IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2009-01-30

Case Number: 28562/07

In the matter between:

LG ELECTRONICS S.A. (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Plaintiff

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JUDGMENT

SOUTHWOOD J

[1] This is an appeal in terms of section 47(9)(e) of the Customs and Excise Act, 91 of 1964 ('the Act'). The products which are the subject of the appeal are 42" Plasma Display Screens with model number 24PX4MVH ('the screens') which are manufactured in Korea by the applicant's parent company, LG Electronics Inc, and imported by the applicant. The applicant contends that the screens are video monitors and that the appropriate tariff heading is 8528.21.20. The respondent (Commissioner) contends that the screens are television

sets, or incomplete television sets, and that the appropriate tariff heading is 8528.12.30. The appeal is directed against the Commissioner's determination that the tariff heading is 8528.12.30.

[2] Since about 2004 the applicant has imported the screens and declared them as video monitors under tariff heading 8528.21.20 which attracts customs duty of 25 % and enjoys a full rebate on the grounds that the monitors do not incorporate television reception apparatus. During July 2006 SARS investigated the screens imported by the applicant and concluded that they were wrongly imported under tariff heading 8528.21.20 because they incorporated a built-in tuner and therefore were television sets falling under tariff heading 8528.12.30. This tariff heading also attracts customs duty of 25 % but enjoys no rebate. Pursuant to the new determination SARS demanded payment of R43 530 187,70 for customs duty, *ad valorem* excise duty and value added tax. Despite the applicant demonstrating that the screens do not have a built-in tuner the Commissioner still contends that the appropriate tariff heading is 8528.12.30 either because the screens are television sets (i.e. reception apparatus for television) or because they are incomplete reception apparatus for television. The Commissioner relies on General Rule of Interpretation 2(a) for the latter contention. The Commissioner also alleges that the importation and sale of the screen (the video monitor) and the tuner (the interface board) separately is a stratagem to avoid payment of the customs duty payable on reception apparatus for television.

[3] The applicant launched this application with the clear intention of demonstrating that the screens fall under tariff heading 8528.21.20 read with explanatory note 6 which describes video monitors. In his answering affidavit the Commissioner denied only that the screens could be connected to a video camera or recorder by means of co-axial cables so that all the radio frequency circuits are eliminated. The denial was based on the expert evidence of Mr Jacques Herman van Wyk. Mr Van Wyk testified that the screens do not have ports (RCA connectors) to enable the screens to be connected to a video camera or recorder by means of co-axial cables, that these ports are found on the interface board (which contains the tuner which receives the television signal) and that unless the interface board is connected to the main printed circuit board of the screen, the screen cannot be connected to a video camera or recorder by means of co-axial cables. This evidence was disputed by the applicant's expert witness, Mr Jacobus Phillippus Fourie, who testified that the screen has a port labelled 'RGB Input' which conforms to a 'VGA connector' which can take a VGA socket or plug and that by means of the RGB Input the screen can be connected to a video camera or recorder by means of a co-axial cable. Mr Fourie demonstrated this empirically.

[4] After the parties had filed their heads of argument, just before the hearing of the matter, the Commissioner filed a supplementary answering affidavit to which was annexed a further affidavit by the

Commissioner's expert witness, Mr Van Wyk, and the applicant filed a further replying affidavit by its expert witness, Mr Fourie. Neither party objected to the filing of the other party's further affidavit and it was ruled that they be received in evidence. As a result of these further affidavits it is now common cause that the screens can be connected directly to a video camera or recorder by means of co-axial cables, so that all the radio frequency circuits are eliminated.

[5] Attached to the Commissioner's heads of argument is a notice of motion stating that at the hearing of the application the Commissioner will seek an order in terms of Rule 6(5)(g) that the matter be referred for the hearing of oral evidence on the following issues –

(1) whether the screens can be connected to a video recorder or camera by means of a co-axial cable without the interface board having been installed in the screen;

(2) whether the manner in which the screens and tuners were imported and distributed locally constituted a simulated transaction as contemplated in ***Commissioner, SARS v Motion Vehicle Wholesalers (Pty) Ltd*** 2006 [JOL 18351] (SCA).

At the hearing the Commissioner's counsel abandoned the application for a referral on the first issue but persisted with the application for the

referral on the second. The court ruled that it would hear full argument before deciding whether or not to grant the application for a referral.

