IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 67269/15

20/4/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

19/4/2017 ....
DATE SIGNATURE

In the matter between:

MUSTEK LIMITED	**APPLICANT**
and	
SOUTH AFRICAN REVENUE SERVICES	**RESPONDENT**

JUDGMENT

RANCHOD J:

Introduction

[1] This is an appeal in terms of the provisions of s49(9)(e) of the Customs and Excise Act 91 of 1964 (the Act) against a tariff determination by the respondent in respect of a certain product the appellant intended[1] to import.

[1] The respondent referred to the product as being 'intended' for importation in the tariff determination but the parties argued the matter as if the product had already been imported. I will deal with the matter on the latter basis.

[2] It is an appeal in the wide sense and was heard as an application *de novo*. The parties are referred to as the applicant and respondent respectively.

[3] The applicant imports what is referred to as a 'bare bone base model' manufacturing module (the H2159) for an all-in-one (AIO) computer[2]. It contends that the H2159 is for purposes of customs tariff classification, a *part* of an automatic data processing machine as contemplated in tariff subheading 8473.30 of Schedule 1 of the Act. The respondent classified the H2159 in tariff subheading 8528.51.90 as being a *monitor* of a kind solely or principally used in an automatic data processing system of heading 84.71.

<u>Background</u>

[4] Mr David Kan, the CEO of the applicant, sketched the background of the concept of an AIO computer of which he says he was the originator. He says the concept was born from the desire to have a system that integrated all the main computing components into the display casing in order to make the PC (personal computer) compact, thus eliminating most of the external cabling and allowing a smaller footprint. The idea was to provide for individual customer needs by varying the specifications of the CPU, graphic cards and hard drives. This would be achieved by supplying a base product which could be assembled into an AIO computer. The base product is generally known as a 'bare bone base'. The H2159, says Kan, was manufactured with the sole intent that it would be a bare bone base to be populated after importation to become a tailor made AIO computer. He says the 'bare bones product' has a generally accepted meaning in the South African and the international computer manufacturing industry and it is considered to be either a partially assembled computer or a part of a computer.

[2] The computer is referred to as an 'automatic data processing machine' in the parlance of the relevant legislation.

[5] The applicant consulted the South African Bureau of Standards (the SABS) which agreed with the applicant's view, as did VIEWG, the manufacturer of the H2159, and the experts of the applicant.

The Issue

[6] The issue to be decided is whether the product was correctly classified by the respondent as a monitor or whether it should have been classified as a part of a computer.

The classification process

[7] Section 47(1) of the Act provides that duty on imported goods shall be paid at the time of the entry for home consumption on such goods in terms of the provisions of Schedule 1 to the Act.

[8] Section 47(8) (a) of the Act provides as follows:

> '(a) The interpretation of—
>
> (i) any tariff heading or tariff subheading in Part 1 of Schedule No. 1;
>
> (ii) ...;
>
> (iii) the general rules for the interpretation of Schedule No. 1; and
>
> (iv) every section note and chapter note in Part 1 of Schedule No. 1;
>
> shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time: Provided that where the application of any part of such Notes or any addendum thereto or any explanation thereof is optional the application of such part, addendum or explanation shall be in the discretion of the Commissioner.'

[9] Contained in the general notes to Schedule 1 are the General Rules of Interpretation (the GRI) of Schedule 1 as they apply internationally to all signatories to the Harmonised System.

[10] It was explained in *Durban North Turf (Pty) Ltd v CSARS*[3] that:

> '15. The Harmonized System means the nomenclature comprising the headings and subheadings and their related numerical codes, section, chapter and subheading notes and the general rules for the interpretation of the Harmonized System.
>
> 16. The Harmonized System determines the classification of goods. However, it does not determine what customs duty is payable on the importation of such goods into a contracting party. Such customs duty is fixed by the individual contracting parties concerned. The Harmonized System has only been devised to bring about uniformity in the classification of goods by contracting parties.'

