned quotation, that the bulk of diesel used by the said industries, are off road. Hence, the purpose to feed the Road Accident Fund and to increase the revenue of the *fiscus* is not necessarily achieved, and calls for a concession in that regard.

[31] The respondent's final contention in this regard, namely that the concession creates an exception to the rule, is without merit and unsubstantiated. Furthermore, the submission by the respondent that the concession is merely part of the *" administrative regime"* and merely seeks to clarify and delimit the extent of the concession by creating an exhaustive narrow outline of qualifying activities to be covered by the Schedule, is unsubstantiated in the light of the clear purpose of the concessions in respect of the farming, forestry and mining industries and has no merit.

[32] In *De Reuck v Director of Public Prosecutions Witwatersrand Local Division et al*[4] the following was said:

> *"The correct sense of 'includes' in a statue must be ascertained from the context in which it is used. ... If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by 'includes' go beyond that primary meaning, the purpose of that list is then usually taken to add to the primary meaning so that 'includes' is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in that list, then the purpose of the list is to make the definition more precise. In such a case 'includes' is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term whose primary meaning - if it is a word in ordinary non-legal usage - fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in Debele as "n moeras van onsekerheid' (a quagmire of uncertainty) in the application of the term."*

[33] The respondent concedes that there is no definition in the Act or in the note of *"own primary production in mining",* and of the term *"mining",* and hence *"mining"* is to bear its ordinary meaning.

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4 2004(1) SA 406 (CC) at [18].

[34] In view to the aforesaid concession, the third class identified in *De Reuck, supra,* is not applicable in the present instance and the two remaining classes require consideration.

[35] The primary meaning of the term *"mining",* as contended for by the respondent, and hence also its dictionary meaning, is that of *"the process or business of digging in mines to obtain minerals"* or *"excavation in the earth for extracting coal or other minerals".* The respondent further contends that *"mining is the extraction of the mineral from the earth"* and hence, mining ends with the extraction. All activity that follows on the extraction of the mineral is post-mining activity.

[36] It follows that the primary meaning is well-known and requires no definition. It is then to be determined, as stated in *De Reuck, supra,* whether the list goes beyond the primary meaning, or not.

[37] The applicant submits that when regard is had *inter alia* to the provisions of (cc) and (kk) in the note 6(*f*)(iii) of the Schedule, the instances mentioned therein, clearly go beyond the primary meaning of the term *"mining".*

[38] A cursory reading of the list in note 6(*f*)(iii) of the Schedule reveals that most of the instances, if not all, go beyond the primary meaning of *"mining".* A simple example will suffice, namely **(vv)** in note 6(*f*)(iii) refers to *"rehabilitation required by an environmental management programme or plan approved in terms of the Mineral and Petroleum Resources Development Act, 2002, but excluding such activities performed beyond the place where the mining operations are carried on or after a closure certificate has been issued in terms of the Mineral and Petroleum Resources Development Act, 2002."*

[39] It follows that the activities in note 6(*f*)(iii) are non-exhaustive activities forming part of, i.e. included in, *"own primary production activities in mining".* It further follows that where activities conducted by the applicant do not fit exactly within any of the activities referred to in note 6(*f*)(iii) of the Schedule, but are in reality part and parcel of the kind of operations which the legislature intended to include in the concept of primary activities in mining, the non-exhaustiveness of list in note 6(*f*)(iii) of the Schedule permits that such activities are also subject to the concession relating to rebates of distillate diesel fuel. Thus, those activities qualify as primary production activities in mining as defined in note 6(*f*)(iii) of Schedule 6 part 3 of the Act.

[40] The applicant is accordingly entitled to the relief it seeks. In respect of the issue of costs, the employment of senior counsel in this matter is justified and warranted. The respondent itself employed two counsel, one of which is a senior counsel.

I grant the following order:

(1) The period of one year referred to in section 96(1)(*b*) of the Customs and Excise Act, 91 of 1964 is extended until 21 February 2018 in respect of the relief sought in prayers (2) to (5) below;

(2) The applicant's appeal against the determination by the respondent contained in Annexure "FA3" to the founding affidavit that the applicant does not qualify for diesel refunds claimed by the applicant under rebate item 670.04 in Schedule 6 to the Customs and Excise Act, be upheld and the determination be set aside;

(3) The aforesaid determination be substituted with a determination that the diesel refunds claimed by the applicant qualify under rebate item 670.04;

(4) The respondent is to pay the costs, such costs to include the cost of senior counsel.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:	**J P Vorster S.C.**
Instructed by:	**MACROBERT ATTORNEYS**
On behalf of Respondent:	**P Ellis S.C.**
	K Ramolefe
Instructed by:	**THE STATE ATTORNEY**