[6] Since the applicant seeks final relief on notice of motion the principles set out in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** at 634E-635C must be applied. In dealing with the issues it must be borne in mind that in motion proceedings the affidavits constitute both the pleadings and the evidence. The affidavits formulate the issues of fact between the parties and contain the evidence upon which each wishes to rely and the issues and averments in support of the parties' cases should appear clearly therefrom – see ***Radebe v Eastern Transvaal Development Board*** **1988 (2) SA 785 (A)** at 793C-H: ***Transnet Ltd v Rubinstein*** **2006 (1) SA 591 (SCA)** para 28; ***Minister of Land Affairs and Agriculture v D & F Wevell Trust*** **2008 (2) SA 184 (SCA)**; ***National Director of Public Prosecutions v Phillips and Others*** **2002 (4) SA 60 (W)** at 106C-D. A party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers provided they arise from the facts established – see ***Van Rensburg v Van Rensburg en Andere*** **1963 (1) SA 505 (A)** at 509E-510B; ***Cabinet for the Territory of South West Africa v Chikane*** **1989 (1) SA 349 (A)** at 360F-G; ***Minister van Wet en Orde v Matshoba*** **1990 (1) SA 280 (A)** at 285E-F. But the court will only decide such a point where there will be no injustice: the court will have to be satisfied that all the relevant

facts are before the court – see ***Matshoba's case*** at 285G-H. These principles are important in the present case because of the argument presented on behalf of the Commissioner.

[7] The background to this appeal which is not in dispute can be summarised as follows:

(1) The applicant is a South African company which carries on business as an importer of electronic machines including the screens and interface boards LG model AP42EX40T ('the interface board'). During the period July 2004 to July 2006 the applicant imported 22 952 plasma screens comprising a range of models and declared them as 'video monitors' under tariff heading 8528.21.20.

(2) During July 2006 two SARS employees, Ms Bernadette Spies and Ms Jolene Joubert, investigated the applicant's import activities and the classification of the screens. They visited the applicant's website and obtained the screens' specifications. One of the features of the screen, according to the information they obtained from the website, was that it was fitted with two tuners. The two investigators concluded from this information that the applicant was importing plasma television sets. They obtained bills of entry for the screens and established that during the two year period the applicant imported 12 976

screens which were declared as 'video monitors' under tariff heading 8528.21.20. Based on this information, on 23 August 2006 SARS made the tariff determination which is the subject of this appeal. According to the motivation given by the investigators, tariff heading 8528.12.30 should be applicable because the screens have built-in TV tuners and should therefore be regarded as televisions. At that stage SARS had not physically examined the screens to confirm that they had built-in tuners.

(3) Based on this determination, on 28 August 2006 the Commissioner demanded payment of R43 530 187,70 from the applicant for customs duty, *ad valorem* excise duty and value added tax. In the Commissioner's letter of demand the Commissioner afforded the applicant an opportunity of rebutting the *prima facie* evidence and addressing the question of its liability under the Act.

(4) On 4 September 2006 the applicant's clearing agent, Safcor Panalpina, made a further submission regarding the tariff determination and on 12 September 2006 SARS confirmed its previous determination. The applicant's motivation was that the screen was nothing more than a video monitor as it did not have a built-in tuner and could only function as a television receiver after a tuner had been fitted. The determination was still based

on the fact that the manufacturer's specification referred to a tuner. It refers to the fact that the applicant had failed to present evidence to support its allegation that the screen was imported without a built-in tuner. The determination shows that a physical inspection of the screens had not taken place and mooted the possibility that the screen could be classified as incomplete reception apparatus for televisions.

(5) On 12 October 2006 the applicant furnished a further resubmission accompanied by a sample of the screen and the LG Plasma TV Owner's Manual incorporating a leaflet entitled 'Interface Board's Owner's Manual' and on 16 October 2006 SARS confirmed its initial determination. SARS' view was that although the screen and tuners are imported and sold separately, the omission of the tuner could not change the nature and characteristics of the screen from a TV set to a video monitor. The screen is equipped with a slot for receiving a TV tuner and it therefore has the character of an incomplete TV set having the essential character of a complete TV. By implication General Rule of Interpretation 2(a) is applicable.

(6) On 26 January 2007 another meeting was held to resolve the matter and on 7 February 2007 the applicant's legal representatives made a further submission. According to the Commissioner this submission was not convincing and it did not

sufficiently address the relevant issues. In the Commissioner's view the facts of the present case are identical or at least quite similar to those in the matter of ***Commissioner, SARS v Motor Vehicle Wholesalers*** **2006 [JOL 18351] (SCA).**

(7) On 14 March 2007 the State Attorney, on behalf of the Commissioner, called upon the applicant to furnish the Commissioner with a range of documentation 'in order to facilitate the correct tariff classification of the plasma display screens in issue'. In the letter the State Attorney referred to the further submission of 7 February 2007 and said –

> 'Based on the available information it would appear as if the separate importation of video monitors and tuners by your client may be a scheme aimed at limiting the customs duty payable on a complete "reception apparatus for television"'.

