


**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

Case number A 1395/2001

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
DATE 9/2/06	 SIGNATURE (Appellant)

In the matter between :

TELKOM SA LIMITED

(Applicant *a quo*)

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

(Respondent)

(Respondent *a quo*)

JUDGMENT

BOTHA J :

This is an appeal against a decision of Bertelsmann J dismissing an application by the appellant to set aside a tariff determination made by the respondent on 15 June 2000.

The application was in fact an appeal in the wider sense of the word, brought in terms of section 47 (9) of the Customs and Excise Act, 1964 (Act 91 of 1964) (the Act).

The appellant is Telkom SA Limited. The respondent is the Commissioner for the South African Revenue Service.

The goods that were the subject matter of the tariff determination formed part of the Telplus Digital Pair Gain System (the Telplus system) manufactured by an Australian company, Telspec. The Telplus system is used to enhance the restricted capacity of copper telephone wires. The system comprises of five components, an exchange shelf, an exchange unit, a remote unit, a repeater, and a front-end interface unit. The tariff determination related to the exchange unit, the remote unit, the repeater, and the front-end interface unit. According to the determination the exchange unit, the remote unit, and the repeater fell under tariff heading 8517.50, which attracts excise duty. The determination was made on the basis that these items were to be considered as " apparatus ". The respondent took issue with this finding, contending that these items should have been classified under tariff heading 8517.90 as " parts " , which classification does not attract excise duty.

The appellant did not appeal against the determination that the front-end interface unit fell under tariff subheading 8543.89, which does not attract duty. Tariff subheading 8543.89 relates to " other " under the heading " Electrical Machines and Apparatus, Having Individual Functions, not Specified or Included Elsewhere.."

It is common cause that the five components of the Telplus system can individually only function within the system. The Telplus system can be described as a subsystem that can be installed in a wider system, such as the telephony system of the appellant. The exchange unit is installed at a telephone exchange. The remote unit is installed in the vicinity of the subscriber, e.g. on the telephone pole that services his home. By means of the technology of the system up to ten speech channels can be transmitted over a pair of ordinary copper wires. The digitisation and encoding of signals is the

intellectual property of Telspec. Telplus units can only be used in their sub system with other Telplus units.

It was also common cause that Telspec does not sell the various components of its system as a unit. They are sold individually and are acquired and imported by the appellant individually and separately from each other.

The appellant annexed affidavits of Mr Ngobo, its Group Executive, Legal Services, Mr Aposporis, an electronic engineer in its employ, Mr Scholtz, its Senior Manager, Cost and Risk Management, and Professor Joubert of the Department of Electrical and Electronic Engineering at the University of Pretoria. Mr Ngobo related the history of the matter, referring, *inter alia*, to the fact that, at the beginning of 1997, the respondent had classified the items in issue as " parts ". Mr Aposporis explained the technical features of the Telplus system and stressed the fact that none of its individual units was capable of functioning on its own. Mr Scholtz confirmed that the units of the Telplus system were procured and imported separately. Professor Joubert confirmed Mr Aposporis' exposition of the technical aspects of the system, in particular that the various components cannot operate independently and that they can only operate in conjunction with each other when connected to a public switch telephone network.

The respondent filed affidavits by Ms Vermaak, his Manager, Tariff, Valuation and Functional Audit, Mr Griessel, an electronic engineer who is a Senior Manager in the Telecommunications and Acquisition Systems Division of Armscor, and Mr Crowcamp, an electronic engineer, who is a technical manager in the

Telecommunications and Acquisition Systems Division of Armscor. Ms Vermaak referred to the various international instruments that are relevant to the classification of goods for customs purposes. She contended that tariff heading 85.17 referred to three concepts : systems, apparatus, and parts. In that context she contended that the goods in issue were apparatus. She referred by analogy to telephone sets, modems, amplifiers and DStv decoders, all of which cannot operate independently, but are classified as apparatus. Mr Griessel distinguished between a user system such as a line telephony system, a subsystem which is in itself an apparatus, and parts of a subsystem or apparatus. He considered the goods in question to be a subsystem or apparatus. In his view the exchange unit and the remote unit should be classified as "multiplexers " because they combine signals from different sources and transmit them on one line. He referred to the analogies of the telephone set, the modem, amplifiers, and a DStv decoder, all of which are apparatus, yet cannot function separately. According to Mr Griessel the repeater fulfils a function analogous to that fulfilled by audio frequency amplifiers used as a repeaters because it converts a small or faint signal into a larger output signal. Mr Crowcamp confirmed the affidavit of Mr Griessel.

