CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 252/24

In the matter between:

THOLO ENERGY SERVICES CC Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Neutral citation:	*Tholo Energy Services CC v Commissioner for the South African Revenue Service* [2026] ZACC [1]
Coram:	Maya CJ, Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Rogers J, Savage AJ, Theron J and Tshiqi J
Judgment:	Mathopo J (unanimous)
Heard on:	26 August 2025
Decided on:	16 January 2026
Summary:	Customs and Excise Act 91 of 1964 — section 47(9)(e) — nature and scope of tariff appeals — what constitutes a determination for purposes of appeal

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ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant is to pay the respondent's costs, including the costs of two counsel.

JUDGMENT

MATHOPO J (Maya CJ, Mlambo DCJ, Kollapen J, Majiedt J, Mhlantla J, Musi AJ, Rogers J, Savage AJ, Theron J and Tshiqi J concurring):

Introduction

[1] This case concerns the proper scope of tariff appeals under section 47(9)(e)[1] of the Customs and Excise Act[2] (CEA). The first question concerns whether the respondent, the Commissioner for the South African Revenue Service (Commissioner), is entitled to rely on additional grounds, not initially raised, to oppose the statutory appeal against its determination, and if so, whether this complies with constitutional principles of just administrative action and access to courts. The second question is whether a licensed distributor of fuel (LDF) must collect fuel levy goods directly from stocks at the licensee's customs and excise manufacturing warehouse (VM) itself, where the fuel was manufactured, or whether the fuel levy goods may be collected from the stocks of a licensee of a VM anywhere in the Republic of South Africa. This

[1] Section 47(9)(e) provides:

> "An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption."

[2] 91 of 1964.

question implicates the correct interpretation and application of section 64F of the CEA,[3] its rules and the requirements of Schedule 6 of the CEA, to claim a refund of the fuel and Road Accident Fund (RAF) levies under South Africa's duty-at-source (DAS) scheme. The third question is whether the LDF was required at the time of export to have an export permit issued by the International Trade Administration Commission (ITAC) in order to qualify for a refund under the DAS scheme in terms of the CEA. Additionally, once the Commissioner is permitted to rely on additional grounds, several further compliance issues arise for determination, including whether the fuel was manufactured in South Africa, whether it was wholly and directly removed, and whether the appropriate party conducted the removal.

[2] The above questions arise on application by the applicant, Tholo Energy Services CC (Tholo), for leave to appeal a judgment and order of the Supreme Court of Appeal, in which that Court dismissed Tholo's appeal against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court) in favour of the Commissioner.

Legislative framework

[3] It is convenient to start by setting out the industry context of this application and the relevant provisions of the CEA and the rules promulgated under section 120 of the

[3] Section 64(F) reads:

> "(1) For the purposes of this Act, unless the context otherwise indicates—
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> 'licensed distributor' means any person who—
>
> (a) is licensed in accordance with the provisions of section 60 and this section;
>
> . . .
>
> (c) is entitled to a refund of duty in terms of any provision of Schedule 6 in respect of such fuel which has been duly delivered or exported as contemplated in paragraph (b);
>
> 'fuel' means any goods classifiable in any item of Section A of Part 2 of Schedule 1 liable to excise duty and goods classifiable in any item of Part 5 of Schedule 1 liable to fuel levy, used as fuel.
>
> . . .
>
> (3)(a) In addition to any other provision of this Act relating to refunds of duty, any refund of duty contemplated in this section shall be subject to compliance with the requirements specified in the item of Schedule 6 providing for such refund and any rule prescribing any requirement in respect of the movement of such fuel to any such country or for export."

CEA prescribing the requirements for a refund of fuel and Road Accident Fund[4] (RAF) levies.

[4] The fuel levy regime under the CEA, read with the Rules and Schedules promulgated thereunder, operates within a complex regulatory framework administered by the Commissioner for the collection of various categories of taxation on fuel products. It provides for the imposition of import duty, excise duty, fuel levy and RAF levy on fuel products, with Tholo's claim relating specifically to the latter two categories, collectively referred to for convenience as "levies". These levies apply to diesel and petrol, which are designated as fuel levy goods in Part 5A of Schedule 1 to the CEA.

[5] The duty control regime operates on a DAS collection scheme. Under this scheme, fuel is regulated within licensed VMs, which constitute fuel refineries. A secondary category of licensed warehouse, known as special storage warehouses (SOS), may receive fuel removed from VMs or store imported fuel. The fuel in respect of which refunds are claimed in this matter does not involve SOS facilities, and accordingly this warehouse category is not material to the present case.

[6] The scheme requires that when fuel levy goods are removed from a VM for any purpose, they must be entered for home consumption or deemed to be entered for home consumption. The licensee bears an immediate obligation to pay the duties, including the levies, to the Commissioner. This scheme precludes removal in bond and creates an immediate duty to account for and pay duties without provision for deferred and secured contingent payment obligations.

[7] Licensees must account to the Commissioner monthly, recording all removals of fuel levy goods produced and received during the accounting period, detailing removals by various modes of transport and calculating the applicable duties. Payment

[4] The Road Accident Fund levies are based on fuel sales collected to compensate the victims of road accidents.

obligations are structured such that 50% of duties must be paid within 30 days after month-end and before the penultimate working day of the following month, with the remaining 50% payable 30 days thereafter.

[8] Where fuel levy goods are removed for export from a VM, duties must nevertheless be paid immediately. However, the legislative framework provides for refund claims in respect of duties actually paid where goods have been exported and, in the case of purchasers in common customs area countries,[5] actually delivered with supporting documentary evidence maintained for inspection. This contrasts with the conventional treatment of other goods, which may be removed in bond for export, where duly documented export results in cessation of duty liability and the associated deferred payment obligation. The export of fuel levy goods is restricted to licensees of VMs or LDFs. Similarly, only VM licensees or LDFs may claim refunds of duty on exported fuel levy goods.

[9] Refund payments to VM licensees commonly occur through set-off against payment obligations for other fuel levy goods removed during the relevant accounting period, subject to compliance with applicable schedule provisions and the Commissioner's approval. Under the DAS scheme, duties are accounted for and paid by the VM licensee. The LDF pays the VM licensee a price inclusive of duties and, while selling for export at an excluding-duty price, must pay duties to the VM and may recover the same through refund applications to the Commissioner.

[10] Refund eligibility requires the LDF to substantiate applications with prescribed information and documentation establishing the chain from the VM to the delivery point outside the Republic. These requirements include valid licensing as an LDF, possession of valid export permits issued by the ITAC, locally manufactured fuel obtained from

[5] For the purposes of item 671.11 and its notes, unless the context otherwise indicates, "BLNS country" or "any other country in the common customs area" as referred to in section 64F means the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia or the Kingdom of Swaziland (Eswatini).

VM stocks, proper entry for home consumption with duty payment by the VM licensee and compliance with transportation and documentation prescripts.

[11] As it will appear later in this judgment, a critical requirement applies to all fuel in Tholo's claim: LDFs may only claim refunds for exported fuel levy goods obtained from the stocks of a VM licensee. At least on the Commissioner's version, the meaning would appear to be that, in his mind, acquisition must occur from stocks maintained at the VM rather than unlicensed facilities of a person who is a VM licensee.

