

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, PRETORIA

CASE NUMBER: 29658/09

DATE: 04/05/2011

REPORTABLE

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

.....

In the matter between:

AQUAZANIA (PTY) LIMITED

Applicant

and

THE COMMISSIONER SOUTH AFRICAN REVENUE SERVICES

Respondent

JUDGMENT

MOKGOATLHENG J

- (1) This application concerns the appropriate tariff classification in respect of hot and cold water dispensers for the purpose of determining the rate of customs duty payable in terms of ***The Customs and Excise Act 91 of 1964 (“the Act”)***, and also an appeal as contemplated by ***section 47(a)(e) of the Act***.

- (2) The applicant seeks:
 - (a) an order setting aside the respondent’s tariff determination of 10 April 2008 to the effect that water dispensers imported by the applicant must for duty purposes be classified under tariff heading *8516.10.90 of Part 1 of Schedule No. 1 to the Act*; and
 - (b) a declarator that the water dispensers must for duty purposes be classified under tariff heading *8418.69.90*, alternatively, *8479.89.90 of Part 1 of Schedule No. 1 to the Act*.

THE NATURE OF THE APPLICATION

- (3) The applicant is an importer of water dispensers which dispense cold and hot water. The water dispensers in issue were imported by the applicant in four models. The design of all four models is the same, save for the base being longer on floor standing models than on desktop models.

- (4) By application of the provisions of *Rule 3(c) of the General Rules for the Interpretation of the Harmonized System (“the GRI”)* the respondent on the 10 April 2008 determined the water dispensers to be “*electric.... storage water heaters*” classifiable under tariff heading *8516.10.90 of Part 1 of Schedule 1 to the Act*.
- (5) By virtue of this determination the importation of the water dispensers attracted a customs duty in the amount of R1 170 950.36. On 29 October 2008 the respondent demanded payment from the applicant of such amount as the consequential payment of customs duty and VAT.
- (6) The applicant disputes the correctness of the determination and contends that the water dispensers are “*refrigerating equipment*” classifiable under tariff heading *8418.69.90 of Part 1 of Schedule 1 to the Act*. In the alternative, and by the invocation of *Note 7 to Chapter 84*, the applicant contends for a classification under tariff heading *8479.89.90 of Part 1 of Schedule No.1 to the Act*, as “*machines and mechanical appliances having individual functions not specified or included elsewhere in Chapter 84*”. Consequently, the applicant argues, the importation of the water dispensers is customs duty free.

THE ISSUE

- (7) The issue for determination is whether tariff heading 8516.10.90 or tariff heading 8418.69.90, alternatively tariff heading 8479.89.90 is the appropriate tariff heading for the classification of the water dispensers.

THE LEGAL FRAMEWORK

- (8) *Section 47(8)(a) of the Act provides that the interpretation of any tariff heading or tariff subheading of Part 1 of Schedule No. 1 “shall be subject to International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonized System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time....”*

- (9) The principles applicable to the interpretation of the *Harmonized System* were definitively dealt with in the matter of ***Secretary for Customs and Excise v Thomas Barlow & Sons Limited 1970 (2) SA 660 (A)***, per Trollip JA at **675H-676B**;

“It is of importance, however, to determine at the outset the correct approach to adopt in interpreting the provisions of the Schedule and in applying the explanations in the Brussels Notes.

Note VIII to Schedule sets out the ‘Rules for the Interpretation of this Schedule’. Para. 1 says:

“The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification (as between headings) shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such heading or notes do not otherwise indicate, according to paras. (2) to (5) below.’

That, I think, renders the relevant headings and section and chapter notes not only the first but the paramount consideration in determining which classification, as between headings, should apply in any particular case. Indeed, right at the beginning of the Brussels Notes, with reference to a similarly worded paragraph in the Nomenclature, that is made abundantly clear. It is there said:

‘In the second provision, the expression ‘provided such headings or Notes do not otherwise require’ (that is the corresponding wording of the Nomenclature) is necessary to make it quite clear that the terms of the headings and any relative section or chapter notes are paramount, i.e., they are the first consideration in determining classification.’” (my underlining)

- (10) Trollip JA in considering the weight to be attached to the Explanatory Notes (or the Brussels Notes as he categorised them) at 676B-676F held as follows:

“It can be gathered from all the foregoing that the primary task in classifying particular goods is to ascertain the meaning of the relevant

headings and section and chapter notes, but, in performing that task, one should also use the Brussels Notes for guidance especially in difficult and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them. They are manifestly not designed for the latter purpose, for they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. And, in any event, it is hardly likely that the Brussels Council intended that its Explanatory Notes should override or contradict its own Nomenclature. Consequently. I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes. If an irreconcilable conflict between the two should arise, which in my view is not the case here, then possibly the meaning of the headings and notes should prevail, because, although sec. 47(8)(a) of the Act says that the interpretation of the Schedule 'shall be subject to' the Brussels Notes, the latter themselves say in effect that the headings and notes are paramount, that is, they must prevail. But it is not necessary to express a firm or final view on that aspect." (my underlining)

- (11) In ***International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise 1985 (4) 852 (A)*** the process of tariff classification was determined by Nicholas AJA to be the following at 863G-H:

*“Classification as between headings is a three-stage process: first interpretation – the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.” See **Secretary for Customs and Excise v Thomas Barlow and Sons Limited 1970 (2) SA 660 (A) at 676B-F.***

- (12) In ***The Heritage Collection (Pty) Ltd v Commissioner, South African Revenue Services 2002 (6) SA 15 (SCA) at 21C-D***; regarding the relevance of the components of a product and the weight attached thereto are concerned, it was held:

“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”.

THE NATURE AND CHARACTERISTICS OF GOODS

- (13) In determining which classification, as between headings, shall apply in any particular case, the test for classification is an objective one. The imported goods must be classified as they are at the time of importation.

The general rule is that goods are characterised by their objective characteristics, and not by the intention with which they were made

nor the use to which they may be put. *In Commissioner, South African Revenue Service v Baking Tin (Pty) Ltd 2007 (6) SA 545 (SCA) 548G-H [also reported at [2007] a All SA 1352 (SCA) – Ed]*, the Court held:

“...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.”

(14) However, there is an exception to the general rule that the nature, form, character and function of the article is objectively determined, where the wording of the relevant tariff items makes the purpose and intention relevant, as it was relied upon in *Secretary v Thomas Barlow and Sons Ltd (supra) at 677D per Trollip AJA (as he then was) and at 683A-B, 864G per Muller JA*.

(15) In *Commissioner, SARS v Komatsu Southern African (Pty) Ltd 2007 (2) SA 157 [SCA] at 160F-G and 161A* Theron (AJA) enunciated the principle as follows:

“It is clear from the authorities that decisive criterion for the customs classification of goods is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance. This is an internationally recognised principle of tariff

classification. The subjective intentions 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.”

THE APPLICABLE SECTION NOTES AND EXPLANATORY NOTES

(16) *Section Notes 3 to Section XVI provides as follows:*

“3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function. (my underlining)

4.

5. For the purposes of these Notes, the expression ‘machine’ means any machine, machinery, plant, equipment, apparatus or appliance sited in the headings of chapter 84 or 85.”; (my underlining)

(17) *The Explanatory Notes to Section Note 3 provide, among others, as follows:*

“In general, multi-function machines are classified according to the principal function of the machine.

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3(c)”; (my underlining)

(18) *The General Interpretative Rule 3(c) provides as follows:*

“(a) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.” (my underlining)

(19) *Section Note 7 to Chapter 84 provides as follows:*

“7. A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose.

Subject to Note 2 to this Chapter and Note 3 to Section XVI, a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, (sic) unless the context otherwise requires, to be classified in heading 84.79.”

- (20) The tariff headings 8418.69.90 and 8479.89.90 contended for by the applicant, both occur in *Chapter 84 of Section XVI*.

Tariff heading 84.18 and the relevant sub-headings thereto read as follows:

“84.18 Refrigerator, Freezers and Other Refrigerating or Freezing Equipment, Electric or Other; Heat Pumps (excluding air conditioning machines of heading 84.15

8418.6 - Other refrigerating or freezing equipment, heat pumps

8418.61 -- ...

8418.69 -- Other

841869.10 -- Suitable for household refrigerators or freezers

841869.90 -- Other”

The relevant Explanatory Notes to the tariff heading state the following:

“The refrigerators and refrigerating equipment of this heading are in the main machines or assemblies of apparatus for the production, in a continuous cycle of operations, of low temperatures (in the region of 0° or less) at the active cooling element, by the absorption of the latent heat evaporation of liquefied gases (e.g., ammonia, halogenated

hydrocarbons), of volatile liquids or, in the case of certain marine types, of water.

...