[11] The General Rules of Interpretation apply sequentially. Rule 1 provides that the wording and terms of the headings, and any relevant Section or Chapter Notes are paramount, i.e. the first consideration in the classification process. The other Rules are only applied if a classification cannot be resolved by the application of Rule 1 and the headings and Notes do not require otherwise[4]. Rules 1, 2 and 3 provide as follows:

> '(1) The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.
>
> EXPLANATORY NOTE

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[3] 2011(2) SA 347 KZP 350 paras 15 and 16.
[4] GRI1, Explanatory Note (V)(a).

...

(2)(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

EXPLANATORY NOTE

...

(3) When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(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.

EXPLANATORY NOTE

...

[12] Part 1 of Schedule 1, including the notes thereto and the tariff headings and sub-headings should be interpreted according to the natural and ordinary sense of the language used therein, unless the context or the subject clearly shows that they were used in a different sense[5] and effect must be given to every word[6]. Words which are not technical or specialised bear their ordinary meaning[7].

[13] The classification process was described as follows in *International Business Machines SA (Pty) Ltd v Commissioner for Customs & Excise*[8] where Nicolas AJA (as he then was) said that:

"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

[5] See Steyn Die Uitleg van Wette 5 ed at 2 para 2: National Screenprint (Pty) Ltd v Minister of Finance 1978(3) SA 501 (CPD) at 506H.
[6] See Durban North Turf Club *supra* at para 19.
[7] See SA Historical Mint (Pty) Ltd v Minister of Finance and Another 1997(2) SA 862 CPD.
[8] 1985(4) SA 852 (A) at 863F-H.

and characteristics of those goods; and third, the selection of the heading which is the most appropriate to such goods.'

[14] In determining the nature, characteristics and properties of the goods, the goods are classified with reference to the nature and characteristics of the goods as a whole[9].

[15] The general rule is that goods are designated by their objective characteristics, and not by the intention with which they were made, nor the use to which they may be put[10]. There is, however, an exception to this general rule namely where the wording of the relevant tariff heading or notes makes the purpose and intent relevant[11].

[16] Section 47(8)(a) of the Act makes the interpretation process also subject to the Explanatory Notes. These notes are not peremptory injunctions. All that s47(8)(a) requires is that the interpretation of the relative headings and section and chapter notes shall be in conformity with, and not contrary to, the Brussels notes[12].

Nature and Characteristics of the H2159

[17] It appears that the nature and characteristics of the H2159 as presented at importation are largely common cause. The respondent seems to rely primarily on the opinion of a Mr Jacques Van Wyk (Van Wyk) who says in his supporting affidavit to the answering affidavit that he is a qualified electronic engineer employed as a senior lecturer at the University of Pretoria

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[9] See The Heritage Collection (Pty) Ltd v Commissioner, South African Revenue Service 2002 (6) SA 15 SCA at 21C-D.

[10] See Commissioner, South African Revenue Service v the Baking Tin (Pty) Ltd 2007(6) SA 545 SCA at 548G-H; Durban North Turf Club *supra* at para 36.

[11] See Secretary for Customs and Excise v Thomas Barlow and Sons Ltd 1970(2) SA 660 A at 677D-H per Trollip JA (as he then was) and at 683A-684B per Miller AJA; Commissioner, South African Revenue Service v Komatsu SA (Pty) Ltd 2007(2) SA 157 SCA at 160F-161A.

[12] International Business Machines SA (Pty) Ltd v Commissioner for Custom and Excise 1985(4) SA 852 A at 864B-D.

in the Department of Electrical, Electronic and Computer Engineering and he is also registered with the Engineering Council of South Africa. Van Wyk's brief was to give his opinion on the nature and characteristics of the H2159.