[12] Section 64F(1)(b) of the CEA defines an LDF as any person who relevantly—

> "obtains at any place in the Republic for delivery to a purchaser in any other country of the common customs area for consumption in such country or for export (including supply as ships' or aircraft stores), fuel, which has been or is deemed to have been entered for payment of excise duty and fuel levy, from stocks of a licensee of a customs and excise manufacturing warehouse."

[13] Schedule 6 Part 3 item 671.11 provides for refunds in respect of fuel obtained from stocks of such licensee and delivered to a purchaser in any other country in the common customs area by a licensed distributor. The Rules distinguish between removal and export in describing export activities in different contexts. Section 52 of the CEA provides that fuel levy goods removed to a BLNS country or brought into South Africa from such a country—

> "shall, if a fuel levy has not been imposed by such party, be deemed to be goods exported from and goods imported into the Republic, respectively, and the provisions of this CEA relating to the exportation from and importation of goods into the Republic shall, subject to such arrangements as the Commissioner may determine, apply to those goods until such time as such fuel levy is imposed by that party as provided in this Act."

[14] This suggests that where the South African fuel levy has been imposed, as occurs under the DAS scheme, removal refers to conventional exports to BLNS countries, while export denotes exports to countries outside the common customs area.

Background facts

[15] Turning to the facts of this specific case, both parties, in their helpful written submissions, have provided a chronology of events. I propose to provide my own background to my reasons in this case. Tholo has an affiliated entity, Tholo Energy Services (Pty) Ltd (Tholo Lesotho), operating in the Kingdom of Lesotho (Lesotho) under the same beneficial ownership, supplying fuel to mining and construction companies there.

[16] During the period April to June 2016, Tholo purchased and collected 25 consignments of diesel fuel, each approximately 40 000 litres, from Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd (PetroSA), for direct removal to customers in Lesotho. PetroSA is itself the licensee of a VM at Mossel Bay. However, the fuel was not collected from the Mossel Bay refinery (VM) directly. Instead, 22 consignments were obtained from PetroSA's storage tanks at its depot in Bloemfontein, two consignments from PetroSA's depot in Tzaneen and one consignment from TotalEnergies' depot in Alrode. The invoice was issued to Tholo, but payment was made on Tholo's behalf by Tholo Lesotho. At least on the Commissioner's version, the explanation would appear to be that Tholo Lesotho uses the identity particulars and credentials of Tholo in its transactions with its South African suppliers and with the Commissioner. All 25 consignments were transported to Lesotho using oil tankers registered there and driven by Lesotho nationals. This was duly cleared by the Commissioner's customs officials at the border.

[17] On 17 and 24 March 2017, Tholo submitted four refund claims totalling R4 254 924.80 to the Commissioner, seeking refunds of fuel levies paid under the DAS scheme. On 3 May 2017, the Commissioner issued a notice of intention to disallow the refunds, but withdrew this notice a week later on 9 May 2017, instead requesting

additional information from Tholo. The administrative dance continued when the Commissioner issued a fresh notice of intent to disallow the refunds on 27 June 2017. Tholo responded on 30 June 2017, and the Commissioner issued his notice of final disallowance on 20 July 2017. This final determination was based on only two grounds: first, that the fuel had not been obtained from a VM as required by section 64F(1)(b) of the CEA; and secondly, that Tholo lacked the required export permits from ITAC as required by sections 38 and 41 of the CEA read with rule 64F.04. Relatedly, the Commissioner also proposed adverse findings regarding perceived differences in the quantities and descriptions of the fuel on the customs forms, but later withdrew them. The determination thus narrowed to two discrete contentions.

[18] Aggrieved, Tholo lodged an internal administrative appeal with the Commissioner's appeal committee on 31 July 2017. The grounds of appeal were three-pronged: the Commissioner's interpretation of section 64F(1)(b) was incorrect; Tholo had substantially complied with the refund items in Schedule 6; and at the relevant times, there was a practice generally prevailing that ITAC permits were not required for exports to BLNS countries. What followed was a protracted process that stretched over more than a year. Tholo appeared before the Commissioner's appeal committee on 27 October 2017 and was subsequently required to provide substantial additional documentation.

[19] The appeal committee requested an inspection *in loco* (a physical examination of a place) in May 2018, raising new issues that had not formed part of the reasons accompanying the original determination. The inspection was conducted between 25 and 29 June 2018 at PetroSA's depots in Bloemfontein and its manufacturing warehouse in Mossel Bay. Crucially, during this inspection, Tholo alleged that both it and the Commissioner's officials established that the fuel was locally manufactured at PetroSA's VM. However, as will be discussed below, SARS disputed this contention, arguing that fuel obtained from unlicensed depots cannot be verified as locally manufactured.

[20] In August 2018, Tholo was informed that the matter would be transferred from the Head Office Excise Appeal Committee to a different branch office committee. On 10 December 2018, this Branch Appeal Committee adjudicated the appeal in favour of the Commissioner, relying solely on the ground that the fuel had not been obtained directly from the licensee's VM. This decision was confirmed on 7 March 2019. After an unsuccessful attempt at alternative dispute resolution, Tholo served a notice of intended litigation on the Commissioner on 8 October 2019 in terms of section 96(1) of the CEA. What followed was another protracted process that would prove significant to the ultimate legal proceedings.

[21] The Commissioner made no fewer than three separate requests for additional information and documents from Tholo between November 2019 and April 2020. The requests were couched as being necessary for the Commissioner to "evaluate the merits of the intended litigation". During these nine months, the Commissioner conducted what amounted to a fresh investigation of the matter. On 15 July 2020, the Commissioner delivered his response to the section 96 notice. This response was a 16-page document that went well beyond the two grounds relied upon in the July 2017 determination.

[22] The Commissioner now indicated that he would oppose the intended litigation on four additional grounds, asserting that he was entitled to rely on different or additional factual and legal bases to those contained in its original determination. These additional grounds were, that there was no proof that fuel was manufactured in South Africa; that the fuel was not wholly and directly removed for delivery to Lesotho; that it was not transported by a licensed remover of goods in bond or in Tholo's own transport; and that Tholo itself did not pay the duties claimed, such duties having been paid by Tholo Lesotho. Dissatisfied with the Commissioner's determination, Tholo launched review proceedings in the High Court, contending that the Commissioner was not entitled to consider different or additional grounds than those contained in the letter communicating the decision to refuse the refund claims and the subsequent internal administrative appeal decision.

Litigation history

High Court

[23] Tholo approached the High Court in terms of section 47(9)(e) of the CEA, seeking, in the first prayer, a declarator that the Commissioner's purported determination of 15 July 2020 was invalid as an impermissible variation of the final determination of 20 July 2017. The remaining prayers, framed in the alternative, sought the typical relief in a tariff appeal – reviewing and setting aside the determination and an order directing the Commissioner to pay the refunds claimed.