The refrigerators of this heading are of two main types:

(A) Compression Type Refrigerators

Their essential elements are:

- (1) The compressor which receives expanded gas from the evaporator and delivers it under pressure to*
- (2) The condenser or liquefier where the gas is cooled and liquefied, and*
- (3) The evaporator, the active cooling element, consisting of a tubular system in which the condensed refrigerant, released through an expansion valve, evaporates rapidly with the absorption of heat from the surrounding air or, in the case of large cooling installations, from brine or a solution of calcium chloride kept in circulation around the evaporator coils.*

Apparatus of the foregoing kinds are classified in this heading in the following forms:

- (1) ...*
- (2) ...Appliances incorporating a complete refrigerating unit or an evaporator of a refrigerating unit, whether or not equipped with ancillary devices such as agitators, mixers, moulds. These*

- (i) *No other heading covers it by reference to its method of functioning, description or type; and*
- (ii) *No other heading covers it by reference to its use or to the industry in which its is employed; or*
- (iii) *It could fall equally well into two (or more) other such headings (general purpose machines).*

For this purpose the following are to be regarded as having ‘individual functions’:

- (A) *Mechanical devices, with or without motors or other driving force, whose function can be performed distinctly from and independently of any other machine or appliance.”*

- (22) The tariff heading contended for by the respondent occurs in *Chapter 85 of Part 1 of Schedule No. 1 to the Act.*

Tariff heading 85.16 and the relevant sub-headings thereto provide for the following:

“85.16 Electric Instantaneous or Storage Water Heaters and Immersion Heaters, Electric Space Heating Apparatus and Soil Heating Apparatus; Electro-Thermic Hair-Dressing Apparatus (For example, Hair Dryers, Hair Curlers, Curling Tong Heaters) and Hand Dryers; Electric Smoothing Irons; Other Electro-Thermic Appliances of a Kind Used for

Domestic Purposes; Electric Heating Resistors

(Excluding those of Heading 85.45)

8516.10 -- Electric instantaneous or storage water heaters and immersion heaters;

8516.10.10 -- Immersion heaters identifiable for use solely or principally for heating industrial liquids.

8516.10.90 -- Other"

EXPERT EVIDENCE

- (23) The parties agree that the court should ignore the respective expert evidence and the disputes arising therefrom and are *ad idem* that the matter can be decided without reference thereto. I agree with this contention as the expert evidence is mutually destructive.
- (24) The respondent argues in effect that the water dispensers are "*storage water heaters*" and contends for a classification in tariff heading *8516.10.90*. The applicant on the other hand argues that the water dispensers are "*refrigerating equipment*" and contends for a tariff classification in heading of *8418.69.90*; in the alternative through the application of the explanatory notes the applicant contends that the water dispensers are "*appliances with individual functions*" classifiable under tariff heading *8479.89.90*.

- (25) The parties are *ad idem* that there is no other possible potential tariff classification heading the court needs concern itself with, as these are the three tariff headings the court will decide in which the water dispensers are to be classified under. I agree that these tariff headings are the only relevant classification the water dispensers can be classified under pursuant to the application of the classification principles.

THE APPLICANT'S SUBMISSIONS

- (26) At importation the applicant contends that water dispensers had the following objectively ascertainable characteristics:
- (a) the cold water storage tank is double the capacity of the hot water, it is *3,4 litres* as opposed to *1,6 litres*;
 - (b) the heating function can be disabled, the cooling function cannot;
 - (c) once the cooling function is plugged in and switched on, the machine cools;
 - (d) the hot water heating function can be switched on and off;
 - (e) the water dispenser is a cold water dispenser; and
 - (f) *71* of the *76* parts at a value of *65 US dollars* relate to the cooling function, as opposed to five components at five dollars aggregate that relate to the heating function.

- (27) Mr Stais on the applicant's behalf argues that on the respondent's version the court must find against the respondent because the respondent essentially makes three fallacious points:
- (a) Firstly, the water dispensers have two main functions, they heat and dispense hot water, they cool and dispense cold water;
 - (b) Secondly, because they perform two functions they are multifunction machines in terms of *Section Note 3*; and
 - (c) Thirdly, because neither of the two functions is their principal function, one applies the *General Interpretative Rule 3(c)* which provides that one has to classify the water dispensers under the heading which occurs last in numerical order among those which equally merit consideration, which is, tariff heading *8518*.
- (28) Mr Stais on applicant's behalf argues that the respondent's contentions are fallacious in that:
- (a) the heating and cooling equipment installed in the water dispensers:
 - (i) have two totally different functions ;
 - (ii) are two totally different types of equipment which perform two totally different functions depending on the criteria selected; and

(iii) the water used in both processes is derived from a common source.

