



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No 218/10

In the matter between

**COMMISSIONER, SOUTH AFRICAN REVENUE
SERVICES**

Appellant

and

**MULTICHOICE AFRICA (PTY) LTD
UEC TECHNOLOGIES (PTY) LTD**

First Respondent
Second Respondent

Neutral citation: *Commissioner, SARS v MultiChoice Africa* (218/10) [2011]
ZASCA 41 (29 March 2011)

Coram: CLOETE, HEHER, SNYDERS, MAJIEDT JJA and PLASKET
AJA

Heard: 8 March 2011

Delivered: 29 March 2011

Summary: Revenue – customs and excise – classification of articles for customs duty – interpretation of statutes – ordinary meaning of enactment leading to repugnance – interpretation of enactment so as to give effect to the legislature's intention.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Seriti J sitting as court of first instance).

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and replaced with the following order:

'The appeal is dismissed with costs, including the costs of two counsel.'

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JUDGMENT

MAJIEDT JA (CLOETE, HEHER, SNYDERS JJA and PLASKET AJA concur):

Introduction

[1] The ubiquitous digital satellite decoder (the decoder) has become a common feature in the more affluent South African home. This appeal, which is with leave of this court, concerns the correct tariff classification of the model 720i decoder in terms of Schedule 1 to the Customs and Excise Act¹ (the Act). The court below (Seriti J, sitting as court of first instance in the North Gauteng High Court, Pretoria) in terms of s 47(9)(e) set aside the appellant's (the Commissioner's) determination in respect of the 720i decoder model, in terms whereof the Commissioner had classified it under Tariff Heading 8528.12.90 of Part 1 of Schedule 1 of the Act which attracts a 7 per cent *ad valorem*

¹ 91 of 1964.

excise duty.

[2] The first respondent (MultiChoice) is a subscription based satellite broadcaster and the second respondent (UEC) is a decoder manufacturer. MultiChoice's core business entails encrypted analogue broadcasts under the brand name M-Net and encrypted digital satellite broadcasts under the brand name DStv. This matter concerns only the latter. The decoder in question enables subscribers to receive satellite broadcasts from MultiChoice. The Commissioner's determination in relation to the 720i decoder involves UEC and in relation to the 988 model decoder, to which I will return later, involves MultiChoice.

[3] The factual difference between the parties that underlies their dispute stems from the nature of the decoder. The Commissioner contends that its primary nature is a television reception apparatus, despite other functions it may be able to perform. UEC on the other hand, regards it as a multi-functional apparatus of which not one function could be singled out as primary. The Commissioner classified the decoder on 10 March 2005 under Tariff Heading 8528.12.90 ('reception apparatus for television, whether or not incorporating radio broadcast receivers or sound recording or reproducing apparatus').

[4] In the court a quo UEC sought a tariff classification under Tariff Heading 8479.89.90 ('machines and mechanical appliances having individual functions, not specified or included elsewhere') alternatively under Tariff Heading 8543.89 ('electrical machines and apparatus having individual functions, not specified or included elsewhere'). Seriti J upheld the main argument and directed that the Commissioner reclassify the 720i decoder under Tariff Heading 8479.89.90.

The evidence

[5] Due to a perceived dispute of fact on the papers the parties agreed to

refer the matter for the hearing of oral evidence. Mr Constant Fourie, an electronic engineer employed by MultiChoice and Mr David Neil Siedle, an electronic engineer in the employ of a company affiliated to Naspers, MultiChoice's parent company, testified on behalf of the respondents. The evidence of a third witness for the respondents, Ms Amanda Armstrong, an attorney whose firm advised and represented MultiChoice, was admitted by agreement. The Commissioner led no evidence.

[6] Fourie testified in detail about the technical operations of MultiChoice, the process of broadcasting services to consumers via a satellite and the functioning of a decoder, with particular reference to the 720i model. Siedle testified about the role and functioning of the conditional access system in a decoder, which is his field of expertise. Prior to the hearing of oral evidence, the parties' respective experts met and recorded their agreements and disagreements on the issues in a schedule. In summary, according to the undisputed evidence MultiChoice broadcasts an encrypted signal from its broadcast centre in Randburg via the satellite dish to the decoder. A number of complex processes are performed inside the decoder which include re-encryption of the signal, demultiplexing of the subscriber's selected channel, decryption by the conditional access module through the decoder's smart card and decoding of the decrypted signal.

