THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 428/09

In the matter between:

**COMMISSIONER FOR THE SA REVENUE SERVICE** **Appellant**

and

**LG ELECTRONICS SA (PTY) LTD** **Respondent**

**Neutral citation**: *CSARS v LG Electronics* (428/09) [2010] ZASCA 79 (28 May 2010)

**Coram:** HARMS DP, NUGENT, LEWIS, HEHER JJA AND GRIESEL AJA

**Heard:** 10 May 2010

**Delivered:** 28 May 2010

**Updated:**

**Summary:** Revenue – Customs and Excise – tariff determination
- video monitors (screens) and tuners separately imported
- whether screens incomplete reception apparatus for television in terms of General Rules for Interpretation, Rule 2(a)
- whether separate importation a scheme to defeat payment of legitimate duties.

## ORDER

**On appeal from:** North Gauteng High Court (Pretoria) (Southwood J sitting as court of first instance):

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

## JUDGMENT

Heher JA (Harms DP, Nugent, Lewis JJA and Griesel AJA concurring)

[1] This is an appeal against an order made under s 47(9)(e) of the Customs and Excise Act 91 of 1964 by Southwood J in the Pretoria High Court. The learned judge refused leave to appeal but such was granted on application to this Court.

[2] The order made by the court *a quo* was as follows:

'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.'

The appeal is against paragraphs 2 to 5 of the order.

[3] The respondent imports the screens referred to in para 2 of the order by sea from South Korea. It imports tuners (also called 'interface boards') from the same source by air. When a screen and a tuner are appropriately combined they constitute a television set.

[4] During the period 2004 to 2006 the respondent declared such screens on entry into the Republic under tariff heading 8528.21.20.[1] The appellant admitted the screens accordingly until July 2006, after which, following investigation, it issued a revised determination in terms of s 47(9)(d)(i)(bb) of the Act in respect of the screens, placing them under tariff item 8528.12.30.[2] Whereas video monitors attracted a customs duty of 25 per cent and enjoyed a full rebate on the grounds that they do not incorporate television reception apparatus, the screens, under the redetermined heading, attracted the same duty without the benefit of a rebate. The redetermination resulted in a credit of R43 530 187.70 in favour of the appellant for customs duty, *ad valorem* excise duty and value added tax. The respondent disputed its liability and maintained its refusal to pay despite several shifts by the appellant in its justification for the application of the re-determined tariff heading. Eventually the respondent put an end to further debate by applying to the High Court for relief substantially in the form that was granted in paras 2 to 4 of the order of Southwood J.

[5] In granting the application the principal finding made by the learned judge was that, 'on the facts the screens are complete video monitors and are used for that purpose'. As to a submission that the separate importation of screens and tuners was a cloak to disguise the reality of the entry of television sets into South Africa with the intention of evading the legitimate levying of duty on such sets, the court *a quo* examined the evidence and concluded that the facts negatived that inference and clearly showed 'that the applicant imported the screens and tuners in order to service two markets and imported them separately because that is how they are exported by the manufacturer worldwide'.

[6] Tariff Heading 85.28 provided as follows at the relevant time:

[1] Ie 'Video monitors'. The evidence is unclear as to the tariff heading under which the tuners were admitted.
[2] Ie 'Reception apparatus, incorporating or designed to incorporate cathode ray tubes or other screens with a screen size not exceeding 3m x 4m'.

| Heading | Sub-Heading | CD | Article Description |
|---|---|---|---|
| 8528 | | | **Reception Apparatus for Television, Whether or Not Incorporating Radio-broadcast Receivers or Sound or Video Recording or Reproducing Apparatus: Video Monitors and Video Projectors:** |
| | | | • *Refer to General Rebates of Customs Duties and Fuel Levy* |
| | | | *460.16 Temporary Rebates of Customs Duties* |
| | | | • *Refer to Ad Valorem Excise Duties from Page 691* |
| | 8528.1 | | --Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound recording or reproducing apparatus: |
| | 8528.12 | | = Other |
| | .30 | 9 | • Reception apparatus, incorporating or designed to incorporate cathode ray tubes or other screens with a screen size not exceeding 3m x 4m |
| | .90 | 2 | - Other |
| | 8528.13 | | = Black and white or other monochrome |
| | .30 | 5 | • Reception apparatus, incorporating or designed to incorporate cathode ray tubes or other screens with a screen size not exceeding 3 m x 4 m |
| | .90 | 9 | - Other |
| | 8528.2 | | --Video monitors |
| | 8528.21 | | = Colour |
| | .10 | 2 | • With a screen size exceeding 3 m x 4 m |
| | .20 | 5 | • With a screen size not exceeding 3 m x 4 m |
| | 8528.22 | 1 | = Black and white or other monochrome |
| | 8528.30 | 3 | --Video projectors |