(8) The applicant's legal representatives advised the applicant not to furnish the documents requested and to launch this application. The applicant advised the Commissioner accordingly.

[8] It is striking that the Commissioner pertinently alleges that the applicant is guilty of simulating its transactions. He says –

> 'The design of the monitors (and interface board) and the manner in which the monitors (and interface boards) are imported into South Africa and on-sold to local retailers, is a stratagem devised by the applicant in terms of which the product is given a temporary different identity with the sole purpose of circumventing the provisions of the Act.'

[9] It is noteworthy that, apart from the facts averred in the answering affidavit, the Commissioner does not refer to any additional facts or other witnesses who could be called to confirm its suspicion that the separate importation and sale of the screens and interface boards could be a stratagem designed to circumvent the provisions of the Act. In argument the Commissioner's counsel while contending that the necessary facts were on record described the application for referral as a 'belts and braces' approach to the dispute. The notice of motion for the referral also does not refer to any additional evidence or witnesses. It also does not refer to particular factual averments which are in dispute. It seeks a referral on the question whether the manner in which the screens and tuners are imported and distributed locally constitutes a simulated transaction as contemplated in ***Commissioner, SARS v Motor Vehicle Wholesalers (Pty) Ltd*** **2006 [JOL 18351] (SCA).** This is a legal issue, not a factual issue, and is not a proper issue for a referral for oral evidence. No authority was referred to in support of a referral in respect of such an issue and I am not aware of any. In ***Minister of Land Affairs and Agriculture v D & F Wevell Trust supra*** at para 56 the court said 'a court should be astute to prevent an abuse of its process by a litigant intent on a fishing

expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one'. If the Commissioner really believes that the separate importation of the screens and interface boards is a simulated transaction and that there is other evidence which would establish this he should have dealt with this other evidence in his affidavits.

[10] In the premises, I am not satisfied that there is good reason to refer the issue for hearing of oral evidence and the application in terms of Rule 6(5)(g) will be refused.

[11] It is trite that tariff classification is a three stage process –

First: Interpretation – the meaning of the words used in the headings (and relevant section and chapter notes) which may be relevant to the classification of the goods concerned, must be ascertained;

Second: The nature and characteristics of the goods must be considered; and

Third: The selection of the most appropriate heading for the goods.

See ***International Business Machines SA (Pty) Ltd v Commissioner of Customs and Excise*** **1985 (4) SA 852 (A)** at

863G-H; ***Commissioner, South African Revenue Service v Kamatsu SA (Pty) Ltd*** **2007 (2) SA 157** (SCA) at para 8.

[12] The competing tariff headings, tariff heading 8528.12.30 and tariff heading 8528.21.20 are in Chapter 85 of Section XVI of Schedule I to the Act. It is common cause that there are no section or chapter notes which apply to this dispute. It is trite that the relevant headings and section and chapter notes are the paramount consideration in determining which classification, as between headings, should apply in any particular case – ***See Secretary, Customs and Excise v Thomas Barlow & Sons*** **1970 (2) SA 660 (A)** at 675H-676B (per Trollip JA). It is also well-established that reference may also be had to the explanatory notes in difficult cases – see ***Thomas Barlow & Sons supra.***

[13] Tariff heading 85.28 and the relevant subheadings read as follows:

'85.28 RECEPTION APPARATUS FOR TELEVISION, WHETHER OR NOT INCORPORATING RADIO-BROADCOAST RECEIVERS OR SOUND OR VIDEO RECORDING OR REPRODUCING APPARATUS; VIDEO MONITOR AND VIDEO PROJECTORS.

8528.1	–	RECEPTION APPARATUS FOR TELEVISION, WHETHER OR NOT INCORPORATING RADIO-BROADCAST RECEIVERS OR

		SOUND RECORDING OR REPRODUCING APPARATUS:
8528.12	-	COLOUR
8528.12.30	–	RECEPTION APPARATUS INCORPORATING OR DESIGNED TO INCORPRATE CATHODE RAY TUBES OR OTHER SCREENS WITH A SCREEN SIZE NOT EXCEEDING 3 M X 4 M.
8528.2	–	VIDEO MONITORS
8528.21	–	COLOUR
8528.21.20	–	WITH A SCREEN SIZE NOT EXCEEDING 3 M X 4 M.'

[14] In order to determine the meaning of headings reference may be had to dictionaries for the ordinary grammatical meaning of words and phrases – see ***Secretary, Customs and Excise v Thomas Barlow & Sons (Pty) Ltd supra*** at 677. The Shorter Oxford English Dictionary defines 'television' as 'the process by which a distant (moving) object or scene is electrically transmitted and reproduced'. Collins English Dictionary – Complete and Unabridged ('Collins') defines television to mean –

> 'The system or process of producing on a distant screen a series of transient visible images, usually with an accompanying

> sound signal. Electrical signals, converted from optimal images by a camera tube, are transmitted by UHF or VHF radio waves or by cable and reconverted into optical images by means of a television tube inside a television set.'

