

# The adjudication of customs' tariff classification disputes in South Africa: lessons from Australia and Canada

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## *Abstract*

One of the responsibilities of a customs administration is the collection of customs duties on imported goods. This necessitates the tariff classification of the goods in question. As a result of South Africa's membership of the World Customs Organization, specific obligations in relation to tariff classification are incurred. Tariff classification is a highly technical and intricate undertaking, subject to both national and international law. Especially the implementation and application of the international provisions result in varying interpretations by stakeholders. This, inevitably, results in disputes. This article discusses the position in South Africa regarding customs tariff classification dispute resolution and compares the South African provisions and practices with those in Australia and Canada. The differences in the approach to dispute resolution in the three countries are critically analysed. In conclusion it is recommended that South Africa should consider introducing an independent tribunal along the lines of the tribunals established in Australia and Canada, or, alternatively, extending the jurisdiction of the Tax Court to include customs duty disputes.

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## **BACKGROUND**

The field of customs dates back thousands of years and is believed to have originated in Mesopotamia, Egypt, the Indian subcontinent, China, Greece, and the Mediterranean.<sup>1</sup> Despite its ancient origins, a closer look reveals an area that is extremely complex, spanning a wide range of topics. Although traceable to antiquity, customs is still evolving in a rapidly globalising world. Contributing to its modern-day complexity, is the reality that it is

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<sup>1</sup> Asakura *World history of the customs and tariffs* (2002) 20.

partly domestic law and partly international law (incorporated directly or by reference into domestic law). Consequently, customs deals with international issues, dealt with by individual jurisdictions, based on globally-developed rules. One such issue is that of customs tariff classification, which is dealt with at an international level by the World Customs Organization (WCO),<sup>2</sup> an intergovernmental body with the mission to enhance the effectiveness and efficiency of customs administrations. A rudimentary review of the workings of the WCO reveals an entwined structure of topics, documents and committees. Numerous international instruments have been developed to assist WCO members with guidelines toward the standardisation and simplification of customs procedures, including that of customs tariff classification. The International Convention on the Harmonised Commodity Description and Coding System (Harmonised System Convention) is of particular importance in relation to tariff classification, providing for a system, its administration, rights and obligations in relation to classification.

South Africa became a member of the WCO on 24 March 1964,<sup>3</sup> thereby incurring international obligations. In order to fulfil the international obligations pertaining to tariff classification, South Africa implemented the Brussels Tariff Nomenclature (BTN), developed by the Customs Cooperation Council (CCC), on 1 January 1965.<sup>4</sup> The BTN encompassed a harmonised approach to the classification of goods, forming the foundation of future changes to the tariff system. The BTN was improved, resulting in its replacement by the Annex to the Harmonised System Convention, being the Harmonised Commodity Description and Coding System (Harmonised System), on 1 January 1988.<sup>5</sup> South Africa became a contracting party on 25 November 1987 and implemented the Harmonised System on 1 January 1988.<sup>6</sup>

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<sup>2</sup> The Customs Co-operation Council (CCC) was established in 1952, but in 1994 the name 'World Customs Organization' was adopted since it is considered to be more reflective of its workings as a global international intergovernmental customs institution. See [http://www.wcoomd.org/en/about-us/what-is-the-wco/au\\_history.aspx](http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx) (last accessed 30 May 2013).

<sup>3</sup> See <http://www.wcoomd.org/en/about-us/wco-members/membership.aspx> (last accessed 27 October 2014).

<sup>4</sup> In 1994 the CCC adopted its current name, the 'World Customs Organization', which is considered to be more descriptive of its workings as a global international intergovernmental customs institution. See [http://www.wcoomd.org/en/about-us/what-is-the-wco/au\\_history.aspx](http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx) (accessed 27 October 2014).

<sup>5</sup> <http://www.wcoomd.org/en/about-us/legal-instruments/conventions.aspx> (accessed 27 October 2014).

<sup>6</sup> See: <http://www.wcoomd.org/en/about-us/legal-instruments/~media/1F153321A5834847B5E4C189E5B5CFAC.ashx> (last accessed

Since the need for a system of tariffs has been realised and established, tariff classification has become more complex.<sup>7</sup> Bateman states in this regard:

The attempt to distinguish manufactured goods from raw material would alone be a herculean task, since no two people can be found to agree on classifying such important articles as chemicals, leather, iron of many kinds, petroleum, yarns, and printing paper.<sup>8</sup>

This statement, made more than a century ago in 1885, articulates how complicated classification of ostensibly ordinary items for customs purposes was even then. The implementation and application of the Harmonised System did not resolve these complexities. The WCO is acutely aware of this reality in relation to tariff classification, stating that the classification system ‘still remains a fairly complex system which often leads to differences regarding the interpretation of its provisions’.<sup>9</sup>

The judiciary, legal fraternity, and customs administration in South Africa share this sentiment. In case law it has been stated that tariff classification is ‘often difficult’,<sup>10</sup> ‘a difficult exercise’,<sup>11</sup> and ‘notoriously difficult’.<sup>12</sup> The South African customs administration holds a similar view stating that ‘[t]ariff classification of goods is one of the more complex issues under the Customs and Excise Act’.<sup>13</sup>

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27 October 2014).

<sup>7</sup> The collection of customs duties relies on a list of commodities and tariffs when goods are imported or exported. Customs duties were normally levied at a flat rate on all merchandise. However, once a rate of duty lower or higher than the standard rate has to be paid in respect of some commodities, a ‘list’ is required to distinguish the products from one another. In customs terms such a list is referred to as a ‘tariff’. One of the greatest achievements of Roman customs was the establishment of the first written customs tariff, being that on a wall at Palmyra in 136 AD. This tariff contained a list of commodities, the quantity (some expressed in terms of ‘donkey load’ or ‘camel load’), as well as the specific amount payable on that quantity. See Asakura n 1 above at 12, 67, 72.

<sup>8</sup> Bateman ‘Customs tariffs’ (1885) 48/4 *Journal of the Statistical Society of London* 622.

<sup>9</sup> WCO *The Harmonized System, a universal language for international trade* (2006) 43.

<sup>10</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 122.

<sup>11</sup> *Telkom SA Ltd v Commissioner for South African Revenue Service* [2006] JOL 17408 (T) at 4.

<sup>12</sup> *3M South Africa (Pty) Ltd v Commissioner for South African Revenue Service and Another* (2010) 72 SATC 216 at 220 par [2].

<sup>13</sup> <http://www.sars.gov.za/ClientSegments/Customs-Excise/Pages/Tariff.aspx> (last accessed 24 March 2014).

The sentiment is no different in the two countries selected for comparative purposes – Australia and Canada.<sup>14</sup> Given that the customs legislation and arrangements in these two countries are comparable to those of South Africa,<sup>15</sup> it is not surprising that their courts have also acknowledged the complexities around tariff classification. In Australia the Federal Court stated that ‘[i]n many cases, it is a difficult task to determine the tariff classification within which imported goods fall’.<sup>16</sup> In Canada the Federal Court of Appeal stated that

[y]et, the Customs Tariff, law as it may be, is nonetheless a law of a very technical nature. It is legislation of such a specialized nature and expressed in terms that have so little to do with traditional legislation that for all practical purposes the Court is being asked to give legal meaning to technical words that are well beyond its customary mandate.<sup>17</sup>

Disputes in the contentious area of customs tariff classification are, therefore, not uncommon, necessitating proper dispute resolution provisions. The position in South Africa in this regard will be addressed next, followed by a discussion of the relevant dispute resolution mechanisms in Australia

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<sup>14</sup> The selection of these two countries have been made from the 180 members of the WCO, considering leading customs administrations that are predominantly English-speaking, in order to facilitate the use of information and documents. To ensure that customs best practices are benchmarked against leading customs administrations, enabling a constructive comparison, only developed countries with modern customs administrations were considered. These two administrations are of a similar age to the customs administration in South Africa; play an active role in WCO affairs; are contracting parties to the Harmonized System Convention; have implemented the Harmonized System Convention’s main instrument, namely the Harmonized System; and are signatories to the Revised Kyoto Convention. Australia and Canada also share other similarities with South Africa. All three countries are former British colonies sharing the renowned British administrative heritage. British influences therefore played a prominent role in the establishment of the customs administrations and its structures, processes and procedures in the three countries. English is also one of the official languages in all three countries, allowing for the use of the relevant documents and information.

