

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 2018/68900

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

18/03/2021

DATE

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SIGNATURE

In the matter between:

SAMSUNG ELECTRONICS SA (PTY) LTD

Applicant

and

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Respondent

JUDGMENT

MNGQIBISA-THUSI, J

- [1] The applicant, Samsung Electronics SA (Pty) Ltd, seeks an order, in terms of s 47(9)(e)¹ of the Customs and Excise² (“the Act”), setting aside the decision of the respondent, the Commissioner for the South African Revenue Service, made on 11 April 2018, to withdraw a tariff determination under tariff heading 8517.12.10 and its replacement by tariff determination under tariff heading 8517.62.90; and costs.
- [2] At the time of importation, the applicant had sort clearance of the product under TH 8517.12.10.
- [3] The applicant is a company duly registered in terms of the company laws of the Republic of South Africa. The applicant is an importer and distributor of multi-functional smart devices (cellular telephones) which include the Samsung Galaxy S7 model (“the product”) and other products. The respondent is the public officer vested, in terms of s 2(1) of the Act, with the administration of the Act, including the interpretation of schedules thereto.
- [4] In terms of the Act and the Schedules thereto import transactions are classified according to an appropriate tariff heading which informs the rate of duty payable on a particular commodity.
- [5] On 3 July 2017 the applicant applied for a tariff determination for its imported multi-functional devices, the Samsung Galaxy S7 (“the product”), under tariff heading 8517.62.90 or tariff heading 8517.69. The applicant’s attorneys having

¹ Section 47(9)(e) of the Act which makes provision for a person aggrieved by a determination made by the respondent to appeal to the High Court against such a determination.

² Act 91 of 1964.

received on 10 August 2017 a tariff determination under tariff heading 8517.62.90 for an Apple iPhone 6s on behalf of another client, submitted applications for refunds of the customs duty on previously imported goods. However, the respondent's officials declined the applicant's refund applications.

[6] As a result of the rejection of the applicant's refund applications, on 6 September 2017 a meeting between the applicant's representative(s) and the respondent's tariff- and refund sections was held. On 12 September 2017 the applicant submitted the product's technical specifications as requested by the respondent³.

[7] On 27 September 2017 the respondent informed the applicant that after consideration of the products' specifications, it has determined that the products were "... smart devices classifiable under tariff sub-heading 8517.62.90". On 27 September 2017 the applicant received a formal tariff determination under tariff heading 8517.62.90⁴.

[8] Despite earlier undertakings to process the applicant's refund applications and after several inquiries in this regard made by the applicant, on 20 November 2017 the respondent sent the applicant a notice of intention to withdraw the applicant's determinations with retrospective effect.

³ On 7 September 2017 the respondent requested the applicant to provide it with technical specifications for all products and indicated that should the technical specifications qualify under the determination of the products under TH8517.62.90, the applicant's refunds would be processed.

⁴ Tariff determination heading: "Machines for the reception, conversion and transmission or regeneration of voice, images or other data".

- [9] On 11 April 2018, the respondent withdrew the tariff determination made on 27 September 2017, with retrospective effect from 4 August 2017, and made a new determination in terms of which the product was classified under tariff heading 8517.12.10⁵. The effect of the withdrawal of the previous determination was to void any entitlement the applicant had with respect to previous imports and made it liable for duties in respect of the imported products.
- [10] The issue to be determined is whether the product should be classified under TH 8517.62.90 as contended for by the applicant or under TH 8517.12.90.
- [11] In terms of s 47(9)(a)(i)(aa) of the Act, the respondent is vested with the power to determine tariff headings and sub-headings under which imported goods shall be classified. S 47(9)(d)(i)(bb) of the Act enjoins the respondent to amend any determination or withdraw a right and make a new determination if it was made in error.
- [12] Section 47(8)(a) of the Act provides that in interpreting a tariff heading or sub-heading in Part 1 of Schedule 1, the general rules for the Interpretation of Schedule 1 and every section note and chapter note Part 1 of Schedule 1 shall be in line with the International Convention on the Harmonised Commodity Description and Coding System done in Brussels on 14 June 1983 and the explanatory notes to the Harmonised System issued by the Customs Co-

⁵ TH8517.12.10 is a classification for “telephones for cellular networks or for other wireless networks designed for use when carried in the hand or on the person”.

Operation Council, Brussels (the World Customs Organisation) from time to time.

- [13] In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*⁶ the court set out the legal principles to be applied in tariff classification and the manner in which they must be interpreted and applied as follows:

“Classification as between headings is a three-stage process: first, interpretation – the ascertainment of 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; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods”.