[7] It was not in dispute that the decoder has multiple functions, namely:

7.1 it receives satellite transmissions containing audio and/or visual and/or interactive data;

7.2 it decodes these satellite transmissions by descrambling the transmission (ie by granting conditional access to it)² and by converting the signal into pictures and/or sound;

7.3 it converts the audio and/or visual data into a format capable of being used by a television set or radio;

² Not all instances require descrambling of the transmission — there are free-to-air services available on the decoder for which no descrambling is necessary.

7.4 it transmits interactive services such as electronic games, weather, news and so forth; and

7.5 when connected by a modem to a telephone line, it serves as a messaging service similar to electronic mail on a personal computer.

The legal principles

[8] This court has, in a long line of cases, established the legal principles which apply to tariff classification. In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*,³ Nicholas AJA set out these principles 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 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, selection of the heading which is appropriate to such goods.'⁴

This is still the approach of this court⁵ and it was not in issue before us. For present purposes it bears emphasis that it is trite that the intention of the manufacturer or importer of goods and the use to which the goods are put are not relevant considerations for an appropriate tariff classification in terms of the Act. What is relevant is the nature, characteristics and properties of the goods and the subjective intention of the manufacturer or importer and use of the goods can only be of some relevance in establishing those aspects.⁶ I now turn to consider the appropriate tariff classification by following the process enunciated in *International Business Machines*.

³ *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A). See also *Secretary for Customs and Excise v Thomas Barlow and Sons Limited* 1970 (2) SA 660 (A) at 676B-F.

⁴ At 863G-H.

⁵ See *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* 2007 (6) SA 545 (SCA); [2007] 4 All SA 1352 (SCA); [2007] ZASCA 100 para 5; *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* 2007 (2) SA 157 (SCA); [2007] 4 All SA 1094 (SCA); [2006] ZASCA 156 para 8.

⁶ See *Komatsu* para 8; *The Baking Tin* para 12.

The headings, sub-headings and relevant section and chapter notes

[9] Tariff Heading 8528.12.90 reads as follows:

'Tariff Heading 85.28.12.90:

Heading	Sub-Heading	CD	Article Description
85.28			Reception Apparatus for Television, Whether or Not Incorporating Radio-broadcast Receivers or Sound or Video Recording or Reproducing Apparatus; Video Monitors and Video Projectors:
	8528.1		• <i>Refer to General Rebates of Customs Duties and Fuel-Levy</i> • <i>460.16 Temporary Rebates of Customs Duties</i> • <i>Refer to Ad Valorem Excise Duties from Page 691</i>
	8528.12		= Colour:
	.30	9	- 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	2	- Other

The relevant explanatory note reads:

'(4) **Receivers of satellite television broadcasts.** These apparatus, which do not include a display device (cathode-ray tube LCD, etc) are similar to video tuners in that they serve to receive amplified signals whose frequency has been lowered by a down converter, to select a single signal (channel) and to convert it to a signal suitable for display on a video monitor. They may incorporate a modulator capable of producing a standard television broadcast signal for outputting to the aerial connection of a television receiver. They may also incorporate a device for receiving remote signals to change the channel selection or to rotate the aerial and polarizer. These satellite receivers may also incorporate a modem for connection to the internet' (own underlining).

Note 3 to Section XVI is also relevant with regard to multifunctional machines with a principal function. It states:

'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' (own underlining).

[10] The Commissioner's contention in support of this tariff classification is that the decoder is dependent on receiving a satellite signal, the overwhelming majority of MultiChoice subscribers (99.9 per cent) use their decoders as a television reception apparatus and that the reception of a television signal is its principal function.