The ordinary grammatical meaning of 'television' is therefore a process whereby an image is transferred from one place to another by means of electrical signals and reproduced at the distant place on the screen. Ordinarily the screen is part of the process. Without the screen the reconverted optical images cannot be seen. Nevertheless TH858.12.30 distinguishes between the 'reception apparatus' and the screen. The screen may or may not be incorporated, but, if not, the reception apparatus must be designed to incorporate the screen. The words 'reception apparatus for television' therefore must refer to a device which is capable of receiving *inter alia* UHF or VHF radio waves and reconverting these signals into optical images. It is not in dispute that in the present case this is done by the tuner which is incorporated in the interface board. The tariff heading also distinguishes between the part before the colon ('reception apparatus for television') and the part after the colon ('video monitor'). Apart from the colon in the heading the two classes are separately dealt with in the relevant subheadings. Note 6 describes a video monitor in the following terms:

> 'Video monitors which are receivers connected directly to the video camera or recorder by means of co-axial cables, so that all the radio-frequency circuits are eliminated. They are used by television companies or for closed-circuit television (airports,

railway stations, steel plants, hospitals, etc). These apparatus consist essentially of devices which can generate a point of light and display it on a screen synchronously with the source signals. They incorporate one or more video amplifiers with which the intensity of the point can be varied. They can, moreover, have separate imputs for red (R), green (G) and blue (B), or be coded in accordance with a particular standard (NT6C in SECAM, PAL, D-MAC, etc.). For reception of coded signals, the monitor must be equipped with a decoding device covering (the separation of) R, G and B signals. The most common means of image reconstitution is the cathode-ray cube, for direct vision, or a projector with up to three projection cathode-ray cubes. However, other monitors achieve the same objective by different means (e.g.. liquid crystal screens, diffraction of light rays onto a film of oil). These may be in the form of CRT monitors or flat panel displays, e.g., LCD, LED, plasma, etc. Video monitors if this heading should not be confused with the display units of automatic data processing machines described in the explanatory note to heading 84.71.' (Emphasis in the original)

[15] Having determined the meaning of the competing headings the next step is to determine, objectively, as at the time of importation, the nature and characteristics of the screen – see ***Commissioner, SARS v Komatsu Southern Africa supra*** para 8. In ***Commissioner, SARS v The Baking Tin (Pty) Ltd*** **2007 (6) SA 545 (SCA)** at 548H-549D the court said:

> [12] The second difficulty with the reasoning of the High Court is that it is well-established that the intention of the

manufacturer or importer of goods is not a determinant of the appropriate classification for the purpose of the Act. Thus the purpose for which they are manufactured is not a criterion to be taken into account in classification. In ***Commissioner, South African Revenue Services v Komatsu Southern Africa (Pty) Ltd*** this Court said:

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

[13] The last sentence of this passage is invoked by The Baking Tin in support of its argument that the intention of the designer, or the use to which the goods are put, may affect what appear to be the objective characteristics of the goods and thus change their classification. It seems to me, however, that the court was suggesting no more than that light may be thrown on the characteristics of the article by subjective factors. The principle remains the same: it is not the intention with which they are made, nor the use to which they may be put, that characterise the containers in question. It is their objective characteristics. Thus the mere fact that the containers are regarded as disposable by The Baking Tin, and perhaps other suppliers and manufacturers in the chain, does not necessarily make them disposable by nature.'

[16] The respondent contends that the screens are not really television monitors and that they are only presented as monitors for purposes of assessment under the Act. The respondent relies on the judgment in ***Commissioner, SARS v Motion Vehicle Wholesalers (Pty) Ltd*** **2006 [JOL 18351] (SCA)** where the court found in paragraph 15 that the importer of the motor vehicles had attempted in a superficial and unsophisticated manner to conceal the true nature of the vehicles by giving them a temporary different form, that it did this with the intention of circumventing the Act and that the modification was clearly a sham. In paragraph 11 the court summarised the relevant principles as follows –

> 'Where a court is confronted with an alleged simulation, it is entitled to take into account all the surrounding circumstances. It has been accepted by this court that a taxpayer may minimize his or her tax liability by arranging his or her tax affairs in a suitable manner. But a court, in considering whether the tax payer has properly achieved a reduction of the tax, will give effect to the true nature and substance of the transaction and will not be deceived by its form. The same considerations apply to the determination of customs classifications.'