[18] The parties agree or it is not disputed that:

18.1 it was manufactured with the sole intent to import a bare bone base to be assembled locally to create an AIO computer;

18.2 it has all the slots, wiring and peripherals to become an AIO computer but is not a computer;

18.3 the slots to accommodate the central processing unit ("CPU"), motherboard and memory are already prepared in the bare bone base but these components are not present at the time of importation;

18.4 inserting the CPU, motherboard and memory to transform the base into an AIO computer is relatively simple;

18.5 the names of the components to be inserted are etched into the bare bones base to indicate the installation position of the different components;

18.6 the end-user will determine the capacity, speed and other specifications that are required and select the CPU, motherboard and other components accordingly to complete the AIO specification the user personally requires;

18.7 it is manufactured by ViewG, a company based in China;

18.8 it is a sophisticated housing to build a "made to order AIO" and is an assembly module specifically designed to accommodate an ATX motherboard;

18.9 the entire bare bones base is designed to connect to an ATX motherboard which in turns contains a CPU and memory to make the product a computer and is a precisely designed base which is to be assembled in accordance with ATX motherboard specifications;

18.10 at least 130 components are used to manufacture the bare bones base;

18.11 it is a computer housing structure;

18.12 without having at least the motherboard and the CPU installed the base does not switch on, even if it is connected to a power source[13];

18.13 it is not a standalone monitor and has not been designed as such[14];

18.14 it is built to strict guidelines dictated by standards of the computer industry;

18.15 all the cabling and connectors (visible on removing the back plate) are specifically measured and incorporated to connect directly to the motherboard;

18.16 the product is an assembly module for an AIO computer and as such the objective of the product is to facilitate the assembly of an AIO computer and has very little to do with monitors except for the fact that in this case the monitor is just another component of a computer sub-assembly, similar to components (units) such as the camera, microphones or the speakers in that assembly[15];

18.17 the connecting cable, connectors and slots for the motherboard, hard drive and other components would be redundant and serve no purpose and would not be necessary if the product was a monitor[16];

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[13] See page 119 annexure DK 15 to the FA – letter from ViewG last and penultimate paragraphs on that page and page 282 paragraphs 6.4 and 6.5 affidavit of Van Wyk.
[14] See page 284 par 7.1 and page 286 par 8.1 affidavit of Van Wyk.
[15] See page 151 par 18 of Tserpes and page 289 par 17 where Van Wyk agrees with it.
[16] See page 152 par 20 of Tserpes and page 289 par 17 of Van Wyk where he agrees with it.

18.18 the power supply unit ("PSU") is one used in computers and not in monitors and there is place for a heat sink fan, which would not be needed in monitor[17];

18.19 the PSU only becomes functional once connected to the motherboard and in turn the CPU has the "toggle" switch which sends the on/off signal to the PSU, which is located on the CPU. This is a distinctive feature of a computer product and not associated with a monitor[18];

18.20 the heat sink fan would not be needed in a monitor of this size but due to the future operation as a computer substantially more heat would be generated resulting in the need for such a fan. A monitor would require far less power[19];

18.21 the principal connectors and media reader are present and integrated in the H2159 at the time of importation and are designed to connect to the motherboard confirming the base was designed to interconnect all the components to function as a AIO computer after final assembly[20];

18.22 the red cables, called serial ATA, are present in the H2159 on importation and these connect the hard drive to the motherboard. The space for the hard drive is specifically designed on the chassis as imported to the extent that the exact point where the hard drive must be screwed in is indicated and catered for. These specifications are in accordance with computer industry standards[21];

18.23 the ports are internal and not external as they would be for a monitor due to the fact that the screen is designed specifically to work with a computer[22];

[17] See page 153 par 22 of Tserpes and page 290 par 18 of Van Wyk.
[18] See page 153 par 23 of Tserpes admitted by Van Wyk, page 290 par 19.
[19] See page 154 par 24 of Tserpes admitted by Van Wyk page 290 par 19.
[20] See page 155 paragraphs 26 and 27 of Tserpes admitted by Van Wyk page 290 par 19.
[21] See page 155 paragraphs 28 and 29 of Tserpes admitted byVan Wyk page 290 par 19.
[22] See page 156 par 31 Tserpes not denied by Van Wyk page 290 par 20.