In the replying affidavit it was accepted that the repeater must be classified, not under tariff heading 8517.90, as previously contended, but under tariff heading 8543.89. That is so because it is a signal amplifier and not an audio frequency amplifier. The tariff heading 8543.89 does not attract any duty. Notice was given that the notice of motion would be amended accordingly. The point was made that the goods in question are parts of the Telplus system, just as a handset would be part of a telephone set.

The court *a quo* referred to **Secretary for Customs and Excise v Thomas Barlow & Sons Limited 1970 (2) SA 660 A at 675 F to 676 F and 679 C to 680 B, International Business Machines SA (Pty) Limited v Commissioner for Customs and Excise 1985 (4) SA 852 A at 863 G-H, Commissioner for Customs and Excise v Capital Meats CC (in liquidation) and Another 1999 (1) SA 570 SCA at 573 A-E and The Heritage Collection (Pty) Limited v Commissioner for Customs and Excise 2002 (6) SA 15 SCA at 21 C-D**, where it was said that “ **the goods are to be classified not by reference to one or other component but by reference to the nature and characteristics of the goods as a whole**”. With reference to the argument that the goods could not be apparatus because they could not function separately, the court remarked that the tariff heading does not suggest that an apparatus must be able to function separately. It referred to the explanatory note dealing with combinations of different machines and devices. It found that the goods had been correctly classified in the determination and that the fact that only separate units of the Telplus system are now imported, is irrelevant, because it is done for reasons of marketing and servicing.

Tariff heading 85.17 reads as follows :

“ Electrical Apparatus for Line Telephony or Line Telegraphy, including Line Telephone Sets with Cordless Handsets and Telecommunication Apparatus for Carrier-current Line Systems or for Digital Line Systems; Videophones : “

Tariff sub-heading 8517.30 reads as follows :

“ – Telephonic or telegraphic switching apparatus..”

Tariff sub-heading 8517.50 reads as follows :

“ – Other apparatus, for carrier-current line systems or for digital line systems .”

Tariff sub-heading 8517.90 refers to parts, parts for telephone sets, which attract duty, and other parts, which do not attract duty.

In the explanatory note to Tariff Heading 85.17 the following explanation appears :

“ The term ‘ electrical apparatus for line telephony or line telegraphy’ means apparatus for the transmission between two points of speech or other sounds (or of symbols representing written messages, images or other data), by variation of an electric current or of an optical wave flowing in a metallic or dielectric (copper, optical fibres, combination cable, etc.) circuit connecting the transmitting station to the receiving station.

The heading covers all such electrical apparatus designed for this purpose, including the special apparatus used for carrier-current line systems.”

Section note 4 of section XVI reads as follows:

“4 Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to the function”.

In Section XVI of the explanatory notes, in paragraph VII, under the heading "Functional Units, Section Note 4" the following explanation appears :

" This Note applies when a machine (including a combination of machines) consists of separate components which are intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or, more frequently, Chapter 85. The whole then falls to be classified in the heading appropriate to that function, whether the various components (for convenience or any other reasons) remain separate or are interconnected by piping (carrying air, compressed gas, oil, etc.), by devices used to transmit power, by electric cables or by other devices.

For the purposes of this Note, the expression ' intended to contribute together to a clearly defined function' covers only machines and combinations of machines essential to the performance of the function specific to the functional unit as a whole, and thus excludes machines or appliances fulfilling auxiliary functions which do not contribute to the function of the whole."

Examples of functional units to which Note 4 refers are given. In the field of electronics the following are given :

" (10) Radio transmitters and associated power packs, amplifiers, etc. (heading 85.26).