[24] Beyond these substantive grounds, Tholo also sought initially to review the Commissioner's purported supplementary determination of 15 July 2020 under the Promotion of Administrative Justice Act[6] (PAJA), contending that the Commissioner's reliance on additional grounds not contained in its final determination of 20 July 2017 was *ultra vires* (beyond the power [of the Commissioner]) the empowering provisions and that the Commissioner had become *functus officio* (discharged of his function) following his final decision. In his answering affidavit, the Commissioner conceded that the July 2020 document was not a determination in its own right, but maintained that he was entitled to rely on the additional grounds set out therein to oppose the appeal. The Commissioner also raised further allegations and additional issues that had not been raised previously, even beyond those contained in his July 2020 response.

[25] The High Court[7] proceeded on the footing that a tariff appeal in terms of section 47(9)(e) of the CEA constitutes a wide appeal allowing for a complete rehearing. The Court accepted the Commissioner's contention that such appeals permit reliance on additional grounds, provided there existed a nexus between the original determination and new contentions. It reasoned that there was indeed such a nexus

[6] 3 of 2000.

[7] *Tholo Energy Services CC v Commissioner for the South African Revenue Service*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 47405/2020 (3 February 2023) (High Court judgment).

because the fundamental determination remained the same, being that Tholo's refund claims were refused.

[26] The High Court held that such an appeal is beneficial to both Tholo and the Commissioner: beneficial to Tholo in that it "can produce new evidence" and beneficial to the Commissioner since he "can rely on additional grounds for disallowing a refund". It considered itself bound by the Supreme Court of Appeal's decision in *Levi Strauss*.[8] On the substantive interpretation issues, the High Court adopted a deferential approach to the Commissioner's construction of the statutory provisions. It held that the Commissioner's interpretation of the statutory provisions must be preferred unless a taxpayer proves it is "patently incorrect or contrary to the purpose and objects of the [CEA] and results in unbusiness like outcomes".[9] This placed the onus on Tholo to demonstrate that the Commissioner's interpretation was manifestly wrong.

[27] The High Court found that each requirement for a refund must be met strictly, characterising fuel levy refunds as privileges requiring rigorous compliance. On this basis, the High Court concluded that Tholo had failed to comply with multiple requirements: the fuel was not obtained from manufacturing warehouse premises; no export permit was obtained; and various other technical requirements were not satisfied.

[28] On 2 February 2023, the High Court dismissed Tholo's appeal with costs on the basis that Tholo had not complied with section 64F of the CEA and its rules, nor the requirements prescribed in Schedule 6. The High Court concluded that Tholo had removed the fuel to Lesotho without the requisite permit issued in terms of the International Trade Administration Act[10] (ITA). With leave of the High Court, Tholo appealed to the Supreme Court of Appeal.

[8] *Commissioner, South African Revenue Service v Levi Strauss South Africa (Pty) Ltd* [2021] ZASCA 32; [2021] 2 All SA 645 (SCA).

[9] High Court judgment above n 7 at para 30.

[10] 71 of 2002.

Supreme Court of Appeal

[29] In a unanimous judgment written by Schippers JA,[11] the Supreme Court of Appeal addressed three main issues: the nature of a section 47(9)(e) appeal; whether the High Court was correct in dismissing the appeal on the additional grounds; and whether the refund claims were rightly refused on the additional grounds raised by the Commissioner.

[30] On the first issue, the Supreme Court of Appeal, relying on *Pahad Shipping*,[12] *Tikly*[13] and *Levi Strauss*, confirmed that a section 47(9)(e) appeal is indeed a wide appeal involving a complete rehearing and fresh determination of the merits. It rejected Tholo's arguments that the Commissioner's reliance on additional grounds was *ultra vires* or administratively unfair. The Court emphasised that while the Commissioner was entitled to defend his determination on any legitimate ground, the appeal remained "an appeal against what was determined in the determination, and nothing more".[14] The Supreme Court of Appeal reasoned that in a wide appeal, a court is permitted to admit new evidence or information as long as the determination remains unchanged.

[31] The Court further held that each statutory requirement must be met for a refund to be granted, emphasising that a rebate of excise duty is a privilege and strict compliance with its conditions may be exacted from the claimant. It found that Tholo had failed to prove that the fuel was manufactured in South Africa; it had not obtained the required ITAC export permit; and it had not complied with various other statutory requirements, including the direct removal requirement and the use of properly licensed transporters.

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[11] *Tholo Energy Services CC v Commissioner for the South African Revenue Service* [2024] ZASCA 120; [2024] 4 All SA 89 (SCA) (Supreme Court of Appeal judgment).

[12] *Pahad Shipping CC v Commissioner for the South African Revenue Service* [2009] ZASCA 172; [2010] 2 All SA 246 (SCA).

[13] *Tikly v Johannes N.O.* 1963 (2) SA 588 (T) at 590G-591A.

[14] *Levis Strauss* above n 8 at para 26.

[32] Significantly, the Supreme Court of Appeal noted that PetroSA's depots in Bloemfontein and Tzaneen, and TotalEnergies' depot in Alrode, were not VMs, and that fuel obtained from these unlicensed facilities could not qualify for a refund regardless of whether the entities operating them held licences for VMs elsewhere. It found that Tholo had failed to establish that the fuel was obtained from stocks of a licensee at a licensed VM, that there was no proof the fuel was manufactured in South Africa and that various other requirements had not been met.

[33] On the substantive issues, the Supreme Court of Appeal found decisively against Tholo. It held that section 64F(1)(b) requires fuel to be obtained directly from stocks kept at the premises of the licensed VM itself, not from unlicensed depots. The Supreme Court of Appeal rejected the interpretation adopted by the High Court of South Africa, Western Cape Division, Cape Town in *Tunica Trading*,[15] which had suggested that fuel could be obtained from intermediaries provided it emanated from stocks of a licensee. The Supreme Court of Appeal found that the interpretation advanced by Tholo disregarded the items specified in Schedule 6 and the rules prescribing requirements for fuel export.

Before this Court

Applicant's submissions

[34] In this Court, Tholo contends that this Court's jurisdiction is engaged under section 167(3)(b)(i) and (ii) of the Constitution,[16] in that the matter raises issues concerning violations of its sections 33 and 34 rights, as the Commissioner's resort to *ex post facto* (after the fact) rationalisations infringes its rights to just administrative action and a fair hearing. Tholo further argues that the matter raises an arguable point

[15] *Tunica Trading 59 (Pty) Ltd v Commissioner, South African Revenue Service* [2022] ZAWCHC 52; [2022] 4 All SA 571 (WCC).

[16] Section 167(3)(b) of the Constitution provides that this Court—

> "(i) may decide constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

of law of general public importance concerning fiscal legislation affecting the entire fuel industry and regional trade.

[35] Tholo submits that decision-makers like the Commissioner are bound by the statutory bases invoked by them in exercising their statutory powers. It also argues that the Commissioner is confined to the reasons for his original determination, and cannot thereafter add or supplement by including additional reasons. Tholo further argues that a wide appeal is a remedy afforded to an aggrieved party who may challenge the correctness of the decision without being confined to the facts relied upon by the decision-maker and the reasons underlying the decision. According to Tholo, section 47(9)(e) of the CEA does not permit *ex post facto* reasons to be invoked in defence of an administrative action. The true reason for the administrative decision, so it is argued, must be given at the time the decision is taken.