18.24 the screen is totally dependant on the computer to power on and off and is a standard feature in AIO computers and an echo cancelling microphone is incorporated in the base, which is also a feature of an AIO computer[23];

18.25 as imported the bare bones base is not functional or adjudged as a single sub-component[24];

18.26 the base is by design a part of computer sub-assembly which is built to specific standards laid down by the computer industry[25];

18.27 to import the base in order to build a monitor would be economically unviable as the additional features are superfluous and are not features to be found on a monitor base but features to be found on a base to build and AIO computer[26];

18.28 the use of the H2159 is to allow the building of an AIO computer to suit the end user[27];

18.29 when the back plate is removed, it is clear that the H2159 is a computer case as it is designed to enclose a motherboard[28];

18.30 proof that the base is a sub-assembly, designed specifically as a platform, is found in the design of the product and the technical aspects of the components that would not be present if this was merely a base to build a monitor[29];

18.31 the H2159 is specifically designed to accommodate a motherboard. Without the motherboard the device is unusable[30];

18.32 the H2159 contains a display driver circuit which is not capable of functioning without the power supply being on and requires a visual data signal to be delivered to the circuit board[31];

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[23] See fn 23 above.
[24] See page 157 par 34 of Tserpes and page 291 par 22.2 of Van Wyk.
[25] See page 158 par 35.1 of Tserpes admitted by Van Wyk page 291 par 23.
[26] See page 158 par 35.2 of Tserpes admitted by Van Wyk page 291 par 23.
[27] See page 158 par 35.3 of Tserpes admitted by Van Wyk page 291 par 23.
[28] See page 172 par 3 of Cox Report uncontested by SARS.
[29] See page 173 par 4 of Cox Report uncontested by SARS.
[30] See fn 30 above.

18.33 the H2159 has a support stand which is also made to support much more weight than a computer monitor, suggesting that the casing is a bare bone computer casing[32];

18.34 using the device as presented on importation as a monitor is "impossible for the average Joe"[33] as demonstrated by the fact that Van Wyk needed to use his specialised knowledge to manipulate the device with a paper clip.

Discussion

[19] As I said, the respondent contends that the H2159 is a complete functional monitor (and not a part of a still to be assembled computer).

[20] Mr Van Wyk firstly confirmed that the essential components of a computer are a Power Supply Unit (PSU), motherboard, a Central Processing Unit (CPU), main memory (RAM), secondary storage (i.e. a hard drive and DVD drive) and input and output ports/devices (such as a monitor/screen/display, keyboard and mouse).

[21] In relation to a stand-alone monitor Van Wyk says it generally comprises of a display panel; a display panel interface board (the A/D board, inverter board; and/or control board as used by the manufacturer); interface buttons; interface connectors; a PSU and a power on/off switch.

[22] Mr van Wyk says the display panel, control board, inverter board and PSU are connected and configured to constitute a complete monitor, and therefore it is a 'unit' as provided for in Legal Note 5(C) to Chapter 84. Further, that the monitor component of the product gives it its essential character and the fact that they will be eventually connected to each other is

[31] See page 175 par 6.5 of Cox Report uncontested by SARS.
[32] See page 177 par 7 of Cox Report uncontested by SARS.
[33] See page 178 par 9 of Cox Report uncontested by SARS.

irrelevant as they remain two distinct components or units of a data processing system.

[23] The relevant portions of Note 5 to Chapter 84 read:

'(A) ...

(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units.

(C) Subject to paragraphs (D) and (E) below, a unit is to be regarded as being part of an automatic data processing system if it meets all of the following conditions:

(i) It is of a kind solely or principally used in an automatic data processing system;

(ii) It is connectable to the central processing unit either directly or through one or more other units; and

(iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

Separately presented units of an automatic data processing machine are to be classified in heading 84.71.