18. Tariff Heading 8529 provided as follows:

| Heading | Sub-Heading | CD | Article Description |
|---|---|---|---|
| 8529 | | | **Parts suitable for use solely or principally with the** |

| | | | |
|---|---|---|---|
| | | | **apparatus of headings 85.25 to 85.28:**<br>• *Refer to Specific Drawbacks and Refunds of Customs Duties and Fuel Levy – 516.10 Television and Radio Receiving Sets* |
| 8529.10 | | | -- Aerials and aerial reflectors of all kinds; parts suitable for use therewith: |
| | | .10 5 | = Parabolic aerial reflector dishes of a diameter not exceeding 120 cm |
| | | .90 3 | = Other |
| | 8529.90 | | --Other: |
| | | .20 9 | = Cabinets for reception apparatus for television |
| | | .50 0 | = Filters or separators, for antennas for reception apparatus for television |
| | | .60 8 | = Tuners (very high frequency or ultra-high frequency) and tuner control devices, for reception apparatus for television |
| | | .70 5 | =Parts of moulded plastic or base metal, not incorporating electronic components for reception apparatus for television |
| | | .80 2 | = Other parts for reception apparatus for television |
| | | .90 9 | = Other |

19. The Explanatory Notes to Tariff Heading 8528 read (to the extent relevant) as follows:

'This heading covers television receivers (including video monitors and video projectors), whether or not incorporating radio-broadcast receivers or sound or video recording or reproduction apparatus.

The heading includes:

(1) Television receivers of the kind used in the home (table models, consoles, etc.) including coin-operated television sets.

*. . .*

*(3)* Video tuners, intended to be used with or incorporated in, e.g., video recording or reproducing apparatus or video monitors. These tuners convert high-frequency television

signals into signals usable by video recording or reproducing apparatus or video monitors. However, devices which simply isolate high-frequency television signals (sometimes called video tuners) are to be classified as parts in **Heading 85.29.**

. . .

*(6)* 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 inputs for red (R), green (G) and blue (B), or be coded in accordance with a particular standard (NTSC, SECAM, PAL, D-MAC, etc.). For reception of coded signals, the monitor must be equipped with a decoding device covering (the separation of) the R, G and B signals. The most common means of image reconstitution is the cathode-ray tube, for direct vision, or a projector with up to three projection cathode-ray tubes, however, other monitors achieve the same objective by different means (e.g., liquid crystal screens, diffraction of light rays on to a film of oil).

Video monitors of this heading should not be confused with the display units of automatic data processing machines described in the Explanatory Note to heading **84.71.**'

[7] It is unnecessary for the purposes of this judgment to discuss the general principles of tariff classification.[3] The respondent's counsel relied on two main submissions on appeal. Firstly he accepted that the screens possessed the objective characteristics of video monitors but submitted that they were in truth incomplete television sets because

a) they were designed to be incorporated with the imported tuners and thereby to become television sets;

b) they possessed sophisticated refinements not related to their functional utility as monitors which were intended only to serve the function of television receptors; and

c) they lacked the circuitry necessary for use as monitors in a domestic context as distinct from the setting of an office or public place.

[3] The cases are cited in *Commissioner, SARS v Komatsu Southern Africa (Pty) Ltd* 2007 (2) SA 157 (SCA) fn

For the purposes of this appeal it may be accepted that these specific characteristics did attach to the monitors. It is unnecessary to enter upon a discussion of the technical aspects which underlie each aspect.

[8] Counsel for the appellant sought to persuade us that, on the strength of the additional features thus identified that Rule 2(a) of the General Rules for the Interpretation of the Harmonized System (which governs the classification of goods) applied to the screens. This Rule provides as follows:

'(a) 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.'