- (29) Mr Stais submitted that, the respondent's contention that depending on the criteria selected, either component it can be argued, gives the water dispensers their principal function, but neither of the two functions can be said to be the principal function is untenable, if regard is had to the common cause nature and characteristics of the product as a whole because the common cause objective characteristics identify the water dispenser's principal function as a cold water dispenser.
- (30) The applicant contends that even if the respondent's approach is used regarding function, the water dispenser has two main functions. It is a multi-function machine in terms of *Section Note 3*, consequently, it is a *non sequitur* to argue having regard to the common cause objective characteristics that one cannot determine its principal function because it is common cause that the water dispenser has a dual purpose. The purpose is to dispense hot water and to dispense cold water.
- (31) Mr Stais submits that the components objectively viewed as a whole upon importation determine that it is the cooling function effect which is the principal function, consequently, that is the principal function which renders the water dispenser principally as a cold water

dispenser. Logically submitted Mr Stais, even on the respondent's version, having regard to the objective determinable characteristics, tariff heading 8418 is the appropriate tariff classification the water dispensers should fall under.

- (32) Mr Stais contends that the applicant incorrectly conflates function and purpose, as the Legislature uses these concepts contextually different in the different Section Notes, Chapter Notes and the Explanatory Notes. Secondly argues Mr Stais these concepts have different dictionary meanings. "*Function*" can be defined essentially as an "*action in a specific thing*" whereas "*purpose is the reason for the thing's existence*". Consequently, the water dispensers can have different functions in order to achieve a specific purpose. Consequently, the machine the principal purpose of which is not described in any heading, or for which no one purpose is the principal purpose, is unless the context otherwise requires, to be classified in heading tariff 84.79.

THE RESPONDENT'S SUBMISSIONS

- (33) The respondent contends that shorn of all adornment, the nature, characteristics and functioning of the water dispensers:

- (a) comprise two main components: a water cooler (*“refrigerating equipment”*) and a water heater (*“electric storage water heater”*) fitted together and incorporated in a common housing;
 - (b) the water cooler and water heater receive water supply from a single source – a replaceable water bottle;
 - (c) the function of the water cooler is to cool water, and of the water heater is to heat water;
 - (d) the water dispenser on demand, supplies hot water and cold water to users;
 - (e) are evidently designed and built to perform the stated two functions.
- (34) Mr Meyer on the respondent’s behalf argued that, evaluated as multi-function machines, the two machines both effectively fulfil their respective functions, the one dispenses hot water to those who want hot water, the other cold water to those who want cold water, consequently, whatever criteria may be selected, either component can be argued to be the component that gives the water dispenser its principal function
- (35) It is nonsensical to argue as the applicant did, that one looks at the components as a whole because this is a contradiction in terms submitted Mr Meyer. One is obliged to look at the product as a whole, not at its individual components. In support of this contention counsel

referred to *The Heritage Collection (Pty) Ltd Commission SARS 2002*

(6) SA 15 SCA at 21C-D. Applying the ratio extrapolated therein one has to consider the product as a whole. The attempt to break up the water dispenser into parts is simply untenable.

- (36) Mr Meyer argued that the basis on which the applicant attempts to invoke the provisions of *Chapter Note 7 to Chapter 84* is in terms of the provisions of the last paragraph of the *Explanatory Notes to Section Note 3*, consequently, the applicant's argument is founded on an erroneous appreciation of the status of Explanatory Notes, that is legally impermissible because:
- (a) firstly, an Explanatory Note cannot identify, create or introduce a category of machine. That is done by means of a Section or Chapter Note;
 - (b) composite and multi-function machines are created by *Note 3 to Section XVI*, multi-purpose machines are introduced by *Chapter Note 7 to Chapter 84*; and
 - (c) neither the *Section Notes to Section XVI* nor the *Chapter Notes to Chapter 85* provide for multi-purpose machines, consequently, these *Section and Chapter Notes* are accordingly limited to *Chapter 84*.
- (37) Mr Meyer argued that, the machines referred to in *Note 7* can only refer to machines classifiable in *Chapter 84*, consequently, it must

follow that in order for *Chapter Note 7* to find application, a machine, in addition to being classifiable in *Chapter 84*, must be capable of being used for more than one purpose.