However, keyboards, X-Y co-ordinate input devices and disk storage units which satisfy the conditions of paragraphs (C) (ii) and (C) (iii) above, are in all cases to be classified as units of heading 84.71.

(D) Heading 84.71 does not cover the following when presented separately, even if they meet all of the conditions set forth in Note 5 (C) above:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) Monitors and projectors, not incorporating television reception apparatus.

(E) Machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function other than data processing are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.'

[24] The Explanatory Note to TH84.71 provides:

'21.1 ports and accessories of the machines listed in TH84.71 are classified in TH84.73;

21.2 that a complete data processing system must at least comprise of a CPU, an input unit and an output unit;

21.3 that an apparatus can only be classified as a unit of an automatic data processing system if it:

21.3.1 performs a data processing function and meets the following criteria set out in Note 5(C) of the Chapter, namely:

21.3.1.1 It is of a kind solely or principally used in an automatic data processing system;

21.3.1.2 It is connectable to the central processing unit either directly or through one or more other units; and

21.3.1.3 It is able to accept or deliver data in a form (codes or signals) which can be used by the system;

21.4 It is not excluded by the provisions of Notes 5 (D) and (E) to Chapter 84.'

[25] The applicant says – and it has not been disputed by the respondent – that the Subheading Notes and Additional Notes to Chapter 84 do not find application.

[26] Explanatory Note to TH84.73 cover parts and accessories suitable for use *solely or principally* with the machines of headings 84.69 to 84.72.

[27] The applicant relies on the views of Mr Kan, the deponent to the founding affidavit; Mr Stephen Cox (computer and electronic engineer employed at the University of Pretoria); Mr Dimitri Tserpes (the CTO[34] of the applicant), a report compiled by the South African Bureau of Standards (the SABS) and VIEWG, the manufacturer of the H2159.

[28] Mr Kan holds a BSc in Mechanical Engineering and is the founder of the applicant company. He says he has been in the information technology (IT) and computer manufacturing business since 1987. He considers himself an expert in the field of computer manufacture and assembly. However, to avoid allegations of bias he obtained the views of an independent expert although he does express his own opinion regarding the nature of the product, i.e. the H2159.

[34] I am informed that 'CTO' stands for 'Chief Technical Officer'.

[29] The SABS report (made after a complete disassembling of the product) includes the following statement:

> '..., according to the original documentation and physical hardware supplied to the SABS, the H2159 BASE is in fact just a bare platform for the H2159 computer stated above, and is not capable of functioning as a stand-alone monitor'.

The SABS had demonstrated both the product as imported and the final AIO computer after assembly to representatives of the respondent[35].

[30] It is further stated in the SABS report that:

> '51.3 Power was supplied to the PSU with no effect, which, *inter alia*, confirms that product is not and cannot be used as a stand-alone monitor;
>
> 51.4 Even when power was supplied to the PSU the unit did not power up, thereby confirming that the PSU that is installed is a switching power supply typically used for computer power applications;
>
> 51.5 This PSU will not switch on if the computer motherboard is not present to provide the relevant POWER ON signal;
>
> 51.6 The LCD [liquid crystal display] driver board cannot be switched on separately as it is electrically wired to work from the PSU in the base;
>
> 51.7 A CPU motherboard and memory are needed to complete the minimum hardware requirements for the product to function on a computer.'

[31] Mr Tserpes has been employed by the applicant since February 1995. His responsibilities include, *inter alia*, all IT services to the applicant, product testing, research and development. He says[36]:

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[35] As confirmed in an affidavit by Mr. Johan Bussutil being annexure 'DK20' to the founding affidavit.

'6. In the computer world a speaker; camera or a monitor, once combined with a computer system, becomes simply a component of that computer assembly and is described in the industry as an input or output unit. A monitor incorporated in a computer system would be described as a display or output unit.

