



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

CASE NO: 448/05

Reportable

In the matter between

**COMMISSIONER, SOUTH AFRICAN REVENUE
SERVICE**

Appellant

and

KOMATSU SOUTHERN AFRICA (PTY) LTD Respondent

Coram: **HARMS, BRAND, CLOETE JJA, THERON and CACHALIA
AJJA**

Heard: 4 SEPTEMBER 2006

Delivered: 26 SEPTEMBER 2006

Summary: Revenue – Customs and Excise Act 91 of 1964 – Classification of goods for the purposes of customs duty – whether a machine imported by the respondent should be classified as a front-end shovel loader.

**Neutral citation: This case may be cited as Commissioner, SA Revenue Service v
Komatsu SA (Pty) Ltd [2006] SCA 118 (RSA)**

JUDGMENT

THERON AJA

[1] This appeal concerns the classification of goods in terms of Schedule 1 to the Customs and Excise Act 91 of 1964 for purposes of customs duty.

[2] The respondent, Komatsu Southern Africa (Pty) Ltd, is a manufacturer of heavy equipment and the importer of the machine at the centre of this dispute, namely, a Komatsu W120-3A wheel loader. The appellant is the Commissioner for the South African Revenue Service. I shall refer to the appellant as ‘the Commissioner’ and the respondent as ‘Komatsu’.

[3] On 13 August 1999 Komatsu applied to the Commissioner for a tariff determination in respect of the machine. On 27 September 1999 the Commissioner, acting in terms of s 47(9)(a)(i) of the Act,¹ determined that the machine is classifiable as a front-end shovel loader under tariff subheading 8429.51 of Schedule 1. Komatsu, in terms of s 47(9)(e),² appealed to the High Court (Durban) against that determination.

¹Section 47(9)(a)(i) provides, to the extent relevant for present purposes: ‘The Commissioner may in writing determine-

(aa) the tariff headings, tariff subheadings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified’.

² Section 47(9)(e) reads:

‘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.’

[4] Oral evidence was heard by Jappie J in the court *a quo* relating, inter alia, to the principal function of the machine and whether the machine, as presented on importation, had the essential characteristics of a front-end shovel loader. Jappie J found that the machine on importation lacked an essential characteristic, viz a shovel or bucket, which would enable it to be categorised as a front-end shovel loader. He set aside the Commissioner's determination and substituted it with a determination that the machine is to be classified under tariff subheading 8430.50. It is against this decision that the Commissioner appeals, with the leave of the court below.

[5] The issue in this appeal is therefore whether the machine falls to be classified under subheading 8429.51 as a front-end shovel loader as determined by the Commissioner or under subheading 8430.50 as 'other machinery, self-propelled' as contended for by Komatsu.³ The latter classification attracts no customs duty while the Commissioner's determination attracts customs duty at the rate of 10 per cent of the value of the machine on importation.

³These subheadings reside under headings 84.29 and 84.30, the relevant parts of which read as follows:

'84.29 Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers:

8429.1 – . . .

8429.20 – . . .

8429.30 – . . .

8429.40 – . . .

8429.5 – Mechanical shovels, excavators and shovel loaders

8429.51 = Front-end shovel loaders

84.30 *Other* moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; piledrivers and pile-extractors; snow-ploughs and snow-blowers:

8430.10 – . . .

8430.20 – . . .

8430.3 – . . .

8430.4 – . . .

8430.50 – Other machinery, self-propelled'

(emphasis added).

[6] The machine consists of a tractor-like self-propelling base with two lifting arms (H-frame) extending towards the front of the machine. In the centre of the lifting arms is a bell crank (Z-frame) that is driven by a hydraulic cylinder. Both the H-frame and bell crank have provision for integration points. These integration points make it possible for various implements like buckets, shovels, forks, rakes and brooms to be fitted to the machine.

[7] It was contended on behalf of the Commissioner that even though the machine was incomplete because it was not fitted with a bucket, it was by virtue of its inherent nature and characteristics in fact a front-end shovel loader. Put differently, it was specifically designed for that principal function. Komatsu's response was that the definition of a shovel loader⁴ emphasises the key characteristic of such a machine, namely that it must be fitted with a bucket without which it cannot be classified as a shovel loader.

[8] The legal principles applicable to tariff classification and the manner in which they should be interpreted and applied have been expounded in a number of cases.⁵ Nicholas AJA, in *International Business Machines*, set out the principles governing the process of classification as follows:

⁴In Explanatory Note [F] self-propelled shovel loaders are defined as:

'... wheeled or crawler machines with a front-mounted bucket which pick up material through motion of the machine transport and discharge it. Some "shovel loaders" are able to dig into the soil. This is achieved as the bucket, when in the horizontal position, is capable of being lowered below the level of the wheels or tracks'.

⁵*African Oxygen Ltd v Secretary for Customs & Excise* 1969 (3) SA 391 (T); *Secretary for Customs & Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A); *Autoware (Pty) Ltd v Secretary for Customs & Excise* 1975 (4) SA 318 (W); *National Screenprint (Pty) Ltd v Minister of Finance* 1978 (3) SA 501 (C); *International Business Machines SA (Pty) Ltd v Commissioner for Customs & Excise* 1985 (4) SA 852 (A); *Commissioner for Customs & Excise v Capital Meats CC (in Liquidation)* 1999 (1) SA 570 (SCA); *The Heritage Collection (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (6) SA 15 (SCA).