<sup>15</sup> However, Australia and Canada have separate laws for customs and excise. Furthermore, the customs legislation in both these countries is also contained in two separate, but complementary, Acts. Juxtaposed, South Africa currently still has one Act providing for all customs and excise matters. The Customs Duty Act (promulgated on 10 July 2014) and the Customs Control Act (promulgated on 23 July 2014), although not yet in force, will bring an end to the current combined legislation in South Africa, not only providing separately for customs and excise, but also providing two customs Acts, similar to that in Australia and Canada.

<sup>16</sup> *Re Brian Leo Cody (Collector of Customs) v Datacraft (Australia) Pty Ltd (Trading as Datacraft Direct Marketing)*, [1989] FCA 216 par 4.

<sup>17</sup> *Canada (Minister of National Revenue) v Schrader Automotive Inc* 1999 CanLII 7719 (FCA) par [5].

and Canada. In conclusion some recommendations are offered to improve the law and practice in South Africa.

## SOUTH AFRICA

### Introduction

The South African Revenue Service (SARS) is responsible for the administration of a number of Acts,<sup>18</sup> including the Customs and Excise Act.<sup>19</sup> A prolonged rewrite of the Customs and Excise Act commenced in 2005. Excise legislation, which is currently still incorporated in the Customs and Excise Act, will inevitably be separated from customs in an Excise Duty Bill.<sup>20</sup> The revision of the customs dispensation resulted in two bills, the Customs Duty Bill<sup>21</sup> and the Customs Control Bill,<sup>22</sup> introduced for debate in the National Assembly on 24 October 2013. Subsequently, the Customs Duty Act<sup>23</sup> was published in the *Government Gazette*<sup>24</sup> on 10 July 2014, while the Customs Control Act<sup>25</sup> was published on 23 July 2014. These Acts are not in operation yet and will only take effect on a date to be announced by the President.<sup>26</sup> Predictably, both Acts make provision for tariff classification. Separating ‘customs duty’ from ‘customs control’ was also necessitated by the dictates of section 77 of the Constitution of the Republic of South Africa, 1996.<sup>27</sup>

<sup>18</sup> <http://www.sars.gov.za/Legal/Primary-Legislation/Pages/default.aspx> (last accessed 14 March 2014).

<sup>19</sup> Act 91 of 1964. Prior to the Customs and Excise Act 91 of 1964, Customs and Excise were treated separately under the Customs Act 55 of 1955 and the Excise Act 62 of 1956.

<sup>20</sup> The Excise Duty Bill has not yet been finalised. While being finalised, the Customs and Excise Amendment Act 32 of 2014 provides for excise-related matters, namely ‘[t]o amend the Customs and Excise Act, 1964, so as to delete all provisions superseded by general provisions of the Customs Control Act applicable to all tax levying Acts; to delete all provisions relating to the customs control of imported goods and goods to be exported; to delete all provisions relating to the imposition, collection and refunding of customs duties and other matters relating to customs duties; to limit the remaining provisions of the Act to excise duties, fuel levies, Road Accident Fund levies, environmental levies, air passenger taxes and matters relating to such duties, levies and taxes; and to change the name of the Act to the Excise Duty Act, 1964; and to provide for matters connected therewith.’

<sup>21</sup> 43 of 2013.

<sup>22</sup> 45 of 2013.

<sup>23</sup> 30 of 2014.

<sup>24</sup> *Gazette No 37821* dated 10 July 2014 and *Gazette No 37862* dated 23 July 2014, respectively.

<sup>25</sup> 31 of 2014.

<sup>26</sup> According to s 229 of the Customs Duty Act, it will take effect on the date the Customs Control Act takes effect. In terms of s 944(1) of the Customs Control Act, it will take effect on a date determined by the President by proclamation in the *Government Gazette*.

<sup>27</sup> Section 77 prescribes the nature of and procedural requirements for so-called money bills.

Once it commences, the Customs Control Act will be the foundation for an improved customs control system for all goods in transit, imported into, or exported from South Africa, collectively ensuring that all revenue due on such goods is collected and that all other related legislation and formal requirements are adhered to. The Customs Duty Act provides for the imposition, assessment as well as the payment and collection of customs duty.<sup>28</sup>

Whereas the redrafting of customs legislation presented the opportunity to address any gaps in the Customs and Excise Act, in particular in relation to tariff classification and related dispute resolution, this opportunity was not necessarily fully exploited.

### **Dispute resolution**

To enable alignment with the provisions of another of the WCO instruments, the International Convention on the simplification and Harmonisation of Customs Procedures (Revised Kyoto Convention), South Africa implemented section 77 of the Customs and Excise Act with accompanying rules. This section provides, amongst other things, for two processes, an internal administrative appeal (IAA) and an alternative dispute resolution process (ADR). The IAA policy<sup>29</sup> and its prescribed form,<sup>30</sup> as well as the ADR policy<sup>31</sup> and its prescribed form,<sup>32</sup> have been made available on the SARS website.<sup>33</sup>

The IAA process can be used by any person who disagrees with the decision taken by an officer, within prescribed time frames.<sup>34</sup> Appeals of a technical

<sup>28</sup> SARS Memorandum on Customs Control Bill (2013); and SARS Memorandum on Customs Duty Bill (2013).

<sup>29</sup> <http://www.sars.gov.za/AllDocs/OpsDocs/Policies/SC-CC-24%20-%20Internal%20Administrative%20Appeal%20-%20External%20Policy.pdf> (last accessed 27 October 2014).

<sup>30</sup> <http://www.sars.gov.za/AllDocs/OpsDocs/SARSForms/DA%2051%20-%20Internal%20Administrative%20Appeal%20-%20External%20Form.pdf> (last accessed 27 October 2014).

<sup>31</sup> <http://www.sars.gov.za/AllDocs/OpsDocs/Policies/SC-CC-26%20-%20Alternative%20Dispute%20Resolution%20-%20External%20Policy.pdf> (last accessed 27 October 2014).

<sup>32</sup> <http://www.sars.gov.za/AllDocs/OpsDocs/SARSForms/DA%2052%20-%20Application%20for%20ADR%20-%20External%20Form.pdf> (last accessed 27 October 2014).

<sup>33</sup> <http://www.sars.gov.za/> (last accessed 27 October 2014)

<sup>34</sup> Provision is made for appeal committees at the branch office, regional office, the Large Business Centre and head office. In head office further provision is made for an Enforcement and Risk Appeal Committee as well as a Customs National Appeal

nature, for example tariff and valuation appeals, may only be considered by Tariff or Valuation Committees at branch or head office level. Should a lodged appeal (IAA) be unsuccessful, it is not possible to appeal to another committee on the next level. The aggrieved party then has the option of making use of the ADR process, or instituting legal proceedings.

