

SOUTH AFRICA / JUDGMENT

International Business Machines South Africa (Pty) Ltd. v Commisioner for Customs and Excise (468/83) [1985] ZASCA 87; [1985] 2 All SA 596 (A) (19 September 1985)

[1985] ZASCA 87

COURT

Supreme Court of Appeal

BEFORE

Kotzé, Miller, Botha, Galgut, Nicholas

CASE / FILE NUMBER

468/83

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468/83/AV

INTERNATIONAL BUSINESS MACHINES SOUTH AFRICA (PROPRIETARY) LIMITED

AND

THE COMMISSIONER FOR CUSTOMS AND EXCISE

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

INTERNATIONAL BUSINESS MACHINES SOUTHAFRICA (PROPRIETARY) LIMITED

AppellantANDTHE COMMISSIONER FOR CUSTOMS ANDEXCISE RespondentCORAM: KOTZÉ,
MILLER, BOTHA, JJA, GALGUT et NICHOLAS, AJJAHEARD: 20 August 1985

DELIVERED: 19 September 1985

JUDGMENT NICHOLAS, AJA

This appeal concerns the classification for customs duty purposes of a machine named the IBM 3624

Consumer 2 Consumer Transaction Facility, an automated teller machine of the kind which has become familiar in banks and building societies in many parts of South Africa.Ss. (1) of s. 47 of the Customs and Excise Act, No 91 of 1964 ("the Act") provides inter alia that customs duty shall be paid on all imported goods in accordance with the provisions of Schedule No 1 ("the Schedule").Part 1 of the Schedule deals with ordinary customs duty. This part is modelled on the

"Nomenclature", which was an annexe to the Convention on Nomenclature for the Classification of Goods in Customs Tariffs. This is one of three Conventions ("the Brussels Conventions")

which

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which were signed on 15 December 1950, and to which the Republic of South Africa has acceded. The essential aims of the Convention on Nomenclature were:

"(a) to establish a common basis for the classification of goods in national Customs tariffs;

(b) to facilitate comparison of the Customs duties applicable in the various countries to all goods entering into international commerce; (c) to simplify international Customs tariff negotiations; (d) to facilitate the comparison of international trade statistics; (e) to provide governments and traders alike with a firm guarantee of the maximum uniformity in the classification of goods in national Customs tariffs; and (f) to facilitate international trade and thus to contribute to its expansion."

(This is an extract from the brochure hereinafter referred to.)

Another 4 Another of the Brussels Conventions was the Convention Establishing a Customs Co-operation Council (CCC). Under the authority of the CCC, the Nomenclature Committee supervises the operation of the Convention on Nomenclature, and generally takes all appropriate steps to ensure international uniformity in the interpretation and application of the Nomenclature. The customs tariffs of 148 countries, territories or areas (including the Republic of South Africa) are based on the Nomenclature. The characteristic features of the Nomenclature (referred to as the CCCN) are described in a brochure issued by the CCC ("In brief THE CUSTOMS CO-OPERATION COUNCIL"):

"The

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"The CCCN is systematic. It provides a framework for the classification of goods in Customs tariffs but, since it includes Interpretative Rules and legal Notes, it also constitutes a comprehensive classification system which has been designed to ensure:

- (a) maximum simplicity, so that it can be readily understood by the public as well as by experts;
- (b) precision, so that the most appropriate heading for a given commodity can be readily identified; and (c) exactness in application, so that the same commodity will be classified in the same way in the tariffs of all the countries using the Nomenclature."

The Nomenclature comprises:

"(a) the Rules for the Interpretation of the Nomenclature which prescribe the general principles governing the classification system;

(b) Section and Chapter Notes, which define

the scope and limits of Sections, Chapters

and 6

and of certain headings. These legal Notes permit the headings to be drafted in concise form without any loss of precision or of exactitude in their interpretation; and (c) a list of headings, arranged in systematic order, covering all the items in international commerce. The 1,011 headings in the Nomenclature ... are arranged in 99 Chapters which are themselves grouped in 21 Sections. In general, goods are grouped according to the material of which they are made; further most Chapters are developed 'progressively', - that is, starting from raw materials and progressing to finished articles."

The Nomenclature Committee prepares Explanatory Notes

(often referred to as "the Brussels Explanatory Notes" or "the Brussels Notes") which when issued constitute the official interpretation of the Nomenclature as approved by the CCC.