[11] UEC conceded that the decoder receives satellite television broadcasts; its case is that this is not the decoder's principal function. On the common cause facts therefore, the decoder slots comfortably into this tariff heading and explanatory note 4 above. The deciding factor will be whether, as a multifunctional device, the decoder can be said to have a principal function as envisaged in note 3 to Section XVI above. Before I deal with that, I consider briefly the two classifications propounded by UEC.

[12] As stated, the court below upheld UEC's principal contention for classification under Tariff Heading 8479.89.90. Classification under Tariff Heading 8543.89 was advanced by UEC in the court a quo as an alternative argument. The reason why UEC adopted the curious approach of contending in this court for a classification under the latter heading, while nonetheless defending the judgment and order of the court below, is simply this: the parties' experts agreed in item 12 of their schedule that since decoders do not have any moving parts (they are electronic devices), they cannot be considered to be mechanical devices. This agreed fact firmly and conclusively puts paid to any possible classification under Tariff Heading 84.79, which reads as follows:

'Tariff Heading 84.79:

Heading	Sub-Heading	CD	Article Description
84.79			Machines and Mechanical Appliances Having Individual Functions, Not Specified or Included Elsewhere in this Chapter:
	84769.89		= Other
	.30	0	- Vacuum cleaners of a value for duty purposes not Exceeding R650
	.31	9	- Other vacuum cleaners, electrical
	.33	5	- Floor polishers and scrubbers, electrical, non-Domestic
	.90	4	- Other

The explanatory notes to this heading state, inter alia, that 'this heading is restricted to machinery having individual functions' which 'is not covered more specifically by a heading in any other chapter of the nomenclature'. Fourie conceded that the decoder does not have an individual, stand alone function.⁷ UEC was consequently compelled to find refuge in a classification under Tariff Heading 85.43. No argument at all was advanced in its heads of argument on Tariff Heading 84.79 in defence of the judgment and order of the court below. In view of my conclusion below, a consideration of heading 85.43 is not strictly necessary, but I do so nonetheless for the sake of completeness. UEC contended that Tariff Heading 85.43 is the most appropriate heading that specifically covers multifunction machines. It contended further that a multifunction machine moves out of this tariff heading only if it has a principal function and that principal function is specifically described in another tariff heading. Plainly therefore, UEC's submissions are dependent on the question whether a decoder has a principal function or not.

⁷ In this regard Fourie concurred in the analogy drawn by counsel who was cross-examining him with the role of a fuel injection system in an internal combustion engine which does not perform an individual function.

[13] Tariff Heading 85.43 reads as follows:

'22.1

Heading	Sub-Heading	CD	Article Description
85.43			Electrical Machines and Apparatus, Having Individual Functions, not Specified or Included Elsewhere in this Chapter:
	8543.1		
	8543.11	8	- Particle accelerators;
	8543.19	9	= Ion implanters for doping semiconductor materials
	8543.20	6	= Other
	8543.30	0	- Signal generators
			- Machines and apparatus for electroplating, electrolysis or
	8543.40	5	electro-phoresis
	8543.81	4	- Electric fence energizers
			- Other machines and apparatus
			= Proximity cards and tags

Plainly this heading only relates to electrical apparatus which do not fall in any other heading of this chapter or which, according to the explanatory notes, are not covered specifically by the heading of any other chapter of the nomenclature. It should be evident from the above that Tariff Heading 85.28 is plainly such a heading. Tariff Heading 85.43 is applicable to machines and devices with individual functions which a decoder is not, as conceded by Fourie under cross-examination. Tariff Heading 85.43 is therefore also not the appropriate classification for the decoder.