In addition to the dispute resolution processes, SARS also launched a SARS Service Monitoring Office (SSMO) in 2002 to provide improved service delivery to taxpayers. Accordingly, taxpayers experiencing disagreements in respect of substantive matters, or difficulties in resolving administrative processes and procedures, can escalate the matter to the SSMO for follow-up until resolved. The SSMO is thus another internal division in SARS to assist the taxpayer. The SSMO will, however, not get involved in the merits of a case; instead it will report and monitor a matter in a supervisory capacity until it has been resolved.<sup>35</sup>

According to Oguttu, SARS has not been able to rid itself of the perception of being both prosecutor and judge in cases to which it is a party.<sup>36</sup> The recent appointment of a Tax Ombud<sup>37</sup> is an attempt to address this perception. The Tax Ombud is appointed by the Minister of Finance, independent of SARS.<sup>38</sup> The Tax Ombud's mandate is to provide taxpayers with a low-cost mechanism to address administrative service matters of a procedural or administrative nature as a result of the application of the provisions of a tax Act by SARS.<sup>39</sup> Although the Customs and Excise Act<sup>40</sup> is excluded from the list of tax Acts,<sup>41</sup> provision has been made for the Tax Ombud to review and address certain complaints in relation to a service, procedural or administrative matter.<sup>42</sup> Tariff classification matters are appeals against decisions of the customs administration, and therefore

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Committee. The different appeal committees are restricted by fixed monetary values as well as the nature of the appeal. For example, a branch office may not consider an appeal above five million Rand.

<sup>35</sup> SARS Media Release Number 15 of 2002 (3 October 2002).

<sup>36</sup> <http://www.unisa.ac.za/news/index.php/2013/10/unisa-chancellor-is-sas-first-tax-ombudsman/> (last accessed 22 April 2015).

<sup>37</sup> On 1 October 2013 Justice Bernard Ngoepe (former Judge President of the Transvaal High Court) was appointed as the first Tax Ombud of South Africa.

<sup>38</sup> Section 14 of the Tax Administration Act 28 of 2011.

<sup>39</sup> Section 16(1) of Act 28 of 2011. For a detailed discussion of the office of the Tax Ombud, see Persaud *Is South Africa's Tax Ombud a "best fit"?* (MPhil dissertation, University of Pretoria 2013) 81–92.

<sup>40</sup> Customs and Excise Act 91 of 1964.

<sup>41</sup> Section 1 of Act 28 of 2011.

<sup>42</sup> Section 2 of the Tax Administration Laws Amendment Act 21 of 2012.

excluded. Even if complaints in relation to tariff classification could be considered, it is improbable that the Tax Ombud would have the required technical knowledge. Tariff classification disputes that cannot be resolved administratively by SARS will, therefore, have to be adjudicated by the courts.

The court structure in South Africa<sup>43</sup> provides for the magistrates' courts (so-called 'lower courts'), the High Court of South Africa (High Court), the Supreme Court of Appeal, and the Constitutional Court.<sup>44</sup> The latter three courts are referred to as the 'superior courts'.<sup>45</sup>

Magistrates' courts have limited jurisdiction in criminal and civil cases. Above the magistrates' courts is the High Court, divided into provincial divisions and adjudicating matters as a court of first instance in cases and appeals outside the jurisdiction of the lower courts, and presiding over appeals from the lower courts. Appeals from the High Court are directed to the Supreme Court of Appeal. The Supreme Court of Appeal has the final say on all matters, except those where the Constitutional Court has been accorded jurisdiction.<sup>46</sup> Decisions by the High Courts constitute binding case law in accordance with the rule of precedent, or *stare decisis*.<sup>47</sup>

Since 1994 the highest court in South Africa is the Constitutional Court. Initially, the Constitutional Court dealt only with constitutional matters, whether as a court of first instance or on appeal from any lower court. At present the Constitutional Court not only decides constitutional matters, but also any other matter that raises an arguable point of law of general public importance, provided the applicant has been granted leave to appeal.

A number of specialist High Courts exercise national jurisdiction, for example the Competition Appeal Court and the Tax Court.<sup>48</sup> The Competition Appeal Court deals with appeals from the Competition Tribunal, an adjudicative body similar to a court. The Competition Tribunal

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<sup>43</sup> <http://www.justice.gov.za/ocj/index.html> (last accessed 17 May 2014).

<sup>44</sup> Section 166 of the Constitution, 1996.

<sup>45</sup> Section 1 of the Superior Courts Act 10 of 2013.

<sup>46</sup> Section 168 of the Constitution, 1996.

<sup>47</sup> In terms of this principle, the decisions of the Constitutional Court are binding on all courts, that of the Supreme Court of Appeal on all lower courts and high court. The decisions of cases decided in the High Court by one judge are not binding on other cases where only one judge is presiding. However, cases presided over by more than one judge are binding to cases with one or two judges.

<sup>48</sup> <http://www.justice.gov.za/about/sa-courts.html> (last accessed 27 October 2014).



is an independent body, subject to the Constitution and the law, which has jurisdiction throughout South Africa to adjudicate competition-related matters. The members of the tribunal should typically have experience in law or economics.<sup>49</sup>

The Tax Court is a court of record dealing with any disputes between a taxpayer and SARS, where the dispute involves an objection by a taxpayer to a decision or assessment made by SARS in relation to a tax Act.<sup>50</sup> Tax Court judgments are only binding on the parties before the court, and merely of persuasive value in respect of other tax cases.<sup>51</sup> In other words, the important principle of *stare decisis* does not apply. A presiding officer in the Tax Court is a High Court judge. He or she is assisted by two assessors: an accountant and a representative of the business community, both selected from a panel of appointed members.<sup>52</sup> As the Tax Court can grant relief in respect of legal issues, it is considered a ‘specialist tribunal’ that can determine issues of fact.<sup>53</sup> Appeals against the Tax Court’s decisions are made either to a full bench of a division of the High Court, or directly to the Supreme Court of Appeal.<sup>54</sup>

Tax disputes involving an assessment not exceeding an amount determined by the Minister of Finance can be heard by the Tax Board.<sup>55</sup> The Tax Board is less formal than the Tax Court and is chaired by an attorney, advocate or accountant who is employed in the private sector. This chairperson is specifically appointed to assist in the dealing of tax-related matters, including non-compliance with tax obligations.<sup>56</sup> Similar to the provisions of the Competition Tribunal, the Tax Court and the Tax Board consist of experts in the specific field relevant to the dispute.

However, although customs duties constitute ‘taxes’, the legislation dealing with customs, as stated above, is specifically excluded from the ambit of tax

<sup>49</sup> <http://www.comtrib.co.za/> (last accessed 27 October 2014).

<sup>50</sup> Section 107 of Act 28 of 2011.

<sup>51</sup> <http://www.sars.gov.za/Legal/DR-Judgments/Tax-Court/Pages/default.aspx> (last accessed 27 October 2014).

<sup>52</sup> Section 118 of Act 28 of 2011.

<sup>53</sup> See *Metcash Trading Ltd v Commissioner for South African Revenue Service* (2000) 63 SATC 13 at 37–38 par [47] and *Rossi v Commissioner for South African Revenue Service* (2012) 8 SATC 387 at 393 par [17].

<sup>54</sup> Section 133(2) of Act 28 of 2011.

<sup>55</sup> Section 109(1)(a) of Act 28 of 2011. Presently this amount is R500,000. See <http://www.sars.gov.za/Legal/DR-Judgments/Pages/Dispute-Resolution-Process.aspx> (last accessed 27 October 2014).

<sup>56</sup> <http://www.justice.gov.za/about/sa-courts.html> (last accessed 27 October 2014).

Acts.<sup>57</sup> Consequently, the Tax Court has no jurisdiction to adjudicate appeals in relation to customs disputes, including tariff classification matters.<sup>58</sup> The possibility for a specialised and knowledgeable tribunal to adjudicate in tariff classification disputes was raised in *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise*,<sup>59</sup> where the court suggested that consideration should be given to amending the legislation to provide for a tribunal with at least one person with tariff classification expertise to hear tariff-related appeals.<sup>60</sup> However, to date government has not acted on this recommendation. The current state of affairs in respect of customs-related disputes will therefore be addressed hereunder.