Counsel relied only upon the incompleteness of the sets as presented and did not contend that the sets were presented unassembled or disassembled.

[9] This was not a submission dealt with in terms by Southwood J who was satisfied that Rule 1 applied *viz*.

'For legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.'[4]

[10] In response, counsel for the respondent submitted that, for the purposes of tariff classification, it is not possible for a product to be regarded as a complete article of one tariff heading and, at the same time, to be treated as an incomplete article of a different tariff heading. That indeed is the effect of Interpretative Rule 3 which eliminates the possibility of classification under more than one heading. But it does not follow that because an article is complete for the purposes of one heading it may not properly be regarded as incomplete under another or that the former must prevail in all instances (as counsel submitted). One may easily envisage an article of low value and utility complete in itself but also possessing the essential characteristics of an incomplete and far more

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[4] Those 'provisions' are contained in the Explanatory Note to Rule I.

significant product. Rule 3 may then appropriately be applied to the determination. It follows that I do not agree that Interpretative Rule 2(a) only arises for consideration if the appellant succeeds in establishing a stratagem which entitles the court to look beyond the admitted character of the screens as video monitors to their 'true' character (being, according to the respondent's contention, incomplete apparatus for television reception).

[11] As note (I) to Rule 2(a) emphasises,

'The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.'

[12] The evidence is clear: a tuner is the means by which television signals are received and converted to an optical image on the screen. Without a tuner the screen can perform no reception function. In these circumstances, absent the tuner, the screen would appear to lack the essential character of a complete television set. Counsel for the appellant met this difficulty by the following submissions:

(a) The provisions of tariff heading 8529.90.60 proves the argument to be wrong. That heading provides that the tuner is not a '*Reception apparatus for television*', but a part thereof. Because '*tuners'* are classifiable as parts of '*Reception apparatus for television*', a '*Reception apparatus for television*' must, as a matter of logic, comprise more than just a tuner, and the screen in the present instance may thus have the essential character of a '*Reception apparatus for television*' notwithstanding the fact that it is not fitted with a tuner.

(b) By definition an incomplete or unfinished article has some part or parts missing and hence cannot function as a complete product (as was the position in the *Komatsu* case).[5] The absence of one component, even if such a component plays an essential role in the functioning of the product, can in itself accordingly never be determinative of the question as to whether the incomplete product has the essential character of the complete product.

(c) The aforesaid reasoning is borne out by the various examples given in a number of Explanatory Notes to the heading of Part 1 of Schedule 1 to the Act. One example is the General Note to Chapter 87:

*'**An incomplete or unfinished product** is classified as a corresponding complete or finished vehicle provided it has the essential character of the latter (see Interpretative Rule 2(a)), as for*

*example:*

*(A) a motor vehicle, not yet fitted with the wheels or tyres and battery.*

*(B) a motor vehicle not equipped with its engine or with its interior fittings.*

*(C) a bicycle without saddle and tyres.*'

As far as '*the motor vehicle not equipped with its engine'* is concerned, counsel submitted that although it might serve as a fully functional chicken coop or trailer and could be used as such at the time of importation, the reason why it would not be classifiable as such is because, if proper regard is had to its true nature and characteristics, it is not a complete chicken coop or trailer, but an incomplete motor vehicle. Similarly, the reason why the screens are not to be classified as '*Video monitors*' notwithstanding the fact that they were fully functional video monitors at the time of importation is because, based on the evidence as to their true nature and characteristics (set out in paragraph 21 above), the intention of the designer and the manufacturer of the screens, as '*objectively embodied*' in the product, clearly was to design and manufacture a '*Reception apparatus for television*' i.e. a television set.'

[13] Attractive as this argument may appear at first glance, I do not think it withstands closer examination for the reasons which follow.

[14] I agree with counsel for the respondent that reliance on tariff heading 8529.90.60 is a red herring because the appellant's argument overlooks Explanatory Note 3 to tariff heading 8528. That note states that tuners which convert high frequency radio waves fall under heading 8528; however, devices which simply isolate high-frequency television signals (sometimes called video tuners) are to be classified as parts in heading 8529. By contrast the wording of the tariff heading contended for by the appellant *viz* 'reception apparatus incorporating or designed to incorporate . . . screens with a screen size not exceeding 3m x 4m' is indicative that a screen, on its own, is not regarded as a reception apparatus.