[14] As stated, the nub of the enquiry as far as the second leg is concerned, is whether the decoder has a principal or primary function. UEC contends that it has multiple functions which complement each other. The Commissioner on the other hand contends that the principal function is the reception of a television signal, in which event it will be dutiable. In resolving this issue it is useful to have regard to the role and function of the conditional access

module inside the decoder, alluded to earlier. The primary purpose of the conditional access module is to provide an auditable means of ensuring that a user pays for the consumption of broadcasting programme rights. Its purpose is to ensure that a subscriber only receives access to the particular services subscribed to and that access is only granted if a subscriber's payments are up to date and lastly that subscribers do not get access to services governed or restricted by certain governments or in terms of certain broadcasting rights.⁸

[15] The court below erred in finding that the decoder does not have a principal function. Its finding is based mainly on Fourie's evidence. But Fourie made a number of important concessions in this regard, over and above the fact that the decoder does not perform an individual stand alone function, alluded to above. These are the concessions:

15.1 One of the decoder's functions is to operate as a television reception apparatus;

15.2 The transport stream transmitted from MultiChoice to the user contains both television and audio services;

15.3 According to Fourie a decoder has to be able to receive television services and be able to apply conditional access, neither of which is its primary function. But he was driven to concede that descrambling, performed by the conditional access system, was not a prerequisite since free-to-air services were beamed without having to be descrambled;

15.4 He applied different criteria to determine whether television reception is its primary function as opposed to conditional access and he readily conceded this inconsistency when it was pointed out to him;

15.5 The death knell for the respondents' case is in my view Fourie's evidence under cross-examination that 'for MultiChoice purposes . . . you need to have conditional access as well, you cannot only have television reception'. This emphasizes MultiChoice's intention with and purpose of the

⁸ MultiChoice broadcasts to various Southern African countries and the satellite broadcasts extend over a number of such countries located close to each other.

decoder, which, as stated, is an irrelevant consideration in law;

15.6 It was also conceded that decoding cannot be the decoder's principal function, because it cannot operate without the reception apparatus part of the decoder; and

15.7 He conceded further that if the conditional access function were to be disabled one would still be able to use the reception part of the decoder, but if the latter were to be removed, the decoder would be useless.

[16] It was contended on MultiChoice's behalf that the conditional access system is as important in the decoder as the receiving of a signal, because it ensures compliance with MultiChoice's licensing conditions. The contention is misconceived — as stated, the enquiry must be directed primarily at the decoder's nature and characteristics, not its intended purpose or use. It is of considerable significance that, on the common cause facts, the overwhelming majority of MultiChoice subscribers receive a television signal, ie they use their decoders as a television reception apparatus. To conclude: the decoder plainly has a principal function which is the reception of a television signal.

The payment of excise duty

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[17] The finding that the decoder was correctly classified by the Commissioner under Tariff Heading 8528.12.90 raises the next question, namely whether it is subject to payment of *ad valorem* duty in terms of the provisions of Item 124.75 of Part 2B of Schedule 1 to the Act. Ordinarily, no duty is payable on goods under Part 1 of Schedule 1 to the Act, under which the three tariff headings under discussion appear. But the Commissioner has levied *ad valorem* excise duty on locally manufactured decoders by virtue of Item 124.75. This tariff item was amended on 22 February 2001 in terms of s 48 of the Act to provide with effect from 1 July 2001 for duty at a rate of 7% on the following goods:

'Reproducing apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors.'

Counsel for UEC argued that the one thing that the decoder is not, is a 'reproducing apparatus for television', which is plainly correct. Counsel went on to illustrate why the tariff item makes perfect grammatical sense and why there is no need to give any word a different meaning than its ordinary grammatical meaning.

[18] UEC contends that the Item is framed in unambiguous terms and effect should be given thereto. Reliance was placed on the *contra fiscum* rule and on a passage in *Johannesburg City Council v Norven Investments (Pty) Ltd*⁹ and the following dictum by Lord Blackburn in *Coltness Iron Co v Black*:¹⁰

'... [n]o tax can be imposed on the subject without words in the Act of Parliament clearly showing an intention to lay a burden on him.'¹¹

The Commissioner contends that the word 'reproducing' is a patent mistake on the part of the legislature and that it should read 'reception'.