(11) Portable radiotelephone transmitters and their associated hand microphone (heading 85.25).

(12) Radar apparatus with the associated power packs, amplifiers, etc. (heading 85.26).

(13) **Satellite television reception systems consisting of a receiver, a parabolic aerial reflector dish, a control rotator for the reflector dish, a feed horn (wave guide) , a polarizer, a low-noise-block (LNB) down converter and an infra-red remote control (heading 85.28).**

(14) **Burglar alarms, comprising, e.g., an infra-red lamp, a photoelectric cell and a bell (heading 85.31). “**

Mr Dunn SC, who appeared for the appellant with Mr Meyer, quoted dictionary definitions according to which “ apparatus “ means the things collectively necessary for the performance of some activity or function and a “ part “ an essential piece of a machine or structure or a component that can be replaced in a machine. He stressed the fact that none of the goods in question can function independently. He submitted that although the exchange unit and the remote unit can jointly be considered to be “ apparatus “, they are, when considered separately, “ parts “.

In respect of the repeater he submitted that because it does not boost or amplify electrical signals of frequencies, it has to be classified as “ Other “ under tariff heading 8543.89, meaning other machines and apparatus.

Mr Puckrin SC, who appeared for the respondent with Ms Kooverjie, pointed out that no appeal lay against the respondent’s determination that the front-end interface unit fell under tariff heading 8543.89, which means that it is not a part, but apparatus. He also pointed out that the appellant’s concession that the repeater fell under tariff heading 8543.89 amounted to a concession that it was apparatus, and not a part. He

contended that all the goods in issue were of the same kind and that therefore the other components should also be considered to be apparatus.

He submitted that the words " apparatus " and " parts " must be considered in the context of the tariff headings and the explanatory notes. He submitted that the fact that goods cannot function independently is not decisive of whether they are apparatus or not and referred to examples of goods classified as apparatus that can manifestly not function separately, such as a telephone set, modems (modulators- demodulators), multiplexers, audio frequency amplifiers used as repeaters, DStv decoders, etc.

The appellant's argument loses sight of the fact that more than one apparatus, each performing a separate function, can be combined to function in a system which may, in itself be an apparatus with its own collective function. That is in essence the understanding upon which the respondent's determination is based. He was able to ascribe a specific function to each unit within the system. In that sense the determination does not fall foul the dictionary definition of the word "apparatus".

The fact that a separate component of a system cannot function independently, cannot be decisive of the issue of whether the component is an apparatus. A telephone set and a modem, for instance, are instruments or devices that cannot function on their own. Yet they are classified as "apparatus". That shows that the classification system is not based on the notion that an apparatus must be capable of functioning on its own.

Mr Dunn also relied on Section 4 of the explanatory notes. In my view it does not follow that because a combination can be classified as a unit that when its constituent

parts are presented separately they cannot be classified as apparatuses in their own right.

The appellant sought to rely on the fact that in the United States printed circuit assemblies are classified as parts. The contention is that the exchange unit of the Telephone system is clearly a printed circuit system and that the remote unit is also comprised of a printed circuit assembly. I agree with Mr Puckrin that such a classification cannot be considered to be authoratative in a South African Court. See **International Business Machines SA (Pty) LTD v Commission for Customs and Excise 1985/4) SA 852 A at 873 J-874 A.**

The appellant has changed its stance in respect of the repeater. Having originally contended that it was a part, it now accepts that it is an apparatus, albeit to be classified under a heading that does not attract duty. In my view the repeater is akin to the exchange unit and the remote unit and should be classified together with them. The appellant was unable to suggest any specific heading under which it can appropriately be classified.

It follows that the appeal must be dismissed.

The following order is made:

The appeal is dismissed with costs which costs are to include the costs attendant upon the employment of ^{two} the counsel.



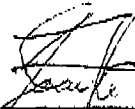
C. BOTHA
JUDGE OF THE HIGH COURT

I agree



F.G. PRELLER
JUDGE OF THE HIGH COURT

I agree



F.J. JOOSTE
ACTING JUDGE OF THE HIGH COURT