[15] While it is clear that each determination must be made according to the salient facts attaching to the goods in question (and, in particular, its objective characteristics), and while in one case an engine may properly be regarded as the essence of the goods,

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[5] *Commissioner, SARS v Komatsu Southern Africa (Pty) Ltd* 2007 (2) SA 157 (SCA).

in another a frame or chassis may be sufficient to satisfy that test. In *Autoware (Pty) Ltd v Secretary for Customs and Excise*,[6] Colman J was required to consider whether a vehicle was a panel van or an incomplete station wagon on importation. The learned judge found that the relative simplicity and low cost of modification was not a decisive criterion, because the enquiry does not turn on what the product was going to be or what it will be adapted to be. Rather, the court must consider what the product was at the time of importation. Colman J held[7] that that issue

'must be decided on the basis of the presence or absence, in the unmodified vehicles, of the essential features or components of a station wagon . . . 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 essential 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.'

I respectfully endorse that approach.

[16] At the time of entry the screens were, as the appellant concedes, functional video monitors. They possessed an existence and utility of their own which did not include or require the incorporation of a device capable of receiving high frequency radio waves and converting the signal into optical images. But without such a device the use of the screens as 'reception apparatus for television' was totally excluded. That the screen was designed to accept such a device or could be easily modified to accept it, is, as, Colman J pointed out, of no consequence if the essential nature does not exist at the time of importation. Nor does the 'unnecessary' addition of the 'sophisticated' features which are embodied in the respondent's screens, make up for the absence of the means of receiving and converting signals albeit that it strongly indicates an intention on the part of the importer that the product is to offer an alternative use to the ultimate purchaser. It is the *primary*

[6] 1975 (4) SA 318 (W).
[7] At 327G-328A.

design and use which carries most persuasion.[8]

[17] For these reasons I am of the view that Interpretative Rule 2(a) did not apply to the video monitors on entry and was rightly not treated as significant by Southwood J.

[18] The second leg of the appellant's argument turned on its having proved in the court *a quo* that the importation was a sham in the sense I have referred to above.[9] The contention faced formidable obstacles.

[19] First, as already emphasised, the screens were per se functional video monitors and are sold and used as such. Second, the uncontested evidence was that the respondent did not itself assemble the screens and tuners into television sets but sold them as separate entities to retailers. Such purchasers might themselves sell the screens and tuners separately or together or assemble them and sell the product as a television set. The respondent neither directed nor controlled such purchases or the ultimate use of the two items.

[20] Prima facie, the modus operandi of the respondent is entirely what it purports to be, *viz* the importation of two separate items each having its own commercial utility. The respondent makes no effort to hide the fact that the overwhelming use by retailers and the public of the two items is in combination, ie as a television set.

[21] At the outset of the proceedings the appellant implicitly recognised the difficulties which it faced in attempting to attach a pejorative intention to the separate importation. Courts are always reluctant to find *fraus legis* without clear evidence; such clarity can generally only be obtained by the examination of witnesses with due regard to the way in which their affairs or those of their businesses have been conducted. Again, adequate assessment invariably requires insight into the books and documents used in the business. The appellant, apparently intent on exposing what it suspected was a stratagem, called on the respondent in correspondence to produce an extensive range of documentation and wide-ranging information originating both in South Korea and South

[8] Cf Dowling J in *Mincer Motors Ltd v Commissioner of Customs and Excise* 1958 (1) SA 652 (T) at 654G-H.

Africa. The respondent (with justification) appears to have regarded this demand as in the nature of a fishing expedition and refused to comply. No aspect of the demand was thereafter pursued by the Commissioner (although his counsel sought to draw an adverse inference from the refusal). Application was made to the court *a quo* for the question of the genuineness of the separate importations to be referred for the hearing of oral evidence. Southwood J refused the application and his refusal has not been put in issue before us. Despite all these considerations the appellant persisted in contending that the court *a quo* should have found, on the papers, that the appellant was engaged in a scheme designed to deprive the *fiscus* of its legitimate deserts.