7. The H2159 bare bone is a far more sophisticated assembly than a monitor and it is purposely designed to build an AIO computer. The whole design of the product has only one use and that is to assemble, on the imported base an AIO computer and therefore could not be considered in any way as being a monitor. In the final analysis the display is merely one component in an intricate assembly of 130 odd parts designed to act as a base to construct an AIO computer to client's specifications.

...

10. However, even visually the H2159 provides to the informed or even slightly informed clues regarding its purpose and design. The first clue in relation to its design is the thickness of the product. The thickness is necessary to create the necessary depth to accommodate a computer, a fan and to contain a PSU. No flat screen LCD manufacturer would use such thickness on the chassis of a monitor.

...

18. ... It must always be borne in mind that the objective of the product is to facilitate the assembly of an AIO computer and has very little to do with monitors except for the fact that in this case the monitor is just another component of a computer sub-assembly similar to components (units) such as the camera, microphones or the speakers in that assembly.'

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[36] Annexure 'DK18' at p144 of the papers.

[32] Mr Cox says[37]:

'8. ... The display screen is certainly not the defining characteristic of the product, but rather the ability to have an ATX motherboard inserted into a space where all the cabling and connectors are in place to connect the motherboard with all the other components of a computer.

9. The absence of [a] motherboard, which is necessary to bring the components already included and other components that are later added, to "live" in my view makes the product an assembly of computer components but lacking the essential of a computer and therefor a part of the computer or at best a unit/component of a computer to be used solely as a base to assemble an all in one computer.'

[33] In the technical report on the H2159 attached to his affidavit[38] Mr Cox says:

'The H2159 is specifically designed to accommodate a motherboard. Without the motherboard the device is unusable. With the motherboard everything is interconnected and communication between the different functions is activated.'

[34] The applicant also attached a letter[39] from Guangzhon ViewG Sci-Tech Co Ltd where the following is stated:

'This AIO (All-In-One) model no. H2159 is manufactured and designed by us. H2159 is a bare bone for an AIO (All-in-One) Computer. The Power Supply of the bare bone cannot supply electricity to the screen (display unit) unless the bare bone is complete All-in-One Computer. Therefore, H2159 alone cannot function as a Monitor. It is in fact a sub

[37] Annexure 'DK19' at p160 of the papers.
[38] Annexure 'SC2' at p169 of the papers.
[39] Annexure 'DK15' at p119 of the papers.

assembly of a computer base which can only derive functionality once a computer is added and has no other purpose.'

Classification of the product

[35] The tariff headings and the section, chapter and explanatory notes are voluminous. I will only refer to those that are relevant for the purposes of this judgment.

[36] Tariff heading 8473 reads as follows:

> 'Parts and accessories (excluding covers, carrying cases and the like) suitable for use solely or principally with machines of headings 84.69 to 84.72.'

TH84.73.30 in turn reads:

> 'Parts and accessories of machines of heading 84.71'.

TH 84.71 in turn reads:

> 'Automatic data processing machines and units thereof, magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.'

TH85.28 reads:

> 'Monitors and projectors, not incorporating television reception apparatus for television, whether or not incorporating radio-broadcasting receivers or sound or video recording or reproducing apparatus.'

TH8528.51 reads:

> 'Of a kind solely or principally used in an automatic data processing system of heading 84.71.'

[37] To substantiate its view as to why the H2159 is a fully functional monitor and not just a part of a computer the respondent's expert, Mr Van Wyk applied the so-called 'paper-clip' method. Van Wyk says when he used a paper clip to connect the 'power on or ps-on' pin of the ATX connector of the PSU to OV ground the monitor was 'fully functional'. In my view, Van Wyk misses the point – and that is that the 'monitor' together with the camera, speakers and other components in the H2159 have been designed to function only with the installation of, *inter alia*, a motherboard inside the H2159.

