

**IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION**

Case No: 7646/2000

In the matter between

KOMATSU SOUTHERN AFRICA (PTY) LTD

APPLICANT

And

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES**

RESPONDENT

JUDGMENT

Date of hearing: 12 November 2004
Date of Judgment: 22 April 2005

JAPPIE J

The Applicant, Komatsu Southern Africa (Pty) Ltd, applies for an order in the following terms:-

The determination of the respondent that the imported main body of the Komatsu WA 120-3A Wheel Loader be classified under tariff heading "8429.51.20", is set aside and is substituted with a determination that the said vehicle be classified under tariff heading "8430.50".

The Respondent, the Commissioner for the South African Revenue Services, opposes the application. The application is in effect an appeal against the determination made by the Respondent in terms of section 47(9)(a)(i) of the Customs and Excise Act, Act 91 of 1964. ("The Act").

The Applicant is the importer of the Komatsu WA 120-3A. As imported the machine consists only of the propelling base and does not have any attachments. The machine as imported is depicted in photograph 1 of Bundle "C". On the 13th August 1999 the Applicant applied to the Respondent at its Durban District Office for a tariff determination. On the 27th September 1999 the Respondent determined that the machine as imported is deemed to be "Front end shovel loaders, not tracked, driven by ICP engine mass between 3 000 kg and 30 000 kg under tariff heading 8429.51.20".

The Applicant contends that the machine should fall under "TH"8430.50 – "other machinery, self-propelled other machinery, not self propelled".

TH 84.29 reads as follows:-

- "84.29 - **SELF-PROPELLED BULLDOZERS, ANGLEDZERS, GRADERS, LEVELLERS, SCRAPERS, MECHANICAL SHOVELS, EXCAVATORS, SHOVEL LOADERS, TAMPING MACHINES AND ROAD ROLLERS.**
- **Bulldozers and angledozers:**
- 8429.11 - **Track laying**
- 8429.19 - **Other**
- 8429.20 - **Graders and levellers**
- 8429.30 - **Scrapers**
- 8429.40 - **Tamping machines and road rollers**
- **Mechanical shovels, excavators and shovel loaders:**
- 8429.51 - **Front-end shovel loaders**
- 8429.52 - **Machinery with a 360° revolving superstructure**
- 8429.59 - **Other"**

TH 84.30 reads as follows:-

- "84.30 - **OTHER MOVING, GRADING, LEVELLING, SCRAPING, EXCAVATING, TAMPING, COMPACTING, EXTRACTING OR BORING**

MACHINERY, FOR EARTH, MINERALS OR ORES; PILE-DRIVERS AND PILE-EXTRACTORS; SNOW-PLOUGHS AND SNOW-BLOWERS (+).

8430.10	-	Pile-drivers and pile-extractors
8430.20	-	Snow-ploughs and snow-blowers
	-	Coal or rock cutters and tunnelling machinery:
8430.31	-	Self-propelled
8430.39	-	Other
	-	Other boring or sinking machinery
8430.41	-	Self-propelled
8430.49	-	Other
8430.50	-	Other machinery, self-propelled
	-	Other machinery, not self-propelled;
8430.61	-	Tamping or compacting machinery
8430.62	-	Scrapers
8430.69	-	Others"

The Applicant and the Respondent rely upon what they contend is the correct interpretation of the tariff heading under which they claim the machine fall.

The custom duty payable on importation of the machine in question falls under Part 1 of Schedule No. 1 of the Act which deals with "ordinary custom duty". Part 1 of the Schedule contains:

- "A The general rules for the interpretation of the Harmonize System.
- B Section notes.
- C Chapter notes.
- D Tariff heading and sub heading
- E The scale of duty in respect of each tariff heading and sub heading."

The process of interpreting the Act, the Harmonize System and the Explanatory Notes were dealt with comprehensively in the case of *IBM v Commissioner for Customs and Excise 1985(4) SA at 852 (A)*, there is no need for me to once again set out the basic principles.

When the application was heard on the 17th June 2002 by his Lordship, the Honourable Mr Justice Hugo he referred the application to oral evidence on the following issues:-

1. Whether the principal function performed by the Komatsu WA 120-3A as presented upon in importation can be determined, and if so, if the principal function performed or purpose of it is that of a "Front-end shovel loader"; and/or
2. Whether the Komatsu WA120-3A as presented upon importation has the essential characteristics only of a completed or finished "Front-end shovel loader"; and
3. Whether the machine as imported is covered by the inclusion referred to in the Explanatory Note under [b][1] at page 88 of the founding papers."

When the matter came before me the Applicant called two witnesses, Nacolaas Burger and Adam Von Wielligh. The Respondent called one witness, Kevin Hoffman.