In terms of section 47(9)(e) the Customs and Excise Act, a single judge of the High Court has jurisdiction to hear *de novo* appeals against a determination made by the Commissioner for the South African Revenue Service (Commissioner).<sup>61</sup> Before the introduction of section 47(9)(e)<sup>62</sup> providing specific jurisdiction, an aggrieved party in a dispute involving tariff classification had to apply on notice of motion for a declaratory order.<sup>63</sup> It would then be required of the aggrieved party to discharge the *onus* that ordinary rested on him or her, providing that the determination by the customs administration was wrong. An appeal in terms of section 47(9)(e) is in its wide sense 'a complete rehearing and fresh determination on the merits of the matter, with or without additional evidence or information'.<sup>64</sup> There is no *onus* on an applicant to prove in court, on a balance of probabilities and within prescribed periods, that the determination made by Commissioner was incorrect. If a trial court finds in favour of the Commissioner, a further appeal cannot succeed on mere doubt against the trial court by an appellate court – there must be adequate ground on which

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<sup>57</sup> Section 1 of Act 28 of 2011.

<sup>58</sup> <http://www.sars.gov.za/Legal/DR-Judgments/Pages/default.aspx?court=Tax Court> (last accessed 27 October 2014).

<sup>59</sup> (1989) 52 SATC 193 (N) 202.

<sup>60</sup> *Id* at 203.

<sup>61</sup> *Metmak (Pty) Ltd v Commissioner of Customs and Excise* 1984 3 SA 892 (T) 893. See also *Colgate Palmolive (Pty) Ltd v Commissioner for South African Revenue Service* (2006) 69 SATC 43 at 46–48.

<sup>62</sup> Sub-section 9 was added by s 6(1) of the Customs and Excise Amendment Act 110 of 1979.

<sup>63</sup> *Metmak (Pty) Ltd v Commissioner of Customs and Excise* 1984 3 SA 892 (T) 892–893.

<sup>64</sup> *Rentreag Marketing (Pty) Ltd v Commissioner for Customs and Excise* (2001) 65 SATC 422 at 423 (and referring to *Tikly v Johannes* 1963 2 SA 588 (T) 590–591). *In casu*, the Supreme Court of Appeal was requested to decide on the correct classification of imported cheese, which required a determination of whether or not it was considered as 'Gouda' or 'Edam'.

to set aside such a decision, otherwise the trial court's decision will stand.<sup>65</sup> The only factual issue where an *onus* of proof could arise is in relation to the nature and characteristics of the goods; no such *onus* exists in relation to questions of interpretation.<sup>66</sup>

### Conclusions

The technicality of classification provisions is broadly recognised in South Africa. As a result, and quite rightly, related disputes may only be dealt with by specialised committees. The dispute resolution processes available are considered appropriate, if properly implemented and applied and supported by knowledgeable staff. However, a fundamental issue in the context of administrative justice, as a constitutional principle, is the extent to which the customs administration can be viewed to be both prosecutor and judge in a specific dispute. For example, the customs administration will detect a possible incorrect classification, make a ruling or determination on the classification of the goods, impose possible penalties, and finally also decide any appeals. Although the appeals are decided at different levels and by different committees, all the officials involved are SARS employees, which could raise the perception of partiality. Furthermore, the IAA and ADR processes have limitations, similar to the SSMO, also served by SARS employees. Even the appointment of a Tax Ombud cannot sufficiently respond to customs disputes, as most customs matters are excluded, save those related to a service, or a procedural or administrative matter. Appeals in relation to tariff classification are therefore excluded.

Neither the Customs Control Act<sup>67</sup> or the Customs Duty Act<sup>68</sup> makes specific reference to a court with jurisdiction to adjudicate customs tariff classification matters. Therefore, general jurisdiction over customs matters rests with the magistrates' courts.<sup>69</sup> However, this general jurisdiction refers to actions and not appeals, and because tariff classification matters relate to

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<sup>65</sup> *Rentreag Marketing (Pty) Ltd v Commissioner for Customs and Excise* (2001) 65 SATC 422 at 430 par [22].

<sup>66</sup> *Commissioner for Customs and Excise v CI Caravans (Pty) Ltd* (1991) 53 SATC 295(N) at 306. *In casu*, the court dealt with an appeal against the decision of the court *a quo*. The court *a quo* ruled that the goods in question, referred to as 'roof vent stays', were of use solely or principally with caravans, while the customs administration contended that it was parts of general use. On appeal it was argued that an *onus* rested on the appellant to prove that the determination was wrong. The court found that no such *onus* exist in relation to questions of interpretation.

<sup>67</sup> 31 of 2014.

<sup>68</sup> 30 of 2014.

<sup>69</sup> Section 899 of the Customs Control Act and s 222 of the Customs Duty Act.

appeals against decisions of the customs administration, these appeals will still have to be adjudicated in a High Court. This is a serious omission in both Acts and an opportunity missed to either set up a tribunal, as suggested in *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise*, or to expand the jurisdiction of the Tax Court to include adjudication in customs-related matters.

Having identified these gaps in the South African position, the position as regards dispute resolution in Australia and Canada are considered.

## **AUSTRALIA**

### **Introduction**

Australia's position as regards customs administration is comparable to that of South Africa. Australia became a member of the WCO on 5 January 1961.<sup>70</sup> It became a contracting party to the Harmonised System Convention on 22 September 1987 and implemented the Harmonised System on 1 January 1988.<sup>71</sup>

### **Dispute resolution**

As is the case in South Africa, provision is made in Australia for internal appeals against customs-related decisions. However, in 1976 Australia established an independent tribunal, the Administrative Appeals Tribunal (AAT).<sup>72</sup> The AAT is independent of the customs administration, and aims to review administrative decisions fairly, economically, informally, swiftly and in a just manner.<sup>73</sup> The AAT consists of a president, presidential members, senior members, and members.<sup>74</sup> To provide for instances where the parties and their representatives, including lawyers, are not sufficiently qualified to analyse and adduce relevant evidence, the AAT is not bound by the rules of evidence. In this way the tribunal will allow a party before it to present its case as it deems fit.<sup>75</sup>

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<sup>70</sup> <http://www.wcoomd.org/en/about-us/wco-members/membership.aspx> (last accessed 27 October 2014).

<sup>71</sup> See [http://www.wcoomd.org/en/about-us/legal-instruments/~/\\_media/1F153321A5834847B5E4C189E5B5CFAC.ashx](http://www.wcoomd.org/en/about-us/legal-instruments/~/_media/1F153321A5834847B5E4C189E5B5CFAC.ashx) (last accessed 27 October 2014).

<sup>72</sup> Established under the Administrative Appeals Tribunal Act 91 of 1975.

<sup>73</sup> Section 2A of the Administrative Appeals Tribunal Act 91 of 1975.

<sup>74</sup> Section 5 of the Administrative Appeals Tribunal Act 91 of 1975.

<sup>75</sup> Section 33(1)(c) of the Administrative Appeals Tribunal Act 91 of 1975. See also *Re Collector of Customs (Qld) v Times Consultants Pty Limited* [1986] FCA 413 par [21].

The AAT has a designated website providing past decisions and further information about its workings.<sup>76</sup> It is the sole function of the AAT to make decisions in relation to earlier decisions, including those made by the customs administration.<sup>77</sup> The Administrative Appeals Tribunal Act<sup>78</sup> provides that the decisions of the AAT shall be the final administrative decision, subject only to an appeal to the Federal Court of Australia, or to the Full Federal Court on questions of law.<sup>79</sup> This appeal will be heard by a single judge, unless the Tribunal included a presidential member, in which case a full bench of the Federal Court will preside.<sup>80</sup> Similarly a full bench of the Federal Court will preside over an appeal from a single judge from the same court. A final appeal is possible to the High Court of Australia, provided that it relates to a question of law.<sup>81</sup> This is in accordance with section 44(1) of the AAT Act,<sup>82</sup> which determines that appeals from decisions of the AAT to the Federal Court of Australia should only be on questions of law, in other words, mistakes made in law by the AAT.