[38] The product as imported, does not have any external ports, which are a distinctive feature of monitors says applicant. Although circuiting to enable display is present in the devise at the time of importation it is intended to be part of the future display device of the AIO computer to be built and its functionality is dependent on the installation of the motherboard which would send data to it to get a visual signal in order to display or function as a monitor.

[39] The respondent concedes that the H2159 is not a standalone monitor and that it was not designed to be used as such. Respondent also concedes that the H2159 is not just a monitor – that it is a base for much more. These concessions in effect mean that it cannot be a monitor as contemplated in TH85.28. Yet on the other hand its reasoning is that the H2159 is a 'composite' product made up of, among others, a monitor, loudspeakers and a camera – ergo, it therefore falls to be classified by applying GRI 3(b) or alternatively, 3(c) . The component which gives the product its essential character is the monitor, alternatively, the monitor is the component which occurs last in numerical order. The product is thus classifiable under TH8528.51.90. The respondent cannot both approbate and reprobate. Respondent simply classified the H2159 under TH85.28 without explaining its reasoning for the classification. It has failed to properly explain why it relies on GRI 3(b) and not on GRI Rule 1. After all, one starts with Rule 1 and if it is found to be not applicable then one moves on to the next Rule.

[40] As I see it, the whole system, including the camera and speakers, is designed in such a way that everything connects only through the motherboard and the CPU. The New Shorter Oxford English Dictionary (1993) defines 'composite', inter alia, as: 'Made up of various parts or elements, compound, made of constituents that remain recognizable'. The various components in the bare bone base comprise, in my view, a single product or platform to build an AIO computer. Van Wyk admits as much when he agrees that:

'The bare bone base is a platform onto or into which a so-called "All-in-One computer" will be built'.

Hence, the respondent's submission that the product is classifiable under

TH8528.51.10 does not pass muster.

[41] In my view, when one considers the wording of the headings, Section and Chapter Notes it is evident that the H2159 is to be used with an automatic data processing machine referred to in TH84.71. The Oxford Dictionary defines a monitor in relation to a computer as a 'screen which displays an image generated by a computer'.

[42] There is no evidence that the H2159 falls within the examples and characteristics mentioned in the Explanatory Notes to TH8528.51. Although the H2159 is clearly intended to ultimately display images generated by a computer, the undisputed evidence of Mr Cox is that, in the device as presented at the time of importation, there is no means to deliver a visual data signal to the circuit board. This it can only do when the other components comprising the AIO computer are connected into the H2159 bare bone base unit. It must be remembered that the parties agree that the base is for use solely or principally with a machine of TH84.71. Mr Van Wyk concedes that the H2159 is '...not just a monitor, it is the base for much more'[40]. This

[40] Van Wyk's affidavit at para 24.

concession, in my view, confirms that the base is a part to be used solely with a machine under TH84.71 which includes 'Automatic data processing machines and units thereof ... suitable for use solely or principally with machines of headings 84.69 to 84.72. Tariff sub-heading 8473.30 refers to 'Parts and accessories of the machines of heading 84.71'.

[43] 'Part' is defined in the Oxford Dictionary as 'An amount or section which, when combined with others, makes up the whole of something'. When the motherboard, hard disk drive, etc. are connected to the slots indicated in the H2159 they, together with the base, become the whole of AIO computer. The applicant says this would fit under TH8473.30 which provides for:

> '84.73 Parts and accessories ... suitable for use solely or principally with machines of headings 84.69 to 84.72:
>
> ...
>
> 8473.30 ... Parts and accessories of the machines of heading 84.71.'

[44] TH84.71 includes 'Automatic data processing machines and units thereof; ...'. The applicant says it has no objection to a ruling that the product is classifiable in TH84.71 but it believes that classification in TH84.73 to be more technically correct. Tariff subheading 8471.80 provides for 'Automatic data processing machines and units thereof; Other units of automatic data processing machines'. Tariff subheading 8473.30 read with TH84.73 provides for 'Parts and accessories...suitable for use solely or principally with machines of headings 84.69 to 84.72; Parts and accessories of the machines of heading 84.71.'