- [14] In *Commissioner, SARS v Komatsu Southern Africa (Pty) Ltd*⁷ this court stated that:

“[8] ... It is clear from the authorities that the 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 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”.

⁶ 1985 (4) SA 852 (A) 863G-H.

⁷ 2007 (2) SA 157 (SCA).

[15] In *CSARS v The Baking Tin (Pty) Ltd*⁸ the court was of the view that what was said by the court in *Komatsu* matter (above) with regard to the role in certain circumstances of the subjective intention of the maker of goods or the use the goods by the importer in determining the nature, characteristics and properties of goods, suggested that they ‘may affect what appears to be the objective characteristics of the goods and thus change their classification’.

[16] The product relevant to these proceedings fall under Part 1 of Schedule 1 of the Act under Tariff Heading 8517 titled:

“Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network) (excluding transmission or reception apparatus of heading 84.23, 85.25 or 85.28)”.

[17] Tariff Heading 8517 is further subdivided into two sub-headings relevant to these proceedings, namely, 8517.1 (Telephone sets, including telephones for cellular networks or other wireless networks) and 8517.6 (Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)).

[18] Tariff Heading 8517.12.10 under which the applicant’s goods are classified is headed ‘Designed for use when carried in the hand or on the person’, whereas the withdrawn tariff heading 8517.62.90 is headed ‘Other’.

⁸ 2007(6) SA 545 at para [13].

[19] Note 3 of section XV1 under tariff heading 85.17 which provides that:

“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”.

[20] However, if it is not possible to determine the principal function of the device, the General Interpretative Rule 3(c) applies which it provides that:

“(c) 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”.

[21] It is common cause that the product is a multi-functional device which can be used as a telephone; for automatic data processing; video call messaging; a camera; music player; internet connection etc.

[22] It is the applicant’s contention that the correct classification of the product for customs duty is TH 8517.62.90 rather than TH 8517.12 10 as contended for by the respondent.

[23] On behalf of the applicant it was submitted that the principal function of the product relates to the connection to the internet, social media, music and games and not the making of telephone calls and the appropriate classification would be under TH 8517.62.90. However, the applicant concedes that telephones for cellular networks do not only have the telephony function but can also perform images and data functions.

[24] It is the applicant's contention that in order to properly determine the correct classification for its product the primary step should be to describe the word 'telephone' in 'telephones for cellular network as envisaged under tariff heading 8517. In its founding affidavit the applicant sets out the meaning ascribed to the word by various sources. The common denominator in the meanings ascribed to the word 'telephone' by these sources is the reference to the phrase 'transmission of sound'.

[25] In support of this contention, the applicant relies on the report of Dr Jacques Van Wyk, an IT specialist, who submitted an affidavit in which he described the design features and the characteristics of the products. Dr Van Wyk further asserts that over and above the telephony function of the product, it uses fixed programmes ('apps') which are not available in a traditional cellphone; makes and receives calls through the GSM network or using either 3G or LTE or using Wi-Fi (WLAN) internet connection; makes video calls, messaging and pictures (SMS and MMS) and data communication (emails, skype, WhatsApp).

[26] Dr Van Wyk concludes that:

25.1 the best fitting description of the product is apparatus which allows for the connection to a wireless communication network for the transmission or reception of speech or other sounds, images or data;

25.2 voice transmission is not the principal function of the product; and

25.3 the product likely has, as its principal function, those relating to connection to the internet, social media, music and games, rather than that for making traditional voice calls.

[27] Further, the applicant relies on a number of market survey reports attached to Dr Van Wyk's affidavit which indicate that the principal function of smartphones like the Samsung S7, are mainly used not for telephony but for internet connection, social media, music and games and not for traditional voice calls and that therefore the appropriate classification of the product would be under TH8517.62.90.

[28] In the alternative, it was further submitted on behalf of the applicant that since its product could fall under either TH8517.6 or TH8517.1, the provisions of General Interpretative Rule 3(c) should be invoked. It is the applicant's contention that since tariff heading 8517.62 occurs after TH 8517.12, its product should be classified under TH 8517.62.90.

[29] On behalf of the respondent it was submitted that it is inexplicable why the applicant would choose to seek the meaning of the word 'telephone' in order to explain its position rather the meaning of 'telephones for cellular networks' as indicated in the tariff heading in light of the development in telephone technology. As correctly pointed out on behalf of the respondent, the technology for the telephones has tremendously developed over time. Therefore, in seeking to define the word 'telephone separately from the phrase 'cellular network', the applicant is attempting to define the principal function of the product out of context.