[22] The considerations which counsel urged upon us as, cumulatively, sufficient to prove that the respondent was engaged in a stratagem, were the following:

1 The opinion of its expert witness, Mr Van Wyk, derived from his identification of the additional features foreign to a video monitor but necessary to a television set, that

a) the monitor was designed and manufactured to incorporate the tuner and, consequently, to be used as a television set;

b) the tuner was probably designed and manufactured to be connected to, and thus to function, exclusively with the monitor;

c) the monitor was not designed simply to be used as a video monitor.

2 On importation the screens were accompanied by a document titled 'Plasma TV Owner's Manual'.

3 With the owner's manual was a pamphlet titled 'Interface Board Owner's Manual' which contained instructions as to how to install the tuner in the screen, and which referred to the owner's manual for operating instructions.

4 According to information downloaded by officials from the respondent's website in July 2006, the monitors were supplied as standard with tuners.

5 At a meeting on 4 September 2006 representatives of the respondent advised the Commissioner's officials that:

(a) the information on its website was incorrect and the monitors and tuners were imported separately;

(b) the screens had been redesigned in order to allow for the easy fitment of a tuner

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[9] As to the general principles, see eg *Michau v Maize Board* 2003 (6) SA 459 (SCA) para 4.

after importation.

6 The respondent's refusal to comply with the Commissioner's request for documents and information.

7 The evidence that certain large retailers

a) only ordered complete television sets;

b) received, as the delivered product, a screen (with a remote control) and an uninstalled tuner;

c) sold the product to their customers as television sets;

d) were, until about March 2007, invoiced by the respondent for television sets, and, thereafter, for the monitors and tuners separately.

8 The respondent imported 22063 screens and 25435 tuners from July 2005 to December 2006. As the tuners had no use apart from their installation and use with the screens, the ineluctable inference is that all screens must have been converted into television sets, leaving the respondent with 3372 spare tuners.

9 The respondent's explanation as to why it changed its method of invoicing ('to avoid any ambiguity that may have existed') was disingenuous and illogical. It was open to only one conclusion, namely that the television sets had all along been ordered, imported and delivered in 'kit form'. As a result of the Commissioner's investigation, the paperwork had to be changed in order to hide the true facts.

10 If due attention were paid to the substance of the products, and the sourcing, purchasing, marketing and onselling of the screens, the conclusion of the court *a quo* should have been that the respondent was engaged in a scheme designed to evade the payment of the tariff applicable to the importation of television sets.

[23] The crux of the factual findings of the court *a quo* in relation to the charge of *fraus legis* was that the screens were designed to serve two markets, one for video monitors or information display panels, the other for television sets, and that the respondent supplied both markets. Neither of these facts were denied by the Commissioner in the court *a quo* or disputed on appeal.

[24] Southwood J also found that cogent commercial reasons existed for the manner in which the screens were designed, manufactured and imported into South Africa. Moreover the modus operandi of the respondent in selling the screen and tuners as separate items

(despite the contrary description in the invoices) was not rebutted at all by the Commissioner. The learned judge disbelieved the evidence put forward by the Commissioner concerning both the holding of the meeting on 4 September 2006 and the content of the admissions allegedly made by and on behalf of the respondent at that meeting. His grounds for doing so were well-motivated and I am unpersuaded that he misdirected himself.

[25] Affording due weight to those of the grounds relied on by the appellant which are either common cause or not seriously denied by the respondent, the conclusion of the learned judge that the Commissioner had proved no stratagem on the part of the respondent in regard to the importation of the screens appears to me to have been justified. There was no evidence to suggest that the respondent manipulated the design or manufacturing or the importation process to avoid payment of duties. This seems clearly to fall within that category of cases where a man may legitimately order his affairs so that the tax is less than it otherwise would be.[10]

[26] Southwood J made a special order of costs against the appellant. Suffice to say that no ground has been adduced to interfere with his discretion.

[27] The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

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J A Heher
Judge of Appeal

[10] *IRC v Duke of Westminister* [1936] AC 1 at 19; *Hicklin v SIR* 1980 (1) SA 481 (A) 494G; *Michau v Maize Board*, above, para 4.

APPEARANCES

APPELLANT: C E Puckrin SC with him J A Meyer SC

Instructed by State Attorney, Pretoria;

State Attorney, Bloemfontein

RESPONDENT: A P Joubert SC with him C J McAslin

Instructed by DLA Cliffe Dekker Hofmeyr, Sandown, Sandton;

Naudes, Bloemfontein