[45] The respondent contends that the H2159 falls under tariff subheading 8528.51.90 which provides:

'Tariff subheading 8528.51.90 'Monitors...not incorporating television reception apparatus'; 'Of a kind solely or principally used in an automatic data processing system of heading 84.71'; 'Other'.

[46] Section Notes 2(b), 3 and 4 to Section XVI provide:

'2(b) Other parts, if suitable for use solely or principally with a particular kind of machine...are to be classified with the machines of that kind or in heading 84.09, 84.31, 84.48, 84.66, <u>84.73</u>, 85.03, 85.22, 85.29 or 85.38 as appropriate... . (My underlining).

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.

4 Where a machine (including a combination of machines) consists of individual components (whether separate or inter-connected 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 that function.'

[47] The respondent also contends that the H2159 is a composite machine as referred to in Note 3 to Section XVI. I do not agree. In my view, it does not consist of two or more machines fitted together to form a whole or a machine designed for purpose of two or more complementary or alternative functions as contemplated in that Note. Even if the H2159 can be considered as a composite machine it seems clear that it was designed and manufactured to perform a single function, namely, as a base to assemble the AIO computer.

In this regard GRI Rule 1 is relevant but, as I said earlier, the respondent does not deal with Rule 1 at all and, without explaining why it does not consider Rule 1 applicable, relies on Rule 3(b).

[48] The respondent claims the H2159 is a composite machine and yet also says it is a monitor. It does not explain why it regards the monitor as giving the machine its essential characteristics. The product is, in my view, much more than a monitor. In *CSARS v LG Electronics*[41] Heher JA held:

> '15. While it is clear that each determination must be made according to the salient facts attaching to the goods in question (and, in particular, its objective characteristics), and while in one case an engine may properly be regarded as the essence of the goods, in another a frame or chassis may be sufficient to satisfy that test. In Autoware (Pty) Ltd v Secretary for Customs and Excise, Colman J was required to consider whether a vehicle was a panel van or an incomplete station wagon on importation. The learned judge found that the relative simplicity and low cost of modification was not a decisive criterion, because the enquiry does not turn on what the product was going to be or what it will be adapted to be. Rather, the court must consider what the product was at the time of importation. Colman J held that that issue 'must be decided on the basis of the presence or absence, in the unmodified vehicles, of the essential features or components of a station wagon . . . What I mean by an essential feature of a station wagon is not a feature which is important, for one reason or another, or even one which is essential for the proper functioning of a station wagon. I mean a feature which is essential in that it embodies the essence of a station wagon, and differentiates such a vehicle from others which are not station wagons.
>
> I respectfully endorse that approach.

[41] 2012 (5) SA 439 SCA at 446-447 paras 15-16.

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

[49] In all the circumstances I conclude that the H2159 falls to be classified under TH8473.30 and the determination by the respondent that it resides under TH8528.51.90 should be set aside.

[50] I make the following order:

1. The tariff determination 102/2013 dated 20 March 2014 classifying the H2159 bare base model in tariff heading 8528.51.90 of Part 1 of Schedule No 1 to the Customs and Excise Act, 91 of 1964 is set aside.

2. The H2159 bare base model imported on 18 December 2013 is classified in tariff heading 8473.30. of Part 1 of Schedule 1 to the Customs and Excise Act, 91 of 1964.

3. The respondent is ordered to pay the costs of the appeal including the qualifying costs of the expert Stephen Cox.

RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv. J.M Barnard
Instructed by	: Jonathan Sweiden Att.
Counsel on behalf of Respondent	: Adv A. Meyer (SC)
	: Adv W. Mothibe
Instructed by	: The State Attorney
Date heard	: 10 November 2016
Date delivered	: 20 April 2017