[30] It was further submitted on behalf of the respondent that tariff heading 8517.1 the subdivisions under the heading are divided by a semi-colon which divides the sub-divisions under the tariff heading into 8517.1 and 8517.6 (other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network). According to the respondent the use of the semi-colon is indicative of mutually exclusive division between telephones (Th8517.1) and other machines other than a telephone (TH8517.6). Further, that due to the mutually exclusive division between the two sub-divisions of 8517, there cannot be any overlapping between the two sub-divisions since a 'telephone' cannot be something other than a telephone.

[31] It was argued on behalf of the respondent that the use of the product using the wireless network to make WhatsApp call, Skype, etc. falls under operating as a telephone 'for other wireless networks under sub-heading 8517.12.

[32] With regard to the objective characteristics of the product, in paragraph 15.5 of its answering affidavit, the respondent surmises that the product is a telephone facility network because:

- "1. the design is such that they are small enough to be carried in the hand or on the person with a high resolution touchscreen of approximately 5 inches;
2. it has a speaker at one end which is audible when placed against the operator's ear and at the other end has a microphone to receive speech or voice from the operator's mouth;
3. it has slots for the insertion of sim cards to operate as telephones and communicate on a cellular network; and

4. it has electronic keypads and software which enable the user to dial a telephone number to initiate a telephone call and to terminate a telephone call.”

[33] Attached to the respondent’s answering affidavit are supporting affidavits of Mr Otis Tichatonga Nyandoro and Professor Ling Cheng.

[34] Mr Nyandoro, after setting out the typical functions of the product and contrasting it and other smartphones with laptops and desktops, concludes with regard to the product that is a ‘telephone for cellular network and not some other device other than a telephone’.

[35] In paragraph 32.10 of his supporting affidavit, Professor Cheng concludes by stating that:

“The Samsung Galaxy S7, like other smartphones, is manufactured such that it can be held in one hand to the side of the user’s face such that the device will have a speaker next to the ear and a microphone that will pick up speech from the user’s mouth to enable a user to hold a telephone conversation. The primary considerations of Samsung Galaxy S7 design are for cellular telecommunication and convenience as a phone handset. As such the Samsung Galaxy S7 is manufactured as a cellular network handset, which is designed to maintain a two-way communication with the base station of a cellular mobile communication system”.

[36] It is common cause that the product is a composite device which can be used, inter alia, as a telephone and can also perform functions of data processing, video calling messaging, a camera, and a music player.

[37] It is trite that in determining the classification of imported goods for purposes of customs duty, the decisive criterion for determining the appropriate tariff

heading the goods should fall in is the objective characteristics and properties of the goods as determined at the time of presentation for customs clearance. Furthermore, it is common cause that the intention of the manufacture or the use of the goods after importation is not determinative of their classification under the Act.

[38] As correctly pointed out by counsel for the respondent, I am also of the view that it would be inappropriate to try to give meaning to the word 'telephone', thereby disjoining it from the tariff heading telephones for cellular networks. We are not dealing with what is referred to as a traditional telephone which was the norm before the advent of smartphones.

[39] The applicant's assertion that the product is not a telephone for cellular networks but is a machine akin to a laptop or desktop is disingenuous, taking into account that the applicant has conceded that its product has telephony functions. That fact that the product has functions found in laptops and desktops does not detract from its principal function of being a telephone for cellular networks. Mr Nyandoro and Professor Cheng have clearly analysed the design, systems and functions of the product and have in my view correctly concluded that it is a telephone for cellular networks.

[40] Further, as shown by the respondent, the product has all the features which conform with the description of tariff heading 8517.12.90 in that it hand-handled and that its principal function is telephony. I am not convinced that the product is a machine other than a smartphone. Its usage through the internet does not change its nature and objective characteristics.

[41] I am of the view that the applicant appears to have premised its proposition that the product is not a telephone for cellular networks on the post-usage of the device and not on the criterion as set out in the *Komatsu* matter (above).

[42] I am further not convinced that the functions of the product straddle between tariff heading 8517.1 and tariff heading 8517.6 and that the provisions of General Interpretative Rule 3(c) should be applicable.

[43] Having read the documents filed and considered counsel's submissions, the following order is made:

'The application is dismissed with costs'.



NP MNGQIBISA-THUSI
Judge of the High Court

Date of hearing: 12 November 2019

Date of judgment: 18 March 2021

Appearances

For Applicant: Adv C E Puckrin SC and Adv J P Vorster SC (instructed by Cliffe Dekker Hofmeyr Attorneys)

For Respondent: Adv J Peter SC, assisted by Adv W Mothibe (instructed by the State Attorney)