The appellant, INTERNATIONAL BUSINESS

MACHINES 7 MACHINES SOUTH AFRICA (PROPRIETARY) LIMITED, (to which I shall refer as "the company") has for several years imported into and marketed in the Republic of South Africa a variety of business machines. These include the IBM 3624 which it has entered for customs duty purposes under tariff sub-heading 84.53.10 of Part 1 of the Schedule. In May 1982 the Controller of Customs and Excise at Johannesburg advised the company that the machine should have been classified under tariff subheading 84.54.90 and demanded payment of R257 019,07, being the amount of customs duty alleged to have been underpaid, and of R2 5 702,00 as a provisional payment to cover any penalty which the Commissioner might decide

to 8 to impose. These sums were deposited by the company on 7 June 1982. Thereafter the company requested the Commissioner to make a determination, in terms of s.47 (9) of the Act, that the IBM 3624 be classified under tariff sub-heading 84.53.10. In November 1982, the company was advised that the machine had been classified under tariff sub-heading 84.54.90 "in terms of a Brussels decision on a similar machine viz. IBM 3614". In terms of para (b) read with paras (e) and (f) of ss. (9) of s. 47, the company appealed to the Transvaal Provincial Division of the Supreme Court. The appeal was dismissed with costs including those consequent upon the employment of two counsel.

With

9 With the leave of the Court a quo, the company now appeals to this Court. The importance of the dispute which has arisen lies in the fact that goods falling under heading 84.53.10 are imported free of duty, while goods falling under 84.54.90 are subject to a duty of 5% plus a surcharge. THE

PROCESS OF CLASSIFICATION 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

10 the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods. The materials for interpretation are prescribed in NOTE IX (formerly NOTE VIII) of the GENERAL NOTES to the Schedule. NOTE IX is entitled "RULES FOR THE INTERPRETATION OF THE SCHEDULE". It provides that "Interpretation of the Schedule shall be governed by the following principles." There are then set out five rules of which the first reads:

"(1) 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

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terms of the headings and any relative section or chapter notes, and, provided such headings or notes do not otherwise indicate, according to paragraphs (2) to (5) below."

The "RULES FOR THE INTERPRETATION OF THE NOMENCLATURE", comprised in the Nomenclature, are substantially identical with NOTE IX. They include a commentary to each rule. It is not necessary for present purposes to refer to the commentaries. Further material for interpretation is contained in the relative Brussels Notes. S. 47(8)(a) of the Act provides that

"(a) The interpretation of Part 1 of Schedule No. 1 shall be subject to the Explanatory Notes to the Nomenclature issued by the Customs

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toms Co-operation Council, Brussels, from time to time "

This provision does not mean that the Notes are to be regarded as peremptory injunctions. For, as was pointed out by TROLLIP JA in *Secretary, Customs and Excise v. Thomas Barlow and Sons* 1970(2) SA 660(A) at 676 C - D,

"... they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations."

All that s. 47(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.

INTERPRETATION

13 INTERPRETATION OF TARIFF HEADINGS 84.53 AND 84.54 These tariff headings fall under SECTION XVI of Part 1 of the Schedule ("Machinery and Mechanical Appliances; Electrical Equipment, Parts thereof") and specifically under Chapter 84 ("Boilers, Machinery and Mechanical Appliances; Parts thereof"). Heading 84.53 An understanding of this heading and its related material requires some background information on the nature of data processing and automatic data processing machines. The following is taken from the affidavit, filed on behalf of the company, of Prof. T.D. Crossman, who is an associate professor in the Department of 14

of Accounting and the head of the Division of Business Information Systems at the University of the Witwatersrand:

"5. I should commence by saying that data

processing is undertaken by a data processing system, the elements of which are commonly and collectively referred to as 'a computer'.

6. The electronic digital computer first appeared in the middle 1940's. Then, it was a specialised calculating tool of mathematicians and scientists. Today, it is helping to solve information problems in almost every area of human activity.

7.1 In order to appreciate fully the operation of the computer we consider it necessary first to outline the procedures undertaken in a simple commercial task. When a stock control clerk receives a requisition he will

perform

15 perform the following tasks:

7.1.1 Read the information appearing on the requisition. In computer terms he accepts information for processing - this is the INPUT of the procedure. 7.1.2 Refer to a price list to obtain the unit price. In so doing he refers to stored or filed information - the computer term is STORAGE. 7.1.3 Multiply the unit price by the quantity. This is the ARITHMETIC of the procedure. 7.1.4 Enter the answer in the appropriate column - this is the OUTPUT.

In the course of his task the stock control clerk may concern himself with the following activities - addition, subtraction, multiplication and division. These are some of the functions which can

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can be performed by a computer.