- (38) Further Mr Meyer argued that, because *Chapter Note 7* provides that “a machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principle purpose were its sole purpose”. If regard is had to the foregoing, then it is clear that the last paragraph of

the Explanatory Notes to multi-function machines does not introduce any new category of machines, but is simply a note alerting the reader of its existence and, in particular, to the fact that when a machine classifiable in *Chapter 84* is used for more than one purpose, then the provisions of *Chapter Note 7* find application.

THE ANALYSIS OF THE EVIDENCE

- (39) The main dispute between the parties concerns the question whether the water dispensers are classifiable in *Chapter 84 or 85* because a multi purpose machine must by definition be introduced through a Section Note and not through an *Explanatory Note* as in the specific instance the machine may also be classifiable under *Chapter 85*.

(40) At the outset I must concede that I find Mr Meyer's argument and submissions more persuasive and masterfully reasoned and I align myself therewith. Lest I be accused of plagiarism I copiously repeat them verbatim. I agree with Mr Meyer that *"neither Explanatory Notes to Section XVI nor to Chapter 84 provide for multi purpose machines, because these Explanatory Notes are unique to Chapter 84 consequently, this presupposes that a machine has first to be classified under a heading in Chapter 84, failing which, the applicability of Explanatory Note 7 is had recourse to, to determine whether the water dispenser has multi functions and to determine its purpose"*.

(41) The applicant does not dispute that:

- (a) the cold water functionality of the water dispenser is a water cooler as contemplated in tariff heading 8418 (*"refrigerating equipment"*);
- (b) the hot water functionality of the water dispenser is a storage water heater as contemplated in tariff heading 8516 (*"electric storage water heater"*); and
- (c) the water dispensers clearly perform two functions.

(42) *Section Note 3* relates to machines and provides:

"3 Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions.

are to be classified as if consisting only of that component or as being that machine which performs the principal function.

(my underlining)

4. ...

Once these requirements are established, classification by the application of *Section Note 3* is imperative.

- (43) The test for compliance with the applicability of *Section Note 3* is:
- (i) whether the product performs two or more functions, and if so,
 - (ii) whether the functions are complementary or alternative; and if so;
 - (iii) whether the product was designed to function as such.
- (44) Considered as a whole, it is patent that the water dispensers were designed to perform two main functions;
- (a) they heat water and cool water, and on demand, dispense cold and hot water; and
 - (b) the water dispensers viewed as a whole, their nature and characteristics render them to be “*multi-function machines*” as contemplated by *Section Note 3 to Section XVI* read with the Explanatory Notes thereto.

- (45) It is uncontroverted that the water dispensers perform two different and distinct functions. The question is whether these two functions are complementary or alternative to each other, with the caveat that *Section No 3* contains no reference to purpose.
- (46) The water dispenser's two functions complement each other in the sense that a user has the option on demand to alternatively source either hot or cold water, consequently, the functions are individually distinctive rendering the machine to perform two complementary and alternative functions within the purview contemplated to *Note 3 to Section XVI*.
- (47) In considering of the nature and characteristics of the water dispenser as a whole neither of its two functions can be described as its principal function. The Explanatory Note to *Section Note 3* provides that when that is the position, the product needs to be classified by the application of *GRI 3(c)* i.e. under the heading which occurs last in numerical order. The contending tariff heading which occurs last in numerical order is tariff heading *8416.10.90*.
- (48) The applicant's contention that although the water dispensers perform two distinct functions, these different functions are not directed at achieving a single purpose, consequently, they cannot be considered to be multi-function machines as contemplated by *Section Note 3*.

- (49) The applicant's contention is logically considered incongruent and untenable having regard to the fact that there is no such requirement in the *Section No 3* or in the *Explanatory Notes* thereto. This fact as correctly argued by Mr Meyer is borne out by the provisions of *Note 7 to Chapter 84 read with Section Note 3*, because the water dispensers have two purposes (as contemplated by Note 7 to Chapter 84) namely to dispense hot water and cold water. The applicant's argument that the water dispensers accordingly have to be classified with reference to the purpose for which they were designed and not functions they perform namely to cool or to heat water, is legally impermissible.
- (50) In the matter of ***Commissioner for South African Revenue Services v The Baking Tin (Pty) Ltd 1993 (1) SA 545 p 548 at para 12 and 13*** the imprecise legal principle governing the classification of as expounded by the applicant is debunked.