[17] In ***Mackay v Fey NO*** **2006 (3) SA 182 (SCA)** para 26 the court said:

> 'A simulation is where parties to a transaction for whatever reason attempt to conceal its true nature by giving it some form different from what they really intend ... It is important to emphasise that a transaction which is disguised in this way is

> essentially a dishonest transaction; the object of which ... is to deceive the outside world.'

In ***Zandberg v Van Zyl*** **1910 AD 302** at 309 the court said the following with regard to a simulated transaction:

> 'And when a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is, not what it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur.* But the words of the rule indicate its limitations. The court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For, if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstance that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.'

[18] In order to succeed in this application the applicant's allegations of fact which are admitted by the respondent together with the respondent's allegations of fact must justify the grant of the order sought – see ***Plascon-Evans supra*** at 634D-F. With regard to the nature and characteristics of the screens the following facts are either common cause or not disputed –

(1) At the time of importation the relevant screen has the following characteristics –

(i) it does not contain a tuner and therefore cannot receive modulated radio-frequency signals or convert these signals into optical images (with or without sound);

(ii) it can receive broadband radio signals as well as VGA computer signals;

(iii) when connected to a video camera or recorder by means of co-axial cables all the radio frequency circuits are eliminated;

(iv) it can be used by a television company or for closed circuit television, more specifically, as an information display monitor;

(v) the screen consists essentially of devices which can generate a point of light and deploy it on a screen synchronously with the sound signals;

(vi) the screen can incorporate one or more video amplifiers with which the point of light can be varied;

(vii) the screen either has separate imputs for red, green and blue signals and it can be varied in accordance with a particular video standard such as NTSC (in the

Americas), PAL (in Europe and South Arica) or SECAM (in France and other Francophone countries). When coded for a particular video standard the screen is fitted with a decoding device which separates the red, green and blue signals;

(viii) the screen uses the differentiation of light rays onto a film of oil in order to reconstitute the image;

(ix) the size of the screen is 42 inches or 105 cm.

(x) it has more than 600 resolution lines.

(2) On importation the screen is accompanied by an LG 'Plasma TV Owners Manual' and a leaflet entitled 'Interface Board Owners Manual (and not an LG monitor owners' manual). The owners manual is 63 printed pages and the leaflet is two printed pages. The owners manual contains detailed operating instructions appropriate to a television set: for example, operating the remote control and the use of external equipment viewing setups (when the interface board is installed). The leaflet enjoins the owner to read the Interface Board Owners Manual carefully before installing the interface board. This manual is to assist the purchaser of an interface board to install the interface board in the screen – which it refers to as a monitor. It states

clearly that the interface board is for the LG Plasma Monitor. It also refers to the LG Plasma Monitors Owners' Manual for operating the interface board. On the face of it, installation of the interface board is very simple process. There is no suggestion in the leaflet that the installation must be done by a technician.

(3) On 7 February 2007 the applicant's attorney delivered a memorandum to SARS in which the applicant's counsel set out in detail the reasons why the tariff determination of 22 August 2006 was wrong. With regard to the nature and characteristics of the screens the following factual statements were made –

(i) at the time of importation the screens do not contain a tuner and their only function is that of video monitor or display screen;

(ii) consumers such as travel agents, shipping centres, airports etc purchase the screens for the purpose of displaying information;

(iii) 'The Screens can have a tuner installed for the purpose of receiving modulated radio frequencies and reconverting those radio waves into optical images, in which event the Screens can be used as television sets.

Because the Screens (when modified from their imported state) have the ability to function as television sets; and because there is a market which uses the Screens as television sets, LG also imports and supplies to tuners to the retail television market. In this regard:

8.1 Since July 2005 (when LG started importing the Screens) LG has imported the tuners separately from the Screens. This has not been done at the behest of LG but, rather, at the instance of the manufacturer in Korea which exports the Screens and the tuners separately on a global basis to facilitate the export of the product.

8.2 Due to their relative compactness, the tuners are imported by LG via airfreight....

8.3 The Screens are imported via sea ...'

(iv) 'Although LG imports and supplies both the Screens and the tuners, it sells the products separately. LG does not install any tuners nor does it sell any Screens with the tuner installed. We are not certain whether the retailer sells the Plasma, with or without a tuner and we are not sure if the retailer's agent installs the tuner or if the

retailer's customer does it on its own. If the retailer intends selling a Screen as a video monitor or display panel, it will only order a Screen from LG'

(v) 'It is important to note that LG has no control over the end use of the Screens, i.e. whether they are used as video monitors or television sets. Since July 2005 (which was the date that LG first imported the Screens into South Africa) to the end of December 2006, LG's records show that it has sold 22 063 Screens and 25 435 tuners. Significantly, in the months of September, November and December 2005, February, June, September and November 2006 LG sold more Screens than tuners ...'