‘Classification as between headings is a three-stage process: first, interpretation – the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.’⁶

It is clear from the authorities that the decisive criterion for the customs classification of goods is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance. This is an internationally recognised principle of tariff classification.⁷ The subjective intention of the designer⁸ or what the importer does with the goods after importation are, generally, irrelevant considerations.⁹ But they need not be because they may, in a given situation be relevant in determining the nature, characteristics and properties of the goods.

[9] Heading 84.29 self-evidently relates to self-propelled¹⁰ machines of the type specified in the heading ie bulldozers, angledozers and the like. Front-end shovel loaders fall within the sub-category of mechanical shovels, excavators and shovel loaders. Heading 84.30 relates to ‘other machinery’ of the type referred to in the heading. The adjective ‘other’ serves to qualify the type of machinery referred to in this heading, by distinguishing them from types of

⁶ At 863G-H.

⁷ See Halsbury’s *Laws of England* (4 ed) (1999 reissue) Vol 12(2) para 13, n 4.

⁸ *Autoware* at 321E-F.

⁹ *African Oxygen* at 394C-D.

¹⁰ The fact that the machines in this heading are self-propelled is a common feature to all of them since the adjective ‘self-propelled’ qualifies all the types of machinery referred to in the heading. This view is supported by the following extract of the Explanatory Notes to heading 84.29:

‘The heading covers a number of earth digging, excavating or compacting machines which are explicitly cited in the heading and which have in common the fact that they are all self-propelled.’

machinery referred to in the preceding heading 84.29. This appears from the Explanatory Notes to heading 84.30.¹¹

[10] It is necessary at this stage to consider briefly the expert evidence led by the parties on the nature, form, character and functions of the machine. See *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 677B-E and *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 (4) SA 318 (W) at 321H-322A.

[11] Mr K A Hoffman, a designer of wheel loader machines (such as the one at the centre of the dispute), gave expert evidence on behalf of the Commissioner. Hoffman's evidence was that the principal function of the machine is that of a wheel loader fitted with a shovel. Hoffman explained that the starting point for the design of the machine is the break out force.¹² According to Hoffman the entire design of the machine is directed at pushing, breaking out and lifting material, invariably with a shovel or bucket attached and the transportation thereof over short distances.

[12] Messrs N D L Burger and A J Von Wielligh testified as experts on behalf of Komatsu. Burger conceded that the ultimate design criterion for the machine is ascertained in relation to a bucket. The high water mark of Burger and Von

¹¹ The Explanatory Notes to heading 84.30 reads:

'This heading covers machinery, other than self-propelled machines of heading 84.29 and agricultural, horticultural or forestry machinery (heading 84.32), for "attacking" the earth's crust (e.g. for cutting and breaking down rock, earth, coal etc.; earth excavation, digging, drilling, etc.) or for preparing or compacting the terrain (e.g., scraping, levelling, grading, tamping or rolling). It also includes pile-drivers, pile-extractors, snow-ploughs and snow-blowers.'

¹²This is the force that is exerted upwards, 100mm from the lip of a bucket fitted to a wheel loader. It is the force that is generated by the bucket cylinder on the bell (Z) crank – the force with which the bucket can swivel.

Wielligh's evidence is that it is not possible, on importation, to ascribe a principal function to the machine. According to them, the propelling base is multifunctional in that it can perform a number of different functions depending upon the implement attached thereto after importation. On importation the machine is not capable of performing any function, nor does it, in its incomplete state, have the essential characteristics of any complete machine. Only once an attachment has been fitted to the machine, can the primary function of the machine be determined. On this basis it was contended by both Burger and Von Wielligh that on importation it is an incomplete multipurpose machine.

[13] It is common cause that the machine on importation is incomplete. General Interpretative Rule 2(a)¹³ is thus relevant. According to this Rule, if the machine has the essential character of the complete machine, then it must be classified as the complete machine. The essential character of the machine is determined by having regard to the purpose for which the machine was designed; linked to this is the ascertainment of the principal function of the machine. That, incidentally, is the difference between this case and *Autoware (Pty) Ltd v Secretary for Customs and Excise*,¹⁴ where the definition concerned made no reference to the purpose for which the article had been designed.

¹³General Interpretative Rule 2(a) provides:

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

¹⁴1975 (4) SA 318 (W).

[14] The court below in arriving at its conclusion referred to in para [4] appears to have been persuaded by the evidence of Burger and Von Wielligh. Their opinion is not convincing because they sought to downplay the importance of the principal design parameters of the machine. They also failed to recognise the fact that the attachments are ancillary to the machine in that they are designed to fit the machine. In my view, the court below erred in not accepting Hoffman's evidence and concluding that the machine as presented on importation lacked the essential characteristics of a front-end shovel loader.

[15] In the result the following order is made:

The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel. The order of the court *a quo* is set aside and the following is substituted:

'The application is dismissed with costs, such costs to include those occasioned by the employment of two counsel.'

L V THERON
ACTING JUDGE OF APPEAL

CONCUR:

HARMS JA
BRAND JA
CLOETE JA
CACHALIA AJA