[36] The gravamen of Tholo's complaint is that the statutory appeal mechanism under section 47(9)(e) of the CEA must be exercised within constitutional bounds that preclude organs of state from substituting *ex post facto* rationalisations for the true reasons underlying administrative determinations. Furthermore, it argues that the Commissioner's interpretation of the fuel levy refund provisions constitutes an impermissible departure from established legislative policy and administrative practice. It asserts that a determination supported by wholly different grounds is impermissible for the purposes of section 47(9)(e). What is permitted is additional evidence and facts only to elucidate the impugned decision, and nothing more. Tholo says the Commissioner is bound by his final determination and is precluded from supplementing and amending the existing determination once a dispute resolution process has commenced as contemplated in section 47(9)(d) and (e) of the CEA.

[37] In the main, Tholo's primary submission rests upon the proposition that a wide appeal, whilst affording enhanced appellate scrutiny, cannot constitutionally permit the Commissioner to defend determinations on grounds materially different from those originally invoked. Tholo contends that such an approach violates the constitutional

imperatives of accountability, procedural fairness and the culture of justification. It argues that the Commissioner's determination was founded exclusively upon two specific grounds – premises-related compliance under section 64F(1)(b) and permit requirements under section 17 of the ITA[17] – but that the courts below erroneously permitted the Commissioner to defend the determination on five additional, fundamentally different bases raised only during litigation.

[38] On the merits, Tholo contends that wide appeals are only for the benefit of the taxpayer, and they cannot permit organs of state to defend decisions on wholly different statutory and factual foundations. Tholo submits that the Constitution and PAJA require administrative action to be justified on contemporaneous reasons, not *ex post facto* rationalisations. In regard to the two grounds in the original determination, Tholo asserts that section 64F(1)(b) explicitly permits licensed distributors to obtain fuel "at any place in the Republic" from "stocks of a licensee" of a VM. Requiring collection at the VM would fundamentally undermine the administrative efficiency that the DAS scheme was designed to achieve. The DAS scheme specifically contemplates obtaining fuel from licensees' duty-paid stocks at inland locations. Similarly, the Commissioner's own practice at the relevant time confirmed that export permits were not required for removals to BLNS countries.

Respondent's submissions

[39] Conversely, the Commissioner opposes the application on the basis that this matter does not raise any constitutional issue nor an arguable point of law of general public importance. He further states that due to Tholo's failure to comply with the legislative provisions relating to the claim for a refund of fuel levy, this matter does not enjoy reasonable prospects of success, and consequently it is not in the interests of

[17] Section 17 of the ITA which makes provision for the issuing of permits or certificates, states:

> "The Commission may investigate, evaluate and determine applications and issue or recommend the issuing of permits or certificates, in terms of—
>
> (a) the rebate and drawback provisions of the Customs and Excise Act; or
>
> (b) Part A and B of Chapter 4."

justice to grant leave. The Commissioner contends that what Tholo characterises as "new grounds" were encompassed within the original determination's finding that refund requirements had not been satisfied, and that Tholo has failed to discharge the onus incumbent upon it. Because tariff appeals require taxpayers to prove compliance with all statutory prerequisites, Tholo always bore the onus of satisfying every requirement, regardless of the Commissioner's initial emphasis. The Commissioner reiterates that a wide appeal is a hearing *de novo* (complete rehearing afresh) where the court conducts a complete investigation of the merits of the matter and is permitted to admit new evidence in order to make a fresh determination of the issues. The Commissioner submits that this latter examination does not amend or alter the impugned decision, which here was a rejection of the claim for refunds.

[40] The Commissioner contends that he is entitled to rely on additional grounds to oppose the statutory appeal, which is an appeal in a wide sense against his determination. He argues that reliance on these grounds does not infringe Tholo's rights to just administrative action and is also not *ultra vires*. He rejects Tholo's primary contention that the High Court's jurisdiction in a section 47(9)(e) appeal, admitted as a wide appeal, should be limited to an administrative review or confined to the reasons for the original determination. He argues that this is absurd, contradictory and contrary to this Court's decision in *Richards Bay*,[18] which extensively canvassed the nature of a wide appeal versus administrative review.

[41] On the substantive interpretation issues, the Commissioner argues that section 64F(1)(b) requires fuel to be obtained directly from the VM premises where the fuel was manufactured, and that it is insufficient for fuel to be obtained from some other depot belonging to the VM licensee, even if that fuel constitutes duty-paid stock under the DAS scheme.

[18] *Commissioner, South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd* [2025] ZACC 3; 2025 (5) SA 617 (CC); 2025 (6) BCLR 639 (CC).

[42] The Commissioner emphasises that he did not alter the determination but merely cited further reasons why it was unassailable. On the applicability of the *functus officio* doctrine, the Commissioner argues that the doctrine applies to decisions and actions, not reasons. And even if the Commissioner were *functus officio*, which is not conceded, the High Court and Supreme Court Appeal, or this Court, is not *functus officio* in a wide appeal, which operates as a *de novo* hearing. The Commissioner contends that Tholo's approach of criticising his initial reasons, rather than proving it met the refund requirements, is a "fundamental error". This is because Tholo conflates the determination with the original reasons; even in a strict appeal, it is the decision that is appealed, not the reasons. The Commissioner asserts that Tholo was always burdened with the onus of proving that each of the prerequisites for a refund had been satisfied and failed to discharge this onus.

[43] I next consider whether our jurisdiction is engaged and, if it is, whether it is in the interests of justice that leave to appeal should be granted.

Jurisdiction and leave to appeal

[44] For this Court's jurisdiction to be engaged, the matter must either raise a constitutional issue or an arguable point of law of general public importance that ought to be considered by this Court.[19] The matter engages our general jurisdiction, being a matter regarding the interpretation of section 47(9)(e) of the CEA and the scope of tariff appeals thereunder. Furthermore, the matter implicates a constitutional issue, arising from the right to just administrative action under section 33 of the Constitution. As this Court held in *Richards Bay*, both a resort to a wide appeal under section 47(9)(e) of the CEA and a right of review seek to assert the right of access to courts embodied in section 34 of the Constitution.[20] The proper scope and interpretation of section 47(9)(e) of the CEA is therefore a constitutional matter, as it determines how taxpayers may vindicate their section 34 right when challenging tariff determinations.

[19] Constitution above n 17.

[20] *Richards Bay* above n 18 at para 110.

[45] On leave to appeal, prospects of success are an important consideration. Such prospects exist here. Some of the issues on the merits raise arguable points of law of general public importance. The first concerns the proper interpretation of section 64F(1) of the CEA, specifically whether an LDF must obtain the fuel directly from the VM or may obtain it from duty-paid stocks of a licensee held at unlicensed premises. The judgment in *Tunica Trading* is one example of why this matter raises an arguable point of law of general public importance that ought to be considered by this Court. This matter has an impact on fuel retailers throughout South Africa and other countries, such as BLNS countries. There is therefore public interest in clarity regarding the statutory provisions required when removing, exporting and transporting fuel to BLNS and other countries. The correct interpretation of the above provisions is not confined to the parties before this Court.