(4) The respondent has not disputed or attempted to refute these statements about the function and market for the screens.

(5) On 14 March 2007 the state attorney on behalf of the Commissioner answered the letter and memorandum and commented –

'Based on the available information it would appear as if the separate importation of video monitors and tuners by your client may be a scheme aimed at limiting the customs duty payable on a complete "reception apparatus for television"'.

The state attorney requested the applicant to furnish a mass of documentation relating to all importation of the screens from July 2005 to March 2007.

(6) The applicant was advised not to furnish these documents and launched this application.

(7) SARS has been informed by representatives of Makro Southern Africa (Pty) Ltd and HiFi Corporation (Pty) Ltd, which are large and well-known retailers of electrical goods and by representatives of Shoprite Chequers Ltd and Furnex Stores (Pty) Ltd which also purchase the screens and interface boards that –

(i) they have never ordered a screen without an interface board from the applicant;

(ii) when ordering the screen and tuners the product description on the order was –

'LG-42 inch Plasma + desktop, stand/tuner'

(iii) the product delivered pursuant to the orders consisted of the monitor (screen) (with remote control) and interface board:

(iv) they sold the monitor (screen) and interface board to purchasers as a television set;

(v) although the installation of the interface board was sometimes done by them it was usually done by the customer;

(vi) until approximately March 2007 they were invoiced by the applicant for television sets. The invoices were then changed to reflect a monitor and screen separately.

(Although this information is only confirmed by HiFi Corporation the applicant does not dispute that retailers bought monitors and interface boards to sell as television sets. This was pointed out by the applicant in paragraphs 8 and 9 of the memorandum referred to above.)

(8) The applicant's invoices do not refer to television sets. They refer to 42" Plasma. The applicant's delivery notes refer to the items separately as 42" Plasma and plasma av board.

[19] There is a dispute of fact relating to admissions allegedly made by the applicant's representatives at a meeting held on 4 September 2006. According to the Commissioner's deponent, Bernadette Spies, at the

meeting (the time and place are not identified), which was attended by a number of the applicant's representatives (the number is not stated and the representatives are not identified), it was conveyed to the SARS' representatives (not identified) that the SARS' determination was wrong ('fatally flawed') and that because of certain facts and reasons the product was a video monitor at the time of importation. These facts and reasons according to Bernadette Spies were the following:

'5.9.1 The information on LG's website relating to the specifications of the video monitor was incorrect;

5.9.2 The monitors and interface boards were imported separately;

5.9.3 After importation the monitors and interface boards were sold to retailers such as Makro (Pty) Limited ("Makro") who, in turn, on-sold them as television sets to their customers;

5.9.4 Because:

5.9.4.1 of the high duties payable on television sets imported into South Africa, the product was redesigned to allow for the fitment of the interface board after manufacture of the monitor. The reason for the aforesaid was to enable LG to import and onsell the product as set out in paragraph 5.9.2 and 5.9.3 above;

5.9.4.2 the tuner is the component that causes the product to function as a television set, the absence thereof at the time of importation causes the monitor to be a "video monitor" and thus classifiable within tariff heading 8528.21'

The applicant denies that the meeting took place as alleged and accordingly that the admissions were made. In argument the applicant contends that these allegations by Bernadette Spies should be rejected on the papers as palpably implausible, far-fetched or clearly untenable. See ***Plascon-Evans supra*** at 635B-C: ***National Director of Public Prosecutions v Zuma*** SCA Case No 573/08 delivered 12 January 2009 para 26.

[20] Understandably, in view of the lack of detail, the applicant's deponent, Hee Bong Lim, who is the applicant's product manager, cannot comment on the meeting which he did not attend and which he disputes. Nevertheless he does dispute that the screens were redesigned to allow for the fitment of the interface board after manufacture of the monitor. He points out that the applicant's parent company manufactures the screens in Korea for export across the globe. He says it is fanciful to suggest that the costs of redesigning the screens would be incurred to accommodate the tiny South African market.

[21] If regard is had to the importance of the admissions alleged, the manner in which the Commissioner deals with the meeting is astounding. The official who called the meeting is not identified and the official has not made an affidavit. The time and place of the meeting are not specified and the persons who represented the parties are not identified. There is no supporting affidavit regarding the meeting by any other SARS official. There is also no minute or note to reflect what was discussed and neither Bernadette Spies nor any other SARS official confirmed what they had been told at the meeting. Furthermore the applicant's clearing agent's letter dated 4 September 2006 does not refer to the meeting or say that he makes the further submission pursuant to what was agreed at the meeting on 4 September 2006. On analysis Bernadette Spies' evidence is simply a bald statement. Where so much hinges on the admissions (pursuant to the determination of 22 August 2006 the Commissioner demanded payment of R43 million in respect of unpaid duty, *ad valorem* tax and VAT) this bald statement is culpably implausible and clearly untenable. It cannot be accepted as the truth.