In *Re Walterscheid Australia Pty Limited v Collector of Customs*,<sup>83</sup> the Federal Court had the following to say in relation to a question of law:

The Court will not necessarily set aside a decision simply because an error of law in the reasoning process has been identified. It will not set aside the decision if it is satisfied that the error was immaterial and did not affect the ultimate decision. However, if the error did affect the decision in a material way, then the decision ought to be set aside.<sup>84</sup>

The process of construction in accordance with the statutory rules of interpretation could raise a question of law.<sup>85</sup> In *Collector of Customs v*

<sup>76</sup> <http://www.aat.gov.au/> (last accessed 6 March 2014).

<sup>77</sup> According to the Hon. Justice Garry Downes AM, a former President of the Administrative Appeals Tribunal. See: <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/implementation.htm> (last accessed 27 October 2014).

<sup>78</sup> Act No 91 of 1975.

<sup>79</sup> Section 44(1) of the Administrative Appeals Tribunal Act 91 of 1975. See also <http://www.customs.gov.au/webdata/resources/files/AdvanceRulingTariffValuationandOriginAdvice-June2012.pdf> (last accessed 27 October 2014).

<sup>80</sup> Section 44(3) of the Administrative Appeals Tribunal Act 91 of 1975. See also *Re Gardner Smith Pty Limited v the Collector of Customs* Victoria [1986] FCA 98 par [1]. Section 44 of AAT Act 91 of 1975.

<sup>81</sup> No 91 of 1975.

<sup>82</sup> [1988] FCA 20.

<sup>83</sup> [1988] FCA 20 par [21].

<sup>84</sup> *Re Collector of Customs of New South Wales v Putale Pty Limited* [1983] FCA 201 – no numbering.

*Pressure Tankers Pty Ltd and Pozzolanica Enterprises Pty Ltd*,<sup>86</sup> the Full Federal Court stated:

Only in exceptional circumstances should the decision of the Tribunal not be the final decision ... As the Full Court said in *Repatriation Commission v Thompson* (1988) 9 AAR 199 at 357:

“... the nature of the task of this Court is clear. It is to leave to the tribunal of the fact decisions as to the facts and to interfere only when the identified area is one of law.”

This translates to a practical as well as principled restraint. The court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts ... The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error [certain citations omitted].<sup>87</sup>

The latter part of this passage was cited with approval in the joint judgment of Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* where the following was stated:

These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.<sup>88</sup>

Decisions on a question of law are not reviewable on merits. In the *Pozzolanica Enterprises* case, the Full Federal Court elaborated on questions of law, stating that:<sup>89</sup>

The principles according to which the jurisdiction conferred by s.44 is limited are not always easy of application. Distinctions between a question of fact and a question of law can be elusive. The proper interpretation, construction and application of a statute to a given case raise issues which may be or involve questions of fact or law or mixed fact and law. Nevertheless there are five general propositions which emerge from the cases:

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<sup>86</sup> [1993] FCA 322; (1993) 115 ALR 1 (1993) 18 Aar 9 (1993) 43 FCR 280.

<sup>87</sup> *Id* at par [21].

<sup>88</sup> [1996] HCA 6; (1996) 185 CLR 259 at 272.

<sup>89</sup> [1993] FCA 322; (1993) 115 ALR 1 (1993) 18 Aar 9 (1993) 43 FCR 280 par [23].

1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law – *Jedko Game Co Pty Ltd v Collector of Customs* (1987) 12 ALD 491; *Brutus v Cozens* [1972] UKHL 6; (1973) AC 854.
2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact – *Jedko Game Co. Pty Ltd v Collector of Customs* (supra); *NSW Associated Blue Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) [1956] HCA 80; 94 CLR 509 at 512; *Life Insurance Co. of Australia Ltd v Phillips* [1925] HCA 18; (1925) 36 CLR 60 at 78; *Neal v Secretary, Department of Transport* [1980] FCA 45; (1980) 29 ALR 350 at 361–2.
3. The meaning of a technical legal term is a question of law. *Australian Gas Light Co. v Valuer General* (1940) 40 SR(NSW) 126 at 137–8; *Lombardo v Federal Commissioner of Taxation* [1979] FCA 66; (1979) 28 ALR 574 at 581.
4. The effect or construction of a term whose meaning or interpretation is established is a question of law – *Life Insurance Co. of Australia v Phillips* (supra) at 79.
5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law – *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7 per Mason J with whom Gibbs, Stephen, Murphy and Aickin JJ agreed; *Australian National Railways Commission v Collector of Customs* (supra) at 379 (Sheppard and Burchett JJ).

When a statute under consideration has no technical meaning, but is understood in its plain, ordinary meaning, a question of law will arise. But a question of law will only arise if on the facts it was found that it must necessarily have come within the particular statutory description.

In *HJ Heinz Company Limited v Chief Executive Officer of Customs*,<sup>90</sup> the Federal Court found that upon determining the question of law as to whether or not a word has a special or technical meaning, or has been answered authoritatively, no further factual findings are possible, subject to reconsideration by a higher court. A court should determine the statutory facts for itself, in other words determining the position in law, instead of some issue of fact between the parties. On appeal it is not required of the court to involve itself in further factual inquiries; it can rely on the facts and findings made by the AAT.<sup>91</sup> In *Collector of Customs v Agfa Gevaert*

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<sup>90</sup> [2005] FCA 291.

<sup>91</sup> [2005] FCA 291 par [11].

*Limited*,<sup>92</sup> the High Court found the distinction between questions of fact and questions of law to be a vital distinction in law. It stated that no formula has been formulated which has found universal application.<sup>93</sup>

The President of the AAT stated that

[t]here is no complete separation of administrative and judicial courts. While the Administrative Appeals Tribunal is the final arbiter of administrative decisions as such, the Federal Court and ultimately the High Court can rule on questions of law. The ultimate decision, however, remains with the Administrative Appeals Tribunal. If the Federal Court answers a question of law differently to the Administrative Appeals Tribunal the matter must return to the Administrative Appeals Tribunal for reconsideration on the merits in accordance with the new determination of the law.<sup>94</sup>

In addition to appeals on questions of law to the Federal Court, jurisdiction can also be established in accordance with the specific provisions in legislation.<sup>95</sup>

In finding a solution to a contentious word, it is required to follow a process of construction of the word in its context within the legislation, as a matter of law. Therefore, whether a given description falls within a particular heading and subheading in the Harmonised System is a question of law.<sup>96</sup> If the wrong approach to construction has been followed, the decision may be set aside.<sup>97</sup> It is necessary to ask, as a question of law, whether different conclusions are open in respect of the facts found falling within the words of the statute. If only one conclusion is reasonably open upon the facts found, it would be the end of the enquiry. However, if different conclusions are reasonably possible it is required to decide which of the alternatives is the correct conclusion, and this is a question of fact.<sup>98</sup> Once the facts have

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<sup>92</sup> [1996] HCA 36; (1996) 186 CLR 389; (1996) 141 ALR 59; (1996) 71 ALJR 123.

<sup>93</sup> *Ibid.*

<sup>94</sup> <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/implementation.htm> (last accessed 27 October 2014).

<sup>95</sup> For example, in classification matters, jurisdiction can be established in terms of sections 167 or 273GA(ii) of the Australian Customs Act 6 of 1901.

<sup>96</sup> *Collector of Customs v Agfa Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389; (1996) 141 ALR 59; (1996) 71 ALJR 123.

<sup>97</sup> *Sharp Corporation of Australia Pty Ltd v Collector of Customs* [1995] FCA 1521 par [21].