[46] The second relates to the nature and scope of wide appeals under section 47(9)(e) of the CEA. While it is firmly established that such appeals involve a complete re-hearing, the question remains whether this permits an administrator to rely on grounds that were not part of the original determination. The Commissioner contends that this issue has been definitively answered in *Richards Bay.* And that thus, the matter does not raise an arguable point of law of general public importance and our jurisdiction is not engaged. In my view, the second issue impacts all tariff appeals under the CEA and extends well beyond the fuel industry to affect customs and excise matters generally. It is accordingly a matter of general public importance.

[47] Having answered the threshold questions affirmatively and being satisfied that the matter raises arguable points of law warranting this Court's consideration, it is in the interests of justice that leave to appeal be granted. Leave to appeal is consequently granted. I now turn to consider the merits of the appeal.

Issues for determination

[48] The issues are these:

(a) whether the Commissioner is permitted to raise additional grounds in order to defend his determination (additional grounds issue);

(b) whether the LDF must collect fuel levy goods from the VM itself or whether the fuel levy may be collected from the stocks of a licensee of a VM anywhere in the Republic (premises issue);

(c) whether the LDF was required at the time of export to be in possession of an export permit issued by ITAC in order to qualify for a refund of DAS in terms of the CEA (permit issue); and

(d) assuming that the Commissioner was entitled to raise additional grounds, whether those grounds are established on the merits.

Analysis

The nature of wide appeals – section 47(9)(e)

[49] The first substantive issue concerns the scope of an appeal under section 47(9)(e) of the CEA. It is well-established that such appeals constitute wide appeals in the sense described in *Tikly*. As this Court said in *Richards Bay*:

> "A wide appeal is described as a remedy afforded to an aggrieved party who seeks to challenge the correctness of a decision without being confined to the facts relied on by the first instance decision-maker and the reasons underlying the decision. In a wide appeal, the empowering statute grants a court, tribunal or forum the power to rehear the matter entirely. This means that the dispute is heard 'afresh' or 'from the beginning' or 'anew' in the sense that the appellate body is not bound by the evidence, information or reasons which arose at the time the first instance decision was made. In doing so, it may receive fresh evidence but can also decide the matter without fresh evidence. The appellate body is, in effect, in the same position as the first instance decision-maker."[21]
> (Footnotes omitted.)

[50] The wide appeal mechanism permits an appellate court to conduct a hearing *de novo* of the matter and make its own determination on the merits, with or without

[21] *Richards Bay* above n 18 at para 104.

additional evidence or information. This is necessitated by the CEA's structure, which does not require the Commissioner, when issuing determinations, to hear evidence, give reasons, or keep a record of proceedings.

[51] Tholo contends that despite the wide nature of the appeal, the Commissioner should be confined to defending the determination on the same grounds originally advanced. This contention finds its genesis in the Supreme Court of Appeal's judgment of *Levi Strauss*, where Wallis JA observed that while a tariff appeal is "an appeal in the wide sense, involving a complete rehearing and determination of the merits, it remains an appeal against what was determined in the determination, and nothing more".[22]

[52] Central to resolving this issue is understanding what constitutes "the determination" for purposes of section 47(9)(e). While *Richards Bay* established the wide nature of section 47(9)(e) appeals, this Court's mind was not directed to the precise issue that arises here: whether a determination is simply an outcome or whether it encompasses some foundational element or basis that constrains its subsequent defence.

[53] The principles that guide our approach to interpretation have often been stated: interpretation is a unitary exercise that takes account of text, context and purpose.[23] The difficulty with Tholo's argument lies in its conflation of the determination with the grounds for the determination. What was determined in this case was straightforward: the Commissioner determined that the goods were not exported as provided in Item 671.11 of Schedule 6 to the CEA. In other words, the goods had not been dealt with in accordance with the requirements of that rebate item, and consequently Tholo's refund claims did not qualify for payment. This determination, the refusal of the refund, remained constant throughout the proceedings. The Commissioner's initial letter identified certain bases for this conclusion, but the determination itself was the refusal

[22] *Levi Strauss* above n 8 at para 26.

[23] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 18.

to grant the refund. The grounds advanced were reasons supporting that determination, not the determination itself.

[54] In *Levi Strauss*, the Supreme Court of Appeal was concerned with the Commissioner attempting to advance an entirely different legal and factual basis for its determination. There, the Commissioner sought to defend a determination initially based on direct consignment requirements by subsequently seeking to invalidate certificates of origin on grounds of misrepresentation – a wholly different basis that had featured nowhere in the determination. Here, by contrast, the Commissioner has consistently maintained that Tholo failed to comply with the requirements for a refund under the CEA, while later providing additional grounds for this same conclusion of alleged non-compliance. The distinction is significant. *Levi Strauss* establishes that—

> "[a]n appeal under section 49(7)(b) of the [CEA] is an appeal against the determination. While it is an appeal in the wide sense, involving a complete re-hearing and determination of the merits, it remains an appeal against what was determined in the determination, and nothing more. It is open to SARS to defend its determination on any legitimate ground, but it is not an opportunity for it to make a wholly different determination, albeit one with similar effect."[24]

[55] The additional grounds advanced by the Commissioner in this matter fall within the former category. They are legitimate bases for concluding that the refund requirements were not met.

[56] This interpretation accords with the essential nature of a wide appeal as a *de novo* hearing. If the appellate court is to make its own determination on the correctness of the Commissioner's decision, it must consider all relevant evidence and legal principles bearing on that determination. To artificially constrain the scope of the determination to the original reasons would be a contradiction to the nature of the wide appeal in terms of section 47(9)(e). This is not to say that the Commissioner may bring in any additional

[24] *Levi Strauss* above n 8 at para 26.

ground to defend the determination. Instead, additional grounds brought in must be connected to the outcome, as contemplated by the language of the provision in question. This is what characterises grounds as legitimate. Therefore, I endorse the High Court's finding that—

> "[s]ince this appeal is a rehearing of the matter on the merits, the [Commissioner] was permitted and entitled to rely on additional grounds disallowing the refund of the Applicant. The additional grounds were legitimate and formed a nexus with the initial determination. The [Commissioner] did not provide a wholly different determination. The determination never changed. The determination was that the [a]pplicant's claim for a refund was refused."[25]

[57] Tholo's invocation of constitutional principles of administrative fairness does not assist its case. The constitutional principles embodied in section 33 require administrative action to be lawful, reasonable and procedurally fair. However, the wide appeal under section 47(9)(e) is itself the mechanism provided by Parliament to vindicate taxpayers' constitutional rights. As this Court confirmed in *Richards Bay*, this statutory remedy adequately protects the rights enshrined in section 33 of the Constitution. Moreover, Tholo was not prejudiced by the Commissioner's reliance on additional grounds. The determination against which it appealed remained the same throughout. The additional grounds were raised prior to Tholo launching its High Court proceedings, so Tholo was in a position to address them in its founding affidavit. The additional grounds were again pleaded in the Commission's answering affidavit in the High Court, with Tholo having full opportunity to respond through its replying affidavit or, if necessary, in oral argument. The benefits of a wide appeal (i.e. that the High Court is allowed to consider new evidence) mitigate against the potential procedural unfairness that a party may suffer if the Commissioner relies on grounds he had not relied on previously.

[25] High Court judgment above n 7 at para 51.