[22] On the facts, the screens are clearly complete video monitors and are used for that purpose. It is also clear that by the installation of the interface board (which contains the tuner) the screens become television sets and are used for that purpose. In the form in which they

are presented for clearance they are capable, after the installation of the interface boards, of performing a dual function. The question to be answered is whether the facts justify a finding or inference that 'the design of the monitor (and interface board) and the manner in which the monitors (and interface boards) are imported into South Africa and on-sold to local retailers, is a stratagem devised by the applicant in terms of which the product is given a temporary different identity with the sole purpose of circumventing the provisions of the Act.'

[23] The applicant has never denied that, provided that the screens are modified, they are sold to users as television sets. This however is determined by the retailers and not the applicant. The applicant does not sell television sets but sells the screens and tuners separately according to orders placed on it by the retailers. While the screens are sold by retailers as televisions sets the applicant has consistently alleged that the screens are also sold to other end users as video monitors. Despite being afforded an opportunity of doing so the Commissioner has not gainsaid this fact.

[24] The court therefore must consider a product which can fulfil one function upon importation and, if it is modified after importation, it can fulfil another. It has been shown that there is a market for both functions which the screens fulfil. I agree with the applicant that there is no rational reason for the applicant not servicing both markets by supplying a video monitor and tuner to the one sector and a video

monitor to the other. I also agree that this is a fundamental distinguishing feature between this case and the facts in the ***Motor Vehicle Wholesalers* case** which is relied upon by the Commissioner. In that case there was no evidence of the importee ever selling the vehicle as suitable for the transport of 10 persons which was the tariff heading under which the vehicles had been imported. In fact the vehicles could never have been sold as suitable for the transport of 10 persons because the importer needed the additional two seats to send back to Australia so that the sham could be perpetrated all over again. This illustrates another point of distinction namely that there is no evidence in this case that the applicant caused the tuner to be removed from the screens before importation. The contrary appears to be true. According to the uncontested evidence the screens are not manufactured with the tuner already installed.

[25] The fact that the screens can be sold to two markets provided that they are modified for the one reveals that there is nothing sinister in the design of the screens. I agree with the applicant that it would have been commercially imprudent to have two different manufacturing processes whereby one process would result in a screen not capable of having a tuner inserted and the other process would result in the same video monitor save that there would be an additional slot for the insertion of the tuner. The fact that the remote control caters for operation specific to television sets takes the matter no further as the

remote control also allows for functions which are not specific to television sets and which are fully operational without a tuner ever being installed and which are used when the screen is used as a video monitor. As is the case with the screens the remote control clearly caters for both functions.

[26] There is also nothing untoward about the manner in which the screens and interface boards are imported. As long ago as 2 February 2007 the applicant informed the Commissioner that the screens and interface boards were imported separately at the instance of the manufacturer in Korea which exports the goods in that manner on a global basis. The applicant also told the Commissioner that the interface boards are imported by air due to their relative compactness and the screens by sea. These are perfectly rational reasons for the manner in which the screens and interface boards are imported.

[27] The import statistics which were conveyed by the applicant to the Commissioner on the 2nd of February 2007 also indicate that the screens and tuners are imported and sold separately. According to the figures provided by the applicant the applicant imported approximately 3 000 more tuners than screens and for seven months during the period of investigation the applicant sold more screens than tuners.

[28] In my view these facts negate the inference which the Commissioner wishes the court to draw.

[29] Furthermore it is a well-accepted principle of our law that 'every man is entitled if he can to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be' – see ***IRC v Duke of Westminster*** **[1936] AC 1** at 19; ***CIR v Estate Kohler*** **1953 (2) SA 584 (A)** at 591E-592H; ***Erf 3183 Ladysmith (Pty) Ltd v CIR*** **1996 (3) SA 942 (A)** at 949I. In ***Erf 3183 Ladysmith (Pty) Ltd v CIR supra*** at 950I-952B the court said:

> 'Within the bounds of any anti-avoidance provisions in the relevant legislation, a taxpayer may minimise his tax liability by arranging his affairs in a suitable manner...., when it comes to considering whether by doing so he has succeeded in avoiding or reducing the tax, the Court will give effect to the true nature and substance of the transaction and will not be deceived by its form'.

[30] As pointed out in ***Zandberg v Van Zyl supra*** before the court ignores the form of the transaction it must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. The facts in this case do not justify a finding that there is some other real intention different from the one reflected by the

transactions. There is no evidence that the applicant always intended to sell television sets but imported the screens and the tuners under the tariff heading for video monitors just so that it could rebate the duties payable. The evidence clearly shows that the applicant imported the screens and the tuners in order to service two markets and imported them separately because that is how they are exported by the manufacturer worldwide.