Nacolaas Burger is a mechanical engineer. In his evidence he described the Komatsu WA 120-3A as a machine which is equipped with a four cylinder turbo charge engine with a three element single stage single phase torque converter fitted to a full power shift, counter shaft time gear box with forward and reverse options. The machine is a four wheel drive with the differentials fitted in the front and the rear. The machine is fitted with an 'H' frame suitable for the attachment of different sub-structures like buckets, forks, grabs and hoisting attachments. The machine is further fitted with a full hydraulic system consisting of a gear pump coupled to a control system for controlling the various actions of the machine. Apart from the control valves needed for steering, additional spool valves may be fitted for controlling the 'H' frame as well as any equipment that may be attached to it. The function of these spool valves is to control the flow of hydraulic oil to various parts of the machine. According to Burger the machine in question is not principally designed as a front end shovel loader. He expressed the opinion that the machine, as imported is a self propelling base, of a tractor type, with the option of fixing various attachments to the machine. As to what functions the machine was capable of, is dependent upon what attachment is fitted onto the 'H' frame and/or bell crank. In his testimony he explained how the various attachments could be coupled to the 'H' frame and the bell crank. In particular, he explained how the machine would function with a fork attached to the 'H' frame. In his conclusion Burger expressed the opinion that the machine is, upon importation, a multi functional machine. The purpose and function to which the machine could be put would depend upon the intention of the user.

Adam Von Wielligh is a mechanical engineer. He too expressed the opinion that one was unable to ascribe a principal function to the vehicle as presented on importation. In his evidence he stated the following:-

“I cannot tell you until you have fixed the attachment to it. If you put a bucket on it, by all means it is a bucket loader and it is deigned to fulfil all the requirements of a bucket loader. And I quite accept the fact that the majority of these loaders are used as bucket loaders, it could be, but when the machine is standing there as depicted in the photographs, if you put a fork on it or if you put a boom on it, or you put a log grabber on it, it changes the application and as such it would then be known as a logger or a whatever.” (Record - page 33 line 10)

Kevin Hoffman is a mechanical engineer. He is presently employed as the product manager of the ‘front end loader team’ with Bell Equipment. Bell Equipment and Komatsu Southern Africa (Pty) Ltd are business competitors in the front end loader market. He explained that Bell Equipment presently enjoys approximately 20% of the South African market. Komatsu Southern Africa (Pty) Ltd presently enjoys about 15% or 16% of the South African market. Hoffman testified that Bell Equipment presently manufactures a wheel loader being Model L1204C. The specification of the said vehicle is set out in Annexure “G” to the papers. According to Hoffman the design methodology employed in the construction of the L1204C is similar to the design methodology employed by those who designed the Komatsu W120-3A. As the principal function for which the L1204C was designed was that of a wheel based front end shovel/bucket loader, the principal function for which

the Komatsu WA120-3A was designed was, therefore, a wheel based front end shovel/bucket loader. Hoffman further expressed the view that if the machine in question was to be used other than as a front end shovel/bucket loader, as suggested by the Applicant, then the machine would not be put to its optimal use but it would then be used in an inefficient manner. Moreover, some of the attachments could only be utilised on the machine after some structural changes were made to the machine which would then change the character of the machine. He expressed the view that the machine as presented on importation, was an incomplete front end shovel loader.

Dealing with the first issue that was referred to oral evidence:-

“Whether the principal function performed by the Komatsu WA120-3A as presented upon importation can be determined, and if so, if the principal function performed or purpose of it is that of a front end shovel loader.”

In Autoware (Pty) Ltd v The Secretary for Customs and Excise 1975(4) 318 at 321 E – Colman J set out what is considered to be the basic approach to be adopted in the interpretation of the various tariff headings. In this regard he said the following:

“Similarly, as there is nothing in the relevant portion of the Act or its Schedules which indicates that any matter in issue is to be governed by the intentions of the designer, manufacturer, importer, assembler or use of the vehicles or their parts, it seems to me that I should not be influenced by evidence of such intentions, except perhaps to the extent that such evidence may help to explain technical matters on which I require technical assistance”.

It seems to me that the determination called for is to be made objectively and uninfluenced by the factors referred to in the above passage.

On importation the machine as presented consists only of a propelling base with two lifting arms extended towards the front of the vehicle. It basically consists of a chassis with an engine, a gear box, transmissions, rear and front differentials, the two lifting arms forms and 'H' frame and with a bell crank. As already pointed out the photograph of the machine on importation can be seen as photograph 1 in Bundle C. It is obvious that on importation the machine is unfinished or incomplete. As presented on importation the machine is incapable of performing any function. For it to become functional it is necessary to affix to the vehicle its functional attachments. Hoffman expressed the opinion that the optimal use for which the Komatsu WA120-3A, was designed, is that of a front end shovel loader. However, on the evidence of Burger and Von Wielligh the machine in question can effectively be used for other purposes as well. The purpose being determined by fixing to the machine one of several available attachments. Hoffman does not seriously dispute this. He however expressed the view that if the machine is to be used for any other purpose other than a front end shovel loader, it would then be used inefficiently.

It seems to me that it is not possible to ascribe to the machine, as it presents itself on importation, a principal function as it lacks any attachment which would make the machine functional. It may well be that it was the intention of the designer and/or manufacturer that the optimal use for the Komatsu WA120-3A was that of a front end shovel loader. However, on importation it

appears without the front end shovel and/or bucket which would enable the machine to be used as such.

The Explanatory Note to TH 84.29 defines a self propelled shovel loader as follows:-

“These are wheeled or crawler machines with a front mounted bucket which pick up material through motion of the machine, transport and discharges it.”