*"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 the determinant of the appropriate classification for the purposes of the act. Thus the purpose for which they are manufactured is not a criterion to be taken into account in classification". See ***African Oxygen Ltd v Secretary for Customs and Exercise 1969 (3) SA 391 (T) at 394D-E at 397B-C.****

- (51) *Note 7 expressly states that when classifying multi-purpose machines, the application of Note 7 will be “(S)ubject to....Note 3 to Section XVI”. Section Note 3 only deals with multi-function (and composite) machines. I agree with Mr Meyer that this exigency clearly “illustrates that the Legislature foresaw that some machines could be both multi-functional and multi-purpose. Consequently, the Legislature introduced the mechanism to effect a classification when such a situation presented itself – function was to be used as the basis for classification”.*
- (52) Consequently, the applicant’s contention that the water dispensers are classifiable under tariff heading 8418.69.90 is founded on GRI 1 and, in particular, the fact that Explanatory Note (2) to tariff heading 84.18 specifically mentions “refrigerated water ... fountains” as one of the products classifiable under this heading is without merit. The reason being that the water dispensers in issue are not only “refrigerated”, but are both “refrigerated and hot water fountains” meaning they are two different products whose nature and characteristics envisage two totally different products.
- (53) The applicant’s second argument is based on the premise that the water dispensers are multi-purpose machines, their principal purpose is the dispensing of cold water, consequently, by application of GRI 1, are classifiable under tariff heading 8418.69.90. There is no merit in this argument.

(54) I agree with Mr Meyer that: *“Classification is based on the purpose for which a product is, or can be used, is introduced and governed by Note 7 to Chapter 84, that Note 7 however, only finds application once it has been determined that the product in issue can be used for more than one purpose”*.

(55) In my view the water dispensers are not multi-purpose machines as contemplated by Note 7:

Note 7, as correctly argued by Mr Meyer, provides for:” a machine used for more than one purpose. Read in context this clearly denotes a single piece of equipment that was not designed to fulfil more than one specific purpose but which, because of its inherent nature and characteristics, can, as such, be used for more than one purpose; and

- (b) *A water dispenser does not constitute one “tool” being used to achieve two purposes. It is one product comprising two distinct “tools” – the one a water cooler (“refrigerating equipment”), the other a water heater (“electric storage water heater”) – each designed and purposively incorporated to perform its unique function;*
- (c) *Even if the water dispensers were multi-purpose machines, Note 7 could not find application;*
- (i) *Chapter notes only apply to goods classifiable in that chapter;*

- (ii) *Note 7, being a chapter note, can only apply, and be invoked, if all the purposes are achieved by means of goods classifiable in Chapter 84;*
 - (iii) *The water heater, i.e. the component of the water dispensers that gives effect to the “purpose of dispensing hot water” is classifiable in Chapter 85 (under TH 8516.10.90); and*
 - (iv) *A classification by application of Note 7 to Chapter 84 is therefore not competent.*
 - (d) *Even if Note 7 found application, there is no basis for a classification under tariff heading 8418.69.90 because:*
 - (i) *In order to be classifiable under this heading (by application of GRI 1) the water dispensers would, “by reference to (their) nature and characteristicsas a whole”, would have to have the characteristic of “refrigerating equipment”;*
 - (ii) *As the water dispensers cool water and dispense it on demand, and heat water and dispense it on demand, there is simply no factual basis on which it can be contended that, adjudged as a whole, the water dispensers they are “refrigerating equipment”.*
- (56) In the alternative, the applicant argued that the water dispensers have a principle purpose, and are to be classified under tariff heading

8479.89.90 by the application of the proviso to *Note 7*. This contention does not avail the applicant, because:

- (a) The dispensers are not multi-purpose machines and, *Note 7* does not, and cannot, find application;
- (b) Even if *Note 7* could find application, a classification by application thereof would for the following reasons not be competent:
 - (i) It is common cause between the parties that the water dispensers perform two (distinct) functions;
 - (ii) The proviso to *Note 7* expressly makes a classification based on purpose subject to the provisions of *Note 3 to Section XVI*;
 - (iii) As *Section Note 3* only deals with multi-function machines it must axiomatically follow that if a multi-purpose product is also multi-functional, *Note 7* is trumped by *Note 3* consequently, the latter is to be applied in determining classification.

THE ORDER

- (57) In the premises, the application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsels.

Dated at Johannesburg on the 29th April 2011.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 27th July 2010

DATE OF JUDGMENT: 4th May 2011

ON BEHALF OF THE APPLICANT: P Stais SC and C McAsLin

INSTRUCTED BY: Werksmans Incorporating Jan S De Villiers

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