<sup>98</sup> *Baxter Healthcare Pty Ltd v Comptroller-General of Customs* [1997] FCA 131.



been found, the correct classification would be a question of law.<sup>99</sup> An error in law would, therefore, arise from the facts found, although a wrong finding of fact would not be sufficient to demonstrate an error in law,<sup>100</sup> provided the correct principles of law have been applied and it is not unreasonable.<sup>101</sup> The usual grounds for appeal will apply if a decision-maker failed to act in a procedurally fair manner, failed to consider a relevant fact, considered an irrelevant matter, or made an unreasonable decision which no reasonable decision-maker could have made.<sup>102</sup> In light of this approach, no *onus* of proof rests on any of the parties.<sup>103</sup>

An advance ruling cannot be disputed by directing it to the AAT. Instead it should be addressed to the customs administration for internal review.<sup>104</sup> However, the customs administration does not have the power to make a final and binding determination on classification – proper classification of goods is to be determined by a tribunal or court. The tribunal or court is not restrained by a finding by the customs administration.<sup>105</sup>

The AAT can be approached on the basis of a dispute relating to the payment of duty, which could include the classification of goods as this dictates the rate of duty. Section 167 of the Customs Act provides for the payment of customs duty under protest at the time of importation, subject to the lodging of a review<sup>106</sup> against a decision by the customs administration. Accordingly, a classification dispute should be identified simultaneously with the clearance of goods for importation.<sup>107</sup> In *Parks Holdings Pty Ltd v Chief Executive Officer of Customs*,<sup>108</sup> the Full Federal Court questioned

<sup>99</sup> *Chief Executive Officer of Customs v I.P.L. Datron Pty Ltd & Anor* [1998] FCA 1055.

<sup>100</sup> *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd* [1993] FCA 322; (1993) 115 ALR 1 (1993) 18 Aar 9 (1993) 43 FCR 280 pars [20–21].

<sup>101</sup> *Commissioner of Taxation v Brixius* (1987) 16 FCR 359 at 365.

<sup>102</sup> *Sharp Corporation of Australia Pty Ltd v Collector of Customs* [1995] FCA 1521 par [20].

<sup>103</sup> *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs* [1995] FCA 1283; (1995) 21 Aar 450 par [16].

<sup>104</sup> There is no right of appeal against a Tariff Advice decision to the AAT set out in s 273GA of the Customs Act 6 of 1901. The AAT can only hear the matter under s 167 once the duty has been paid under protest. See also: <http://www.customs.gov.au/tariff/tariff-advice.asp> (last accessed 4 September 2013).

<sup>105</sup> *Re Narish Holdings Pty Ltd v the Commonwealth of Australia, Brian Leo Cody (Collector of Customs of Victoria) and Thomas Plunkett Hayes (Comptroller-General of Customs)* [1988] FCA 428 par [36].

<sup>106</sup> This review should be lodged within six months after the payment under protest.

<sup>107</sup> *Re Table Eight Pty Ltd; Lee Mckeand and Son Pty Ltd and Kate Madden Pty Ltd v Collector of Customs* [1993] FCA 22; (1993) 17 Aar 54 (1993) 40 FCR 524 par [12].

<sup>108</sup> [2004] FCAFC 317.

why an importer would pay under protest if goods had already been released into its possession.<sup>109</sup> The importer stated that it had elected to pay under protest on the basis of the decision in *Stretton v Malika Holdings*<sup>110</sup> where the court held that section 167 was the only means of challenging the amount, rate and liability to the customs administration.<sup>111</sup> This decision was later overturned by the High Court<sup>112</sup> confirming that it was not required of an importer to pay the duty demanded by the customs administration under protest. Instead, the importer can merely defend any proceedings instituted by the customs administration.<sup>113</sup>

The decisions of judges reported in case law, provide principles and processes that are binding on lower courts in terms of the doctrine of precedent. In *Grundfos Pumps Pty Ltd v Collector of Customs*,<sup>114</sup> the Federal Court stated that one court may depart from a decision of another court of equal standing, further providing the circumstances under which such a departure may happen. The court said that it was not prohibited in law for a single judge to comment on the correctness of the decisions of a higher court, but that it would be a rare occurrence and something generally to avoid. The court also confirmed that decisions of higher courts were law which had to be applied by judges no different to an Act of Parliament.<sup>115</sup> In other words, the principle of *stare decisis* is applied in Australian courts.

In *HJ Heinz Company Limited v Chief Executive Officer of Customs*,<sup>116</sup> it was found that the AAT would be wrong to opine that it was bound by a decision of the Full Federal Court. Since, as a tribunal, the AAT is not bound by decisions of the higher courts, the *stare decisis* rule is not applicable when it hears cases. However, since the determination of the meaning of a word is of a legal nature, the AAT would be entitled to refer to such a decision of the higher courts.<sup>117</sup>

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<sup>109</sup> [2004] FCAFC 317 par [22].

<sup>110</sup> [1998] VSCA 127.

<sup>111</sup> [1998] VSCA 127 par [2].

<sup>112</sup> *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14; 204 CLR 290; 178 ALR 218; 75 ALJR 626.

<sup>113</sup> [2001] HCA 14; 204 CLR 290; 178 ALR 218; 75 ALJR 626 par [44].

<sup>114</sup> [1996] FCA 1537.

<sup>115</sup> [1996] FCA 1537 par [20].

<sup>116</sup> [2005] FCA 291.

<sup>117</sup> [2005] FCA 291 par [12].

### **Conclusions**

Once all internal avenues have been exhausted in relation to a tariff classification dispute, an aggrieved party can address the matter to the independent AAT, instead of reverting to a court (as is the case in South Africa).

Decisions of the AAT are regarded as a final administrative decision, subject only to an appeal to the Federal Court of Australia, the Full Federal Court, and finally the High Court of Australia, provided that it involves a question of law. Decisions of the AAT and the courts are conflicting, confirming the difficulties surrounding tariff classification. Many decisions reflect an agreement with the application of the statutory framework by the customs administration, while others expose their incorrect application and interpretation. Regardless, the fact that a tribunal has been established to deal with customs-related disputes is highly commendable; it provides a relief mechanism prior to approaching a formal court.

## **CANADA**

### **Introduction**

Similar to South Africa and Australia, Canada became a member of the WCO on 12 October 1971.<sup>118</sup> It has also been a contracting party to the Harmonised System Convention since 14 December 1987 and implemented the Harmonised System on 1 January 1988 so fulfilling its international obligations with regard to classification.<sup>119</sup>

### **Dispute resolution**

In Canada a dispute regarding a determination or advance ruling can be submitted by filing a dispute notice or request for review.<sup>120</sup> If a person is still dissatisfied with a customs classification matter, an appeal can be submitted to a Federal Administrative Tribunal,<sup>121</sup> referred to as the Canadian International Trade Tribunal (CITT).<sup>122</sup> The CITT was established

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<sup>118</sup> <http://www.wcoomd.org/en/about-us/wco-members/membership.aspx> (last accessed 27 October 2014).

<sup>119</sup> See <http://www.wcoomd.org/en/about-us/legal-instruments/~media/1F153321A5834847B5E4C189E5B5CFAC.ashx> (last accessed 27 October 2014).

<sup>120</sup> Section 60(1) and (2) of the Canadian Customs Act, respectively.

<sup>121</sup> Section 67 of the Canadian Customs Act.

<sup>122</sup> Established under the Canadian International Trade Tribunal Act (RSC 1985 c 47 (4<sup>th</sup> Supp)).

in 1988 in terms of the Canadian International Trade Tribunal Act<sup>123</sup> as the administrative decision-making authority to which classification disputes must be referred.<sup>124</sup>

The CITT is headed by a chairperson who may assign one or three members to a case arising, which is then adjudicated through file hearings or public hearings.<sup>125</sup> These hearings should be carried out 'informally and expeditiously'.<sup>126</sup> As with the AAT, the CITT also has a designated website<sup>127</sup> with further information, including regulations, rules, notices, decisions, publications, directives and guidelines.

Sections 67 and 68 of the Customs Act [RSC, 1985, c 1 (2nd Supp)] ('Canadian Customs Act') provide for appeals. Section 67, *inter alia*, requires that:

(1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given...