[58] Where the Commissioner requires amendment of a determination, mechanisms exist under section 47(9)(d) of the CEA. Case management directions can address any procedural concerns arising from the grounds belatedly raised. The wide appeal framework necessarily contemplates additional argument and evidence, subject to the overarching requirement that such grounds be legitimate and related to the determination under appeal.

[59] Tholo submits further that raising additional grounds more than three years after its audit and determination is administratively unjust and procedurally unfair. It argues that the Commissioner's determination of 20 July 2017 remains in force until set aside by an order of the court as provided in section 47(9)(b)(ii)(bb) read with section 86(1)(b). Tholo's argument misses the point. In my view, the Commissioner is entitled to lead additional evidence and advance additional grounds in support of his determination, but he is not permitted to make a wholly different determination – one that concerns an entirely different question or rests on an unrelated legal foundation to that which was originally determined. Expressed differently, the Commissioner may rely on additional grounds that speak to non-compliance with different requirements within the same statutory framework, provided all grounds relate to the same determination. In this case, all grounds, original and additional, relate to whether Tholo satisfied the requirements for a fuel levy refund under the CEA.

[60] To demonstrate the fallacy in Tholo's argument, it is useful to refer to the jurisprudence of the Supreme Court of Canada. In particular, the principles articulated in the companion cases of *Dow Chemical* [26] and *Iris Technologies*[27] provide instructive guidance on the proper characterisation of administrative determinations for purposes of statutory appeals. While those decisions concerned the jurisdictional boundaries between the Tax Court of Canada and the Federal Court in respect of income tax

[26] *Dow Chemical Canada ULC v Canada* 2024 SCC 23.

[27] *Iris Technologies Inc v Canada (Attorney General)* 2024 SCC 24.

assessments, the reasoning illuminates fundamental questions about what constitutes the subject matter of an appeal.

[61] In *Dow Chemical*, Kasirer J (writing for the majority) was concerned with whether the Minister of National Revenue's discretionary decision to deny a downward transfer pricing adjustment under section 247(10) of the Income Tax Act fell within the Tax Court's appellate jurisdiction over assessments, or whether it could only be challenged by way of judicial review in the Federal Court. Central to this determination was the settled meaning of an "assessment" in Canadian tax law. As Kasirer J observed:

> "[a] tax assessment is, as this Court's jurisprudence confirms, a purely non-discretionary determination by the Minister of the taxpayer's tax liability for a particular taxation year."[28]

[62] The majority emphasised that this understanding traced back to the foundational decision in *Okalta Oils*,[29] where Fauteux J explained that an assessment means "the actual amount of tax which the taxpayer is called upon to pay by the decision of the Minister, and not the method by which the assessed tax is arrived at". Kasirer J was at pains to distinguish between the product of the assessment – the quantum of tax owing – and the process by which that determination was reached.

[63] The majority rejected the taxpayer's argument that, because the Minister's discretionary decision under section 247(10) directly affected the quantum of tax liability, it should be treated as part of the assessment itself. Kasirer J reasoned that while the Minister's opinion may well be a relevant consideration informing the correct computation of tax liability, "this cannot be the basis to conclude that the Minister's decision is itself an assessment or part of one".[30] While the Minister's opinion may well be a relevant consideration informing the correct computation of tax liability, this

[28] *Dow Chemical* above n 26 at para 43.

[29] *Okalta Oils Ltd v Minister of National Revenue* [1955] SCR 824.

[30] *Dow Chemical* above n 26 at para 58.

does not make the opinion itself part of the assessment. The appropriateness or reasonableness of that opinion, the policy considerations underlying it and the process by which it was reached stood apart from the assessment itself.

[64] *Dow Chemical* further cited the companion case of *Okalta Oils*, which also dealt with these principles in a different context. *Okalta Oils* reinforced that the Tax Court's role was limited to determining "the correctness of the Minister's determination of the amount of tax owing, applying the rules in the [Income Tax Act] to the facts as she finds them".[31] It is evident that where the Minister's conduct was at issue, or where taxpayers sought to challenge the underlying process or motivations for issuing an assessment, such matters were properly the subject of judicial review before the Federal Court. Furthermore, in *Iris Technologies*, Kasirer J explained that challenges to the Minister's conduct or underlying process, as distinct from challenges to the product of the assessment, fell outside the Tax Court's appellate jurisdiction.

[65] Applying this reasoning to the present matter, the determination under section 47(9)(e) of the CEA must be understood as the Commissioner's conclusion that the relevant goods were not exported as provided in Item 671.11 of Schedule 6. The effect of this determination was that Tholo's refund claims did not qualify for payment.

The requirements for fuel levy refunds

[66] The second substantive issue concerns whether Tholo satisfied the requirements for a fuel levy refund under the CEA. A refund of excise duty or fuel levy is, as the Supreme Court of Appeal recognised in *Tunica Trading*, a privilege—

> "[e]njoyed by those who receive it. It has been stated that it is neither unjust nor inconvenient to exact a rigorous observance of the conditions as essential to the acquisition of the privilege conferred and that it is probable that this was the intention of the Legislature . . . . Moreover, the provision is obviously designed to prevent abuse of the privilege and evasion of the conditions giving rise to such privilege, and again

[31] Id at para 47.

> this supports the view that a strict compliance with the requirements laid down is necessary."[32]

[67] The claim for a fuel levy refund is governed by the provisions of section 75(1) and rebate Item 671.11 of Part 3 of Schedule 6, note 2 of Part 3 of Schedule 6 and note 12 of the general notes of Part 3 of Schedule 6.

[68] Section 75(1)(d) provides:

> "Subject to the provisions of this Act and to any conditions which the Commissioner may impose—
> . . .
> in respect of any excisable goods or fuel levy goods manufactured in the Republic described in Schedule 6, a rebate of the excise duty specified in Part 2 of Schedule 1 or of the fuel levy and of the Road Accident Fund levy specified respectively in Part 5A and Part 5B of Schedule 1 in respect of such goods at the time of entry for home consumption thereof, or if duly entered for export and exported in accordance with such entry, or a refund of the excise duty, fuel levy or Road Accident Fund levy actually paid at the time of entry for home consumption shall be granted to the extent and in the circumstances stated in the item of Schedule 6 in which such goods are specified, subject to compliance with the provisions of the said item and any refund under this paragraph may be paid to the person who paid the duty or any person indicated in the notes to the said Schedule 6:
> Provided that any rebate, drawback or refund of Road Accident Fund levy as contemplated in paragraph (b), (c) or (d), shall only be granted as expressly provided in Schedule 4, 5 or 6 in respect of any item of such Schedule."

[69] Rebate Item 671.11 of Part 3 of Schedule 6 provides for a refund "as provided in Note 12 read with Note 13" in respect of the following goods:

> "Goods liable to the fuel levy and [RAF] levy as specified in Part 5A and Part 5B of Schedule No. 1 respectively, which, after entry or deemed entry for home consumption and payment of duty by a licensee of a customs and excise manufacturing warehouse

[32] *Tunica Trading* above n 15 at para 53.

as contemplated in section 19A and its rules is obtained from stocks of such licensee and delivered to a purchaser in any other country in the common customs area by a licensed distributor contemplated in section 64F, subject to compliance with Note 12."