Costs

[31] The applicant seeks a special cost order against the Commissioner because of his 'obstinate refusal to act reasonably in this matter'. The applicant contends that because of this refusal the applicant has been forced to incur unnecessary expenses in bringing this application. The relevant facts are as follows:

(1) On 22 August 2006 the Commissioner determined that the applicant had imported the screens under the wrong tariff heading on the basis that the screens were imported with the tuners already installed.

(2) On 4 September 2006 the Commissioner was informed that his determination was factually incorrect in that no screen was ever imported with a built-in tuner. In support of this fact the

Commissioner was furnished with the relevant invoices, transport documents and packing lists.

(3) On 12 September 2006 the Commissioner confirmed his earlier determination on the basis that 'this determination ... is based on the reasonable information that the monitor is fitted with a built-in tuner at time of import'. In regard to the documents that were furnished to the Commissioner which demonstrated the contrary, the determination baldly asserts that 'this obviously does not constitute proof'. Notwithstanding the aforegoing, the determination significantly records that the question as to whether or not the screens were imported with built-in tuners 'must be verified ... by physical inspection'. Obviously the Commissioner made the determination without verifying the one fact upon which the entire determination was premised;

(4) Since neither the applicant's say so nor the supporting documents were considered by the Commissioner to be adequate proof of the fact the applicant delivered a screen to the Commissioner so that a physical inspection could be done.

(5) Presented with incontrovertible evidence that the determination was factually flawed, on 16 October 2006 the Commissioner contrived to confirm his earlier determinations by (quite wrongly) relying on Rule 2(a) in order to conclude that the applicant had

imported an incomplete television set. The fact that the applicant actually imported a complete and fully functional video monitor was ignored by the Commissioner.

(6) During a meeting on 26 January 2007 the applicant attempted to persuade the Commissioner's representatives that Rule 2(a) could not arise for consideration because the screens had to be classified as video monitors by application of Rule 1. Apparently the Commissioner's representatives took offence at the fact that the Commissioner's determination was legally unsound.

(7) On 2 February 2007 the applicant furnished the Commissioner with comprehensive written representations with a view, as it was stated in the memorandum, 'to persuading the Commissioner, in an informal manner and without the necessity to go to court', that his tariff determination is incorrect;

(8) The memorandum set out in detail why the screen should be classified as video monitors and why Rule 2 could not apply. In this regard the contentions advanced in the memorandum are no different to the contentions advanced in this application. Annexed to the representations were all the relevant documents supporting the contentions advanced in the memorandum. The Commissioner never responded to the contentions advanced in the written representations.

(9) Instead, on 14 March 2007, the Commissioner suggested that the applicant was guilty of committing a fraud on the fiscus. The grounds upon which the suggestion was made were baseless. The Commissioner had made no attempt to verify any of the contentions or information contained in the applicant's written submissions before making this allegation. More importantly, the Commissioner made no attempt to address the applicability of Rule 2(a) which underpinned his most recent determination and which turned almost entirely on the application of the principles of tariff classification.

(10) The Commissioner's refusal to engage the applicant on the merits of the matter and his willingness to embark upon an investigation of fraud without a factual basis for doing so obliged the applicant to launch this application in order to obtain the relief which the Commissioner has refused to concede.

I agree that the Commissioner's conduct justifies a special costs order.

Order

[32] 1. The respondent's application for a referral to evidence is dismissed.

2. The respondent's tariff determination of 23 August 2006 to the effect that 42" Plasma Display Screens with model number 42PX4NVH imported by the applicant must for duty purposes be classified within Tariff Heading 8528.12.30 of Part 1 of Schedule 1 to the Customs and Excise Act No 91 of 1964 is set aside.

3. The respondent's determination is substituted by a determination that Tariff Heading 8528.21.20 applies.

4. It is declared that Rebate Item 460.16 of Schedule 4 to Act 91 of 1964 applies to the screens.

5. The respondent is ordered to pay the costs of this application which costs shall include the costs consequent upon the employment of two counsel and shall be on the scale as between attorney and client.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 28562/07

HEARD ON: 19 November 2008

FOR THE APPLICANT: ADV. A.P. JOUBERT SC
ADV. C.J. McASLIN

INSTRUCTED BY: Mr A.T. Lamey of Rooth & Wessels Inc.

FOR THE RESPONDENT: ADV. C.E. PUCKRIN SC
ADV. J.A. MEYER
ADV. T. KHATRI

INSTRUCTED BY: Mr D.C. du Toit of the State Attorney

DATE OF JUDGMENT: 30 January 2009