(3) On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.

In terms of section 2 of the Customs Act, the 'President' referred to is the President of the Canada Border Services Agency appointed under subsection 7(1) of the Canada Border Services Agency Act.<sup>128</sup> Sections 60 and 61 provide respectively for the re-determination or further re-determination of origin, tariff classification, and value for duty or marking.

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<sup>123</sup> RS 1985, c 47 (4<sup>th</sup> Supp).

<sup>124</sup> *CB Powell Limited v Canada Border Services Agency* 2010 FCA 61 (CanLII) par [4].

<sup>125</sup> Sections 2 and 13 of the Canadian International Trade Tribunal Act (RSC, 1985 c. 47 (4<sup>th</sup> Supp)).

<sup>126</sup> [https://www.citt-tcce.gc.ca/publicat/ar2n\\_e.asp#P596\\_16904](https://www.citt-tcce.gc.ca/publicat/ar2n_e.asp#P596_16904) (last accessed 6 March 2014).

<sup>127</sup> <https://www.citt-tcce.gc.ca/> (last accessed 6 March 2014).

<sup>128</sup> SC 2005, c 38.

All administrative tribunals must act fairly and not arbitrarily, recognising what the law requires them to do.<sup>129</sup> The CITT is a court of record, with all such powers, rights and privileges as are vested in a superior court of record, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, and other matters necessary or proper for the due exercise of its jurisdiction.<sup>130</sup> However, the procedures followed in the CITT are not as formal as those in the courts.

The rules and procedures followed are similar to those used in a court of justice, although not as strict, but do allow for witnesses to be subpoenaed and information to be presented. It is also not merely an adjudicative body, since it also investigates and undertakes inquiries with the assistance of experts it retains, when dealing with a broad range of trade matters arising from a complex array of related statutes and international obligations,<sup>131</sup> such as the Harmonised System Convention.

In *Canada (Minister of National Revenue) v Schrader Automotive Inc.*,<sup>132</sup> the Federal Court of Appeal described the CITT as follows:

The Canadian International Trade Tribunal is, clearly, a specialized tribunal. It is even more so when the decision at issue is with respect to the Customs Tariff Act. That Act is a statutory enactment and its interpretation thereby becomes a question of law, hence the right to appeal tariff decisions to this Court on a question of law. Yet, the Customs Tariff law as it may be, is nonetheless a law of a very technical nature. It is legislation of such a specialized nature and expressed in terms that have so little to do with traditional legislation that for all practical purposes the Court is being asked to give legal meaning to technical words that are well beyond its customary mandate. Furthermore, there are unique Canadian and international rules of interpretation applicable to the Customs Tariff that bear little resemblance to the traditional canons of statutory construction. Therefore, considerable deference should be accorded to the Tribunal's decisions and litigants who appeal tariff decisions to this Court should be aware that they have a tough hill to climb.<sup>133</sup>

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<sup>129</sup> *Nicholson v Haldimand Norfolk (Regional) Police Commissioners* 1978 CanLII 24 (SCC) [1979] 1 SCR 311.

<sup>130</sup> Section 17 of the Canadian International Trade Tribunal Act.

<sup>131</sup> *Deputy Canada (Minister of National Revenue) v Yves Ponroy Canada* 2000 CanLII 15801 (FCA) par [32].

<sup>132</sup> 1999 CanLII 7719 (FCA).

<sup>133</sup> 1978 CanLII 24 (SCC), [1979] 1 SCR 311 par [5].

The court also stated that it can only substitute a decision of the CITT if that decision is found to be unreasonable. The standard of review applicable on a question of law in relation to the interpretation of the statutory framework for the customs administration, is that of reasonableness and not correctness.<sup>134</sup> The standard of review on a question of law, where there is no need for technical expertise in relation to particular goods or to balance competing public policy considerations, is correctness.<sup>135</sup> As a result, customs tariff classification disputes, directed from the CITT to a court, will be considered against a standard of reasonableness. To be successful, an appellant should be able to show positively that the decision (on a question of law) was unreasonable.<sup>136</sup> A decision will be unreasonable if the CITT adopted an interpretation of words that the Canadian Customs Tariff cannot reasonably support.<sup>137</sup>

An appeal against a decision of the CITT can be directed to the Federal Court of Appeal, and thereafter to the Supreme Court which deals with all appeals. Provision is made for appeals against administrative decisions to the CITT,<sup>138</sup> and from the CITT to the Federal Court of Appeal, but only on questions of law.<sup>139</sup> In terms of the Federal Courts Act,<sup>140</sup> the Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review from certain federal boards, commissions, or other tribunals, one of which is the CITT.<sup>141</sup> Unless there are extraordinary circumstances, parties must exhaust their rights administratively, with the courts acting as a last resort.<sup>142</sup> It is also possible for the CITT to refer a question to the courts for resolution.

Decisions of the Supreme Court are binding on all lower courts, the CITT, and the customs administration. Decisions by the Federal Court of Appeal are binding on the CITT and the customs administration, while CITT

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<sup>134</sup> See also *Pushpanathan v Canada (Minister of Citizenship and Immigration)* 2002 FCT 867 (CanLII) par [23]; *Rollins Machinery Ltd v Canada (Deputy Minister of National Revenue – MNR)* (1999) 247 NR 399 (FCA) par [3]; and *Deputy Canada (Minister of National Revenue) v Yves Ponroy Canada* 2000 CanLII 15801 (FCA) pars [4, 6, 37–38].

<sup>135</sup> *Canada (Deputy Minister of National Revenue) v Mattel Canada Inc* 2001 SCC 36, [2001] 2 SCR 100 par [33]; and *Sable Offshore Energy Inc v Canada (Customs and Revenue Agency)* 2003 FCA 220 (CanLII) par [13].

<sup>136</sup> *Law Society of New Brunswick v Ryan* 2003 SCC 20 [2003] 1 SCR 247 par [48].

<sup>137</sup> *Canada (Customs and Revenue Agency) v Agri Pack* 2005 FCA 414 (CanLII) par [25].

<sup>138</sup> Section 67 of the Customs Act.

<sup>139</sup> Section 68 of the Customs Act.

<sup>140</sup> RSC 1985 c F-7.

<sup>141</sup> Section 28(1)(e) of the Federal Courts Act (RSC 1985 c F-7).

<sup>142</sup> *CB Powell Limited v Canada Border Services Agency* 2010 FCA 61 (CanLII) par [4].

decisions are binding only on the customs administration.<sup>143</sup> It is a recognised principle of administrative law that administrative tribunals such as the CITT are not bound by their earlier decisions, although they should strive to be consistent.<sup>144</sup>

Section 68 of the Canadian Customs Act provides that:

(1) Any of the parties to an appeal under section 67, namely, (a) the person who appealed, (b) the President, or (c) any person who entered an appearance in accordance with subsection 67(2), may, within ninety days after the date a decision is made under section 67, appeal therefrom to the Federal Court of Appeal on any question of law.

(2) The Federal Court of Appeal may dispose of an appeal by making such order or finding as the nature of the matter may require or by referring the matter back to the Canadian International Trade Tribunal for re-hearing.

Based on subsections 67(3) and 68(1), classification decisions of the CITT are not subject to judicial review. Instead, these decisions are subject to an appeal to the Federal Court of Appeal on questions of law. Essentially, the Federal Court and Federal Court of Appeal have civil jurisdiction, but, since created by an Act of Parliament, they can only deal with matters which have been specified in federal laws. The courts exercise a supervisory role over the CITT to ensure that it does not exceed its responsibilities are that fair procedures are followed.

The overarching character of jurisdiction is that

[a]dministrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.<sup>145</sup>

Therefore, if the CITT interprets the authority granted to it incorrectly, its actions could be found *ultra vires*. The CITT cannot appropriate to itself jurisdiction that has not been conferred by its enabling legislation.