[70] Note 2 of the general notes to Part 3 of Schedule 6 provides:

"A rebate and refund of fuel levy and Road Accident Fund levy specified in Part 5A and Part 5B of Schedule No. 1, respectively, in respect of any goods specified in this Schedule shall, subject to the provisions of section 75, be allowed to the extent stated in this Part, in respect of such goods on compliance with the provisions of the item in this Part in which such goods are specified and of any notes applicable in respect of such item."

[71] Note 12 of the general notes to Part 3 of Schedule 6 provides the following relevant notes in respect of the goods described in Item 671.11 quoted above:

"(b) Requirements in respect of refunds:

(i) The refund provided for in this item is subject to the provisions of section 75(11A).

(ii) Any application for a refund of fuel levy and [RAF] levy in terms of this item shall be subject to compliance with—

(aa) section 64F and its rules;

(bb) rule 19A4.04 mutatis mutandis [(with the necessary changes having been made)] and any other rule regulating the movement of goods to which this item relates.

(iii) (aa) Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery in any other country in the common customs area by the licensed distributor in order to be considered for a refund of duty.

(bb) A refund shall only be payable on quantities actually delivered to a purchaser in any other country of the common customs area."

[72] Distilled from the above provisions, the pertinent requirements include: (a) the fuel must have been manufactured in South Africa; (b) the fuel must have been from the stocks of a licensee of a manufacturing warehouse; and (c) the fuel must have been

entered or deemed to have been entered for home consumption with payment of duty by a licensee of a manufacturing warehouse from whom it was obtained.

[73] Below, I address the grounds relied upon by the Commissioner. I begin with the premises issue, which formed part of the original determination. In turn, I then consider whether the removal was conducted by the appropriate entity, before turning to the permit issue which also formed part of the original determination. Finally, I address the remaining additional grounds.

The premises issue

[74] The first ground concerns the interpretation of section 64F(1)(b) of the CEA, which defines a "licensed distributor" as a person who—

> "obtains at any place in the Republic for delivery to a purchaser in any other country of the common customs area . . . fuel, which has been or is deemed to have been entered for payment of excise duty and fuel levy, from stocks of a licensee of a customs and excise manufacturing warehouse."

[75] The Commissioner contends that this provision requires fuel to be obtained directly from the VM. Tholo argues that it suffices to obtain fuel from stocks of a VM licensee anywhere in the Republic, provided the fuel constitutes "duty-paid stock" under the DAS scheme. This interpretive question must be considered in light of the DAS scheme implemented by the Commissioner since 2003. Under this scheme, VM licensees pay excise duties and fuel levies at the point of manufacture, when goods are "entered for home consumption". The policy rationale, as articulated in the Commissioner's own documentation, was to reduce the administrative burden by eliminating the need to monitor movements between multiple bonded warehouses. As a result, approximately 455 storage warehouses were deregistered.

[76] The DAS scheme operates on the principle that once a VM licensee has paid duty on manufactured fuel, that fuel becomes "duty paid stock" that may be stored at any

location without remaining subject to customs control. Rule 19A4.04(a)(i) defines duty-paid stock as "stocks which have been entered or are deemed to have been entered for home consumption". Subrule (a)(ii) specifies that fuel may be removed "from a storage tank owned by or under the control of a licensee of a customs and excise manufacturing or special customs and excise storage warehouse". From this, it is pertinently clear that what is licensed is the VM, not the owner of the VM.

[77] At first blush, it would seem that the plain language of section 64F(1)(b) supports Tholo's interpretation. The provision requires fuel to be obtained "from stocks of a licensee" of a VM, not from the VM itself. It expressly permits acquisition "at any place in the Republic". The facts of this case indicate that the fuel in question was allegedly manufactured at PetroSA's Mossel Bay VM and subsequently transferred to PetroSA's inland depots as duty-paid stock. Tholo obtained the fuel from PetroSA's depots in Bloemfontein, Tzaneen and TotalEnergies' depot in Alrode. It is common cause that none of these depots are licensed VMs. Obtaining fuel from such stocks would appear to satisfy this statutory interpretation. However, this Court must be mindful of the broader implications of this interpretation. The Supreme Court of Appeal, in both this case and *Tunica Trading*, emphasised the CEA's control objectives. Manufacturing warehouses are licensed premises subject to strict oversight. Permitting fuel to be obtained from unlicensed depots, even those operated by VM licensees, potentially undermines the control framework. Tholo was requested to produce VM invoices but failed to do so.

[78] The Supreme Court of Appeal's interpretation, while arguably strict, serves legitimate policy objectives. It ensures that refunds are only granted where fuel can be traced through controlled environments, reducing the risk of fraud and revenue leakage. The statutory language, properly construed in light of the CEA's overall scheme, supports this interpretation.

[79] Doubtless, this interpretation has significant implications for the fuel industry. Many licensed distributors may routinely obtain fuel from inland depots of VM

licensees rather than from the manufacturing facilities themselves, particularly given capacity constraints at manufacturing sites. However, the potential for broad commercial impact cannot override the proper interpretation of the statutory text, particularly where that interpretation serves the CEA's control objectives. Therefore, the fuel must be wholly and directly obtained from the licensed VM.

[80] It is an express requirement of section 75(1)(d) that the fuel levy goods are manufactured in South Africa. It was thus incumbent upon Tholo to prove that the fuel in question was manufactured in South Africa to bring itself within the provisions of the latter section. In this case, the consignments of fuel in question were obtained from the PetroSA depots in Bloemfontein and Tzaneen and TotalEnergies' depot in Alrode. Tholo concedes that these were not licensed VMs. In my view, the fact that fuel was obtained from unlicensed depots means that it was obtained from a non-controlled environment. Fuel from such environments cannot be verified as locally manufactured as opposed to being imported. In light of these facts, it is clear that Tholo failed to discharge the onus of proving that the fuel was manufactured in South Africa.

[81] Another difficulty facing Tholo is that the fuel was not obtained from the stocks of a licensee. The fuel was purchased from PetroSA, which in turn had purchased it from BP. This was contrary to rebate Item 671.11, which provides for a rebate in respect of fuel levy goods which is obtained from the stocks of a VM. Tholo's argument that "for as long as the person from whom the fuel was acquired is a licensee of a [VM], [it] would qualify for a refund" misses the point. The provision requires fuel to be obtained from stocks "of" a VM – that is, stocks held at the licensed warehouse premises, not stocks belonging to an entity that happens to hold a VM license for different premises elsewhere. Premises have to be licensed in order to comply with rule 19.1. It is thus clear, as correctly found by the Supreme Court of Appeal, that the proper interpretation of section 64F means that the fuel must be obtained from the stocks at a licensee's VM and not from a depot or unlicensed premises.

[82] Furthermore, consideration must be given to Schedule 6, Item 671.11 and Note 12(b)(iii)(aa), which I have set out earlier. Item 671.11 requires fuel to be "obtained from stocks of such licensee" of a VM, while Note 12(b)(iii)(aa) requires that fuel must be "wholly and directly removed for delivery" to another BLNS country by an LDF. This is so because, if excisable goods are removed from this controlled landscape, it becomes difficult for the Commissioner to ascertain the source of the goods, in particular to ascertain whether the fuel was manufactured in a local VM or imported. It follows that fuel refunds must only be allowed for fuel obtained from the VM and not any other premises operated by a VM licensee. This also accords with the requirement that fuel refunds will only be granted for fuel that was locally manufactured in South Africa.