[19] The conundrum is that this wording of Item 124.75 is completely at variance with the structure of the enactment, particularly with Tariff Heading 85.28 which uses the word 'reception' instead of 'reproducing'. There are compelling reasons to uphold the Commissioner's contention that the word 'reproducing' is the result of a patent error by the legislature. First, the Item as it stands would plainly be repugnant to the entire structure of the enactment and to the legislature's intention. It is common cause that the decoder is not a 'reproducing apparatus for television'. Each and every item heading repeats the Tariff Heading word for word, except 124.75 which replaces the word 'reception' with 'reproducing'. In *Venter v R*¹² Innes CJ held that a court may depart from the ordinary meaning of the plain words of a statute where to give effect thereto 'would lead to absurdity so glaring that it could never have been contemplated by the legislature'.¹³ In a separate, concurring judgment Solomon J held that departure from the ordinary meaning of plain words in a

9 *Johannesburg City Council v Norven Investments (Pty) Ltd* 1993 (1) SA 627 (A) at 638A-C.

10 *Coltness Iron Co v Black* 1881 (6) App Cas 315.

11 At 330.

12 *Venter v R* 1907 TS 910.

13 At 915.

statute is warranted if the result of a literal interpretation would be 'something which is repugnant to the intention of the legislature'.¹⁴ The *contra fiscum* rule only finds application where there is some doubt as to the true meaning of an ambiguous enactment.¹⁵ Here the repugnance is overwhelmingly evident when the entire structure of the enactment is examined. It is permissible for a court to interpret an enactment which is repugnant to the intention of the legislature so as to give effect to that intention and to make it compatible with other provisions.¹⁶ This applies equally to the Act.¹⁷

[20] Second, a tariff item such as 124.75 is always defined with reference to a specific tariff heading. It co-exists with that heading and does not differ or extend beyond the ambit of that heading. Cronje, *Customs and Excise Service*¹⁸ explains this as follows: 'the classification of goods under headings or sub-headings of Part 1 of Schedule 1 quoted in the said items . . . primarily determines whether goods are classifiable under the item concerned'. Item 124.75 is listed with its tariff heading being 85.28 and sub-heading 85.28.00. If, as the respondents contend, the legislature intended to impose duties on only a part of Tariff Heading 85.28, namely on television sets, one would expect the legislature to have specified accordingly by inserting for example sub-headings 85.28.12 (colour televisions) or 85.28.13 (black and white or other monochrome televisions). Item 124.75, correlated to

14 At 921.

15 *Johannesburg City Council v Norven Investments (Pty) Ltd* supra at 638B-C and cases cited there.

16 *Hanekom v Builders Market Klerksdorp (Pty) Ltd & others* 2007 (3) SA 95 (SCA); [2006] ZASCA 2 paras 7-9.

17 *Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd & another* 2007 (6) SA 117 (SCA); [2007] ZASCA 59 para 6 and footnote 2.

18 At 5-41.

Tariff Heading 85.28 and sub-heading 85.28.00, fortifies the conclusion that the word 'reproducing' in that item is a patent mistake and should read 'reception', in harmony with the rest of the enactment. This finding obviates the necessity to consider the alternative argument advanced by the Commissioner, namely to have regard to the Afrikaans text of Item 124.75 and the countervailing argument that it would be impermissible to do so, in view of the provisions of s 82 of the Constitution.

[21] I turn lastly to MultiChoice's position in relation to the model 988 decoder.

The Commissioner issued a determination in respect of the model 988 decoder to MultiChoice on 2 April 2002. MultiChoice prosecuted its appeal in February 2006 well out of time and it had to obtain condonation from the court for this non-compliance. MultiChoice argued that there was no need to seek condonation and that s47(9)(d)(i)(bb) of the Act entitles MultiChoice to an order directing the Commissioner to reclassify the 988 decoder in accordance with the reclassification of the 720i decoder, because they are similar. This issue need not be decided, given the outcome of this appeal.

Conclusion

[22] The appeal must therefore be upheld with costs and the Commissioner's original determination must stand.

[23] The following order is issued:

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and replaced with the following order:

'The appeal is dismissed with costs, including the costs of two counsel.'

S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

Counsel for Appellant	:	C E PUCKRIN SC I ENSLIN
Instructed by	:	The State Attorney, Pretoria
Counsel for Respondent	:	A P JOUBERT SC C J McASLIN
Instructed by	:	DLA Cliffe Dekker Hofmeyr Inc, Sandton Webbers, Bloemfontein