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<sup>143</sup> Kiselbach, Xilinas & Xilinas *Canadian customs law* (2012) 487.

<sup>144</sup> *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)* [1993] 2 SCR 756.

<sup>145</sup> *Dunsmuir v New Brunswick* 2008 SCC 9 [2008] 1 SCR 190 par [29].

### **Conclusions**

After all internal appeal processes have been followed in relation to customs matters, including tariff classification, a specialised tribunal is available in Canada – somewhat similar to the position in Australia. The CITT is easily accessed by an aggrieved party as the final administrative decision-maker. It is considered an expert tribunal, which should be afforded deference by the courts. Appeals against decisions of the CITT are addressed to the Federal Court of Appeal only on questions of law. The Federal Court of Appeal will only interfere with a decisions of the CITT if it is clearly wrong and is unable to withstand a probing examination.

The existence of the CITT confirms the value of such a tribunal in relation to customs matters. The detailed analysis and reasons provided by the CITT are considered invaluable in understanding the interpretation and application of the statutory framework governing tariff classification.

### **OVERALL CONCLUSIONS AND RECOMMENDATIONS**

From the reported cases it is clear that customs tariff classification matters often present technical and complicated arguments, resulting in disagreements on the interpretation and application of the relevant statutory frameworks. Not surprisingly, therefore, the customs administrations in South Africa, Australia and Canada have well-developed internal dispute resolution mechanisms. Appeals are handled internally at different levels of authority within the administration.

However, these internal appeals have serious limitations. An initial limitation is that the records of the proceedings and findings are not available to the public. The reasons for any particular decision are, therefore, not available for consideration and use by anyone else. Secondly, justice must be seen to be done. Internal appeals are dealt with 'in-house' by the customs administration, raising questions as to impartiality and independence.

Lastly, many of these internal appeals inevitably result in further litigation. However, due to the high costs associated with litigation in the courts, it is not always financially viable to pursue an appeal in relation to customs tariff classification using this avenue. Even in cases where a favourable decision would result in a positive financial outcome, the perception remains that it would be opposing government, seen to have the backing of the entire taxpayer base and its substantial financial resources. Therefore, in instances



where the costs of litigation would exceed the benefits of a positive decision, or where an aggrieved party is reluctant to enter into litigation with government, the most likely alternative would be to accept the decision and include the additional cost to the cost of the products, and generally passing this on to the consumer.

As is clear from the South African dispensation, the courts do not necessarily offer a satisfactory alternative to the internal dispute resolution mechanisms. Courts are a time-consuming and costly alternative. Furthermore, the presiding judges will rarely have the technical expertise to dispose of a tariff classification dispute swiftly and professionally – necessitating the use of costly expert witnesses.

Therefore, the need for a less formal, less expensive, but at the same time more expedient and professional way for resolving tariff classification disputes, is clear. An independent expert tribunal is a logical bridge between internal dispute resolution on the one hand, and costly, and often lengthy litigation in the courts, on the other. Experts, exposed to these technical issues on a regular basis, are in the best position to apply the classification framework and to ensure that tariff classification is performed as envisaged internationally. These experts are not subject to the pressures of revenue considerations, and can be truly independent and objective, avoiding a negative perception of bias.

In both Australia and Canada specialised tribunals have been created to adjudicate an array of matters, but importantly, provision has been made to include appeals in relation to customs disputes such as tariff classification matters. As a result, an alternative to lengthier and more expensive court procedures is offered to parties aggrieved by a determination made by the customs administration. This alternative mechanism allows for experts to decide technical customs-related appeals in a swift and cost-effective manner.

A cursory overview of the number of the cases adjudicated by the courts in the three countries, compared to the number of cases heard by the respective tribunals in Australia and Canada, reveals that many more cases are heard by the tribunals than by the courts. The large number of cases adjudicated by the tribunals in Australia and Canada reflect the willingness and need of traders to have their cases adjudicated expertly, independently, swiftly, and cost effectively outside of the normal court structure. The tribunals allow the

aggrieved parties to obtain an expert and independent opinion on the classification of their goods, and the transparent manner the dispute is dealt with and reported, contributes to trade facilitation, transparency and fairness. Most cases presented to the tribunals are resolved by the tribunals, with only a small number of tribunal decisions needing to be resolved on appeal to the courts.

The decisions of the tribunals in Australia and Canada are held in high esteem, as is evident from case law. Having recognised how technical tariff classification disputes have become, the Australian and Canadian courts have not lightly interfered in decisions made by the respective tribunals. In Australia a court will only interfere with a decision of the tribunal in relation to questions of law. Only if an error in law has occurred in the application and interpretation of the legislative framework, and if that error of law was material enough to affect the final decision of the tribunal, will the court set aside a decision of the tribunal. In Canada a court will also only interfere with a decision of the tribunal relating to tariff classification, on a question of law and if the decision is found to be unreasonable. If the tribunal's decision can withstand a 'somewhat probing examination', the court will not intervene in the final decision.

Given the successes of the AAT (in Australia) and CITT (in Canada) in resolving tariff classification disputes, a specialised, independent tribunal dealing with appeals in relation to tariff classification matters could also be an invaluable instrument and should be considered for South Africa. The recent introduction of the Tax Administration Act<sup>146</sup> and, even more recently, the new Customs Acts presented opportunities to establish such a tribunal. However, these opportunities were not grasped. A specialised tribunal will ensure that tariff classification appeals in South Africa can also be dealt with by an independent panel of experts. The knowledge that an appeal is dealt with independently and by experts will provide reassurance and transparency to aggrieved parties, further facilitating tariff classification. Many traders will use a tribunal as a faster and more cost-effective way of resolving tariff-related issues. A tribunal will also address the non-reporting of internal disputes since its decisions will be published and supported by reasons. In addition, the reporting of decisions of a tribunal also provides valuable checks in terms of which customs administrations can ensure that they are interpreting and applying relevant provisions as they were intended to be applied.

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<sup>146</sup> Act 28 of 2011.

The aim of this research is not to discuss the details of the establishment, mandate, structure and operation of such a tribunal, but simply to argue the case – or more accurately, to reinforce the call in *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise*<sup>147</sup> for its creation. As a minimum, however, the tribunal should comprise of a president,<sup>148</sup> assisted by at least two recognised technical experts. The presence of experts should expedite proceedings and contribute towards the correct and professional application of the tariff framework so ensuring correct decisions in technical matters. Access to the tribunal should ideally be free of costs to the applicant, with specific time frames linked to all processes. The proceedings before the tribunal should be informal, although it should serve as a court of record. As a court of record, its decisions will assist trade facilitation since other traders will have access to its public records. This will ensure that more decisions are available for guidance to assist in the interpretation and application of the tariff classification framework. Parties to a specific dispute will benefit from a more accurate technical decision. More generally, however, the customs administration and other traders struggling with tariff classification matters will also benefit.

If a proper, in-depth cost-benefit analysis suggests that a dedicated, independent customs tribunal is not a viable option, it is recommended that the jurisdiction of the Tax Court simply be extended to include customs-related disputes. In essence the Tax Court already performs the function of a ‘specialised tribunal’ determining matters of fact, which could comfortably be extended to incorporate technical customs matters, including tariff classification. In tariff classification matters one or both assessors could be individuals with the required technical expertise. In practice, this means that individuals with these skills will have to be appointed as members of the Tax Court.

The creation of a tribunal, or alternatively, the extension of the mandate of the Tax Court, will be a positive step in the highly-technical and evolving customs environment. It should inevitably lead to more accurate tariff classification resulting, in turn, in improved trade facilitation. The difficulties and significant costs in accessing the courts will be addressed positively, providing an accessible, simple, cheaper and faster alternative in respect of the existing resolution of technical customs disputes.

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<sup>147</sup> (1989) 52 SATC 193 (N) 202.

<sup>148</sup> Ideally the president will be a judge or retired judge of the High Court.