The permit issue

[83] The second ground concerns Tholo's lack of an export permit issued by ITAC under the ITA. Tholo argues that there is a marked difference between removal and export and that the Commissioner failed to appreciate that a removal of fuel levy goods to a BLNS country cannot be treated the same as exports of fuel levy goods to other countries. It relies on the Commissioner's previous external reference guide, which provides that no permit was required for removals to BLNS countries. Tholo submits that at the time of the removal to Lesotho, no permits were required. Tholo says the previous directives distinguished between removal to BLNS countries and exports to other countries. And it states that the Commissioner did not require a permit for the removal to BLNS countries. In support of its argument, it contends that other taxpayers (e.g. PetroSA) removed products to BLNS countries without permits and claimed duties on such products, as this was the practice generally prevailing at that time.

[84] Much as Tholo attempted to differentiate between removal and export, this is a distinction without a difference. The requirement for an export permit arises not from the CEA, but from section 6 of the ITA, read with, Government Notice R92 of 10 February 2012 which prescribes that certain goods, including diesel, may not be exported except under authority of a permit. The ITA defines "export" as "to take or

send goods, or to cause them to be taken or sent, from the Republic to a country or territory outside the Republic". While the CEA draws terminological distinctions between "removal" to BLNS countries and "export" to other countries, both constitute exports in the ordinary sense. Lesotho is a BLNS country outside the Republic of South Africa, and goods were taken or sent out to that country. The underlying transaction for the refund must be lawful. In this instance, the removal was unlawful as the fuel was not obtained from the VM. It then follows that Tholo cannot claim a refund based on an unlawful underlying transaction.

[85] The ITA requires export permits for specified goods, including diesel. Moreover, Government Notice R92 of 10 February 2012 requires the issuance of a permit under the ITA to import or export restricted goods. Diesel is specifically listed as restricted goods. It is clear that the exportation of diesel requires a permit, irrespective of whether the exportation is to a BLNS country. Additionally, exports further require customs declarations to the Commissioner.

[86] Tholo's reliance on an alleged practice generally prevailing under section 44(11A) of the CEA lacks merit. The evidence for such a practice consisted largely of uncontested allegations rather than cogent proof of a consistent administrative approach across the Commissioner's offices. Moreover, even if such a practice existed, it cannot override clear legislative requirements imposed by valid regulations. The CEA does not contain a general exception applicable to cases where something happened in accordance with a "practice generally prevailing". That expression is found in only two subsections of the CEA, neither applicable to circumstances such as the present.[33]

[87] Having found that Tholo failed to comply with both the premises requirement and the export permit requirement – either of which is sufficient to dismiss the appeal – I turn to consider the additional grounds raised by the Commissioner. As established in my analysis of the wide appeal issue above, the Commissioner was entitled to rely on

[33] See sections 44(11A) and 76B(3).

these grounds in defending the determination. Although my findings on the original two grounds are dispositive, in the interests of completeness and given the importance of these issues to the fuel industry, I address the additional grounds as well.

The additional grounds

[88] Tholo asserts that fuel was moved to Lesotho by Tholo Lesotho, an entity controlled by Tholo, as they shared the same member, director and shareholder, and were controlled by the same natural person, Mr Morohoae, and used the trucks owned by the same entity. What Tholo fails to appreciate is that the fuel was not removed by a licensee-owned transport or by a licensed remover of goods in bond.

Transport by Tholo Lesotho, not Tholo

[89] Rule 64F.06(b) requires that unless the licensed distributor uses "own transport", fuel transported by road must be carried by a licensed remover of goods in bond as contemplated in section 64D of the CEA. Furthermore, both Item 671.11 and Note 12(b)(iii)(aa) require that fuel must be removed for delivery to another country in the common customs area by the licensed distributor itself.

[90] The evidence establishes that Tholo did not use its own transport to transport fuel to Lesotho. Instead, the transport was undertaken by Tholo Lesotho using vehicles registered in Lesotho and driven by Lesotho nationals. Tholo Lesotho is neither an LDF nor a licensed remover of goods in bond as contemplated in section 64D.

[91] Tholo argues that because it and Tholo Lesotho share the same member, director, and shareholder, there is sufficient connection to constitute substantial compliance. However, the statutory provisions require strict compliance. Only a licensed distributor or licensed remover may transport fuel levy goods by road. Tholo Lesotho held neither licence. The fact that related entities share common ownership and management does not satisfy the statutory requirement.

Payment by Tholo Lesotho, not Tholo

[92] Item 671.11 requires compliance with Note 12. Note 12(b)(i) provides that the refund is subject to section 75(11A), which requires proof of payment of duty. The evidence shows that payment to PetroSA was made by Tholo Lesotho, not Tholo. While Tholo argues that payment by its affiliated entity should be accepted, the statutory requirement is clear: the refund may be paid to "the person who paid the duty" under section 75(1)(d). Since Tholo did not make the payment, it cannot claim the refund, regardless of its relationship with Tholo Lesotho.

[93] Additionally, the invoices submitted had discrepancies. Tax invoices issued by PetroSA to Tholo reflect the latter's income tax reference number rather than a VAT reference number. This invalidates the documents as proper tax invoices for VAT purposes and undermines the documentary trail required to substantiate the refund claim.

[94] Each of these additional grounds independently supports the dismissal of Tholo's refund claims. Tholo's failure to comply with these additional requirements precludes its privilege for recovery of the refund.

Conclusion

[95] The Supreme Court of Appeal's judgment reflects a careful consideration of the relevant legal prescripts in their proper context. Its conclusion that Tholo failed to establish compliance with multiple statutory requirements is well-founded and cannot be faulted. While Tholo frames its argument in constitutional terms, the matter ultimately turns on the correct interpretation and application of statutory requirements to facts.

[96] The wide appeal mechanism under section 47(9)(e) adequately protected Tholo's constitutional rights while allowing for a comprehensive determination of its entitlement to a refund. The Commissioner's reliance on additional grounds in

defending the determination was permissible and did not violate principles of administrative fairness or procedural due process. The wide appeal framework necessarily contemplates such additional argument and evidence, subject to the overarching requirement that the court determine the correctness of the original determination.

[97] I am therefore satisfied that the Supreme Court of Appeal correctly applied the law to the facts and reached the correct conclusion. Tholo's failure to satisfy any one of the statutory requirements is sufficient to defeat its refund claim. Its failure to satisfy multiple requirements makes the case clear-cut. There is no basis for interfering with the Supreme Court of Appeal's judgment. As a result, the application for leave to appeal is granted, but the appeal is dismissed.

Order

[98] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant is to pay the respondent's costs, including the costs of two counsel.

For the Applicant:	PA Swanepoel SC, FB Pelser, CA Boonzaaier, and M Davids instructed by Cliffe Dekker Hofmeyr Incorporated
For the Respondent:	GJ Marcus SC, JA Meyer SC, and NK Nxumalo instructed by Klagsbrun Edelstein Bosman Du Plessis Incorporated