This definition suggests that for it to be classified as a front end shovel loader it is essential that the machine on importation must be fitted either with a front end shovel or a front end bucket which will then make its function discernable as a front end shovel loader. Assuming that the machine was to be imported with an attachment that would enable it to function as a log grabber then the machine would not have been classified as a shovel loader but as a logger.

The machine on importation is incapable of performing any function at all. It is for the user to determine what attachment will eventually be fixed to the machine making its function discernable. Applying the principles as set out in the *Autoware* case the intention of the user is an irrelevant consideration in making the determination. The only conclusion that I can come to is that it cannot be said that the principal function of the Komatsu WA 120-3A, on importation, is that of a front end shovel loader.

I now turn to second issue raised; -

"Whether the Komatsu WA 120-3A as presented upon importation has the essential characteristics **only** of a completed or finished front end shovel loader?".

The answer to this question depends on what are the essential characteristics of a completed or finished front end shovel loader. The character of the machine imported must form part of the essence of that machine, or must be necessarily implied in its definition. One comes to the conclusion that the meaning of the phrase "essential character" is that what is referred to, which distinguishes the machine from other machines of its type which do not have that character.

It seems to me that what distinguishes a front end shovel loader from other loaders in its class is the presence of a front end shovel or bucket. To satisfy this requirement of "essential character" of the machine in question, the condition of the incomplete or unfinished vehicle must be examined to determine whether an unessential feature or component is lacking, even though it may be important, so that it is still possible to categorize the machine as an incomplete machine of the type described by the heading. If an essential feature is lacking it is not such a machine at all. In the regard see *Autoware (Pty) Ltd v Secretary for Customs and Excise 1975 (4) SA 318 (WLD)* at 327 :-

"I have now reached the crux of the enquiry, and it is perhaps appropriate that I elaborate upon my last statement. What I mean by an essential feature of a station wagon is not a feature which is important, for one reason or another, or even one which is necessary for the proper functioning of a station wagon.

I mean a feature which is essential in that it embodies the essence of a station wagon, and differentiates such a vehicle from others which are not station wagons. The question is whether the unmodified vehicle was an incomplete station wagon, akin to a kettle without a lid, a motor car without tyres, a rudderless boat, or a bicycle with a missing pedal, or whether it is akin to the so-called (miscalled) "knife without a blade", "hammer without a head", "liquid ice", or "unmarried wife".

Without there being a front end shovel and/or bucket attached to the imported machine, the machine lacks an essential component which would enable one to categorise it as a front end shovel loader. Since it is possible to fix various attachments to the front of the machine other than a shovel and/or bucket it is not possible to categorise the machine as an incomplete front end shovel loader. In my view the machine on importation, lacks an essential characteristic which would enable it to be categorised as a front end shovel loader.

The third issue raised was:-

"Whether the machine as imported is covered by the inclusion referred to in the Explanatory Note under [b][1] at page 88 of the founding papers".

The relevant portion of the Explanatory Note which is applicable to TH 84.30 referred to in this issue reads as follows:-

"On the other hand, this heading covers self-propelled machines in which the propelling base, the operating controls, the working tools and their actuating

equipment are specially designed for fitting together to form an integral mechanical unit. This applies, for example, to a propelling base resembling a tractor, but specially designed, constructed or reinforced to form an integral part of a machine performing one or more of the functions mentioned in this heading (excavating, levelling, etc.). Presented separately, such propelling bases also fall in this heading, as incomplete machines having the essential features of complete machine of the same kind. Propelling bases potentially classifiable in several of the headings 84.25 to 84.30 because they can be equipped with several different working parts, are classified in accordance with Note 3 to Section XVI or by application of Interpretative Rule 3(c)."

What needs to be considered is what machinery may be classified under TH 84.30. The answer to this question is to be found in the Explanatory Note to tariff heading which reads as follows:-

This heading covers machinery, **other than the 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."

It is clear that machinery that are covered by TH 84.29 is specifically excluded from TH 84.30.

The Explanatory Note in question specifically makes mention of "self propelled machines in which the propelling base, the operating controls, the working tools and their actuating equipment are specially designed for fitting together to form an integral mechanical unit". As the Komatsu WA 120-3A on importation consists

only of the propelling base and it is designed in such a way that it allows for various actuating equipment to be attached to it and only then forming an integral mechanical unit, the question thus posed by the third issue referred to oral evidence must be answered in the affirmative. That is to say that the machine, as imported is covered under the Explanatory Note under TH 84.30

In the result, I am persuaded that the Applicant is entitled to the order sought.

I accordingly grant an order in the following terms:-

1. That the determination by the Respondent that the imported main body of the Komatsu WA 120-3A wheel loader be classified under tariff heading 8429.51.20, be set aside and is substituted with a determination that the said vehicle be classified under tariff heading "8430.50".
2. That the Respondent is ordered to pay the Applicant's cost such cost to include the cost of two counsel.

A. udoy

DATE OF HEARING: 10,11 AND 12 November 2004

DATE OF JUDGMENT: 22 April 2005

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