7.2 The operation of the computer involves the same four distinct tasks as the operation done by the stock control clerk - input, storage, arithmetic and output - but in order to perform correctly the operation must be executed in a pre-determined sequence. The correct operation of the procedure depends on the observation of this pre-determined sequence of instructions. It is

therefore necessary to add a fifth element to the four listed above - PROGRAM. The program is not part of the information to be processed, but the list of instructions that have to be followed in order to provide a problem solution. Information given for the purpose of processing is described as DATA. The program is applied to the data in order to give the required results. The program must reside in the computer before it can be executed.

7.3

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7.3 In the same way as the tasks performed by an office clerk, their sequence and so on, are under the direction and control of a manager, so too a computer needs certain hardware and software components to perform a control function. We can call these the CONTROL elements.

7.4 The computer operation procedure is therefore as follows:

7.4.1 the original information is read into the machine. INPUT

7.4.2 the completed answer is read out of the machine OUTPUT 7.4.3 in between is the "work area", called the CENTRAL PROCESSOR 7.4.4 in which reference is made to the stored data and the stored program STORAGE

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7.4.5 and also in which the calculations are carried out

ARITHMETIC

7.4.6 and the whole proceeding supervised by CONTROL

7.5 The computer installation will therefore consist of the central processor and its appurtenances (peripherals), commonly known as HARDWARE. 7.6 The program to instruct the computer and the data on which it will work are collectively known as SOFTWARE. 7.7 The central processor can store and manipulate data, store and execute program instructions on such data and monitor these procedures through the medium of software known as an operating system. It will also have the capacity to communicate the results of its processing (the output). 7.8 The manipulation of data may involve

many

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many processes, but will include the central processor's capacity to process arithmetic functions, to compare data items, to assemble data into predetermined output formats and to arrive at conclusions based on criteria supplied to it. These functions will only be executed on instructions, the vehicle of instruction being the computer program. Finally, the output device will present the result in a readable and usable form - the computer print-out.

7.9 The term 'data processing' embraces all the above operations.

8.1 By way of illustration, let us take a look at the pocket calculator:

8.1.1 The first hand-held calculators were simple devices limited to adding, subtracting, multiplying, dividing and displaying a result. The result was displayed only temporarily

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temporarily and was soon replaced with another entry.

8.1.2 This type of calculator is similar

to the CPU (Central Processing Unit). The CPU accepts data and performs operations on it. As the computer continues processing, the result of each operation are quickly replaced with another piece of data or instruction.

8.1.3 As pocket calculators became more advanced, memory became a standard feature. Constants or results were stored and used over again in later calculations. Eventually, however, these too could be erased when the 'clear memory' key was pushed (or, in some calculators, the calculator was turned off). 8.1.4 Of course, main storage in the computer is much larger and more complex than the memory of a pocket calculator; however, their functions

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tions are the same. The computer's memory stores data and instructions until the CPU is ready to use them. Like some calculators' memory, main storage is temporary. Once a program is processed, its data and instructions are replaced with information required by another program. Therefore, to permanently keep data we need some kind of auxiliary storage device and a means of transferring data between these devices and main storage."

Prof. Grossman then described, with reference to a diagram, the general organisation of a computer or data processing system, so-called because a computer can consist of more than one unit forming the system, namely, an input unit, a Central Processing Unit (CPU) and an output unit.

The input unit converts data and instructions

from

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from man-readable language to machine-readable code, and

transmits the coded information or data to the Central

Processing Unit (CPU).

The CPU usually consists of three inter-related

elements: a control unit, an arithmetic/logic unit and a memory unit.

"The control unit, as its name implies, maintains order and controls what is happening in the CPU. It does not process or store data. Rather it directs the sequence of operations. The control unit interprets the instructions of a program in storage and initiates commands to circuits to execute the instructions by producing the proper signals. Other functions of the control unit are to communicate with the input device in order to begin the transfer of instructions and data into storage and similarly to initiate the transfer of results from storage to the output device.

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The Arithmetic/Logic Unit (ALU) handles the execution of all arithmetic computations and logical operations. Since the bulk of internal processing involves calculations or comparisons, the capabilities of a computer often depend upon the design and capabilities of the ALU. The Arithmetic/Logic Unit does not store data; it merely performs the necessary manipulations.

The primary storage unit (internal memory) holds all instructions and data necessary for processing. It also holds intermediate and final results during manipulation. Data is transferred from the input device to the primary storage unit where it is held until it is needed for processing. Data that has been processed and immediate results from ALU calculations are also held in primary storage. After all computations and manipulations are completed, the final results remain in memory. The control unit directs them to be transferred to an output device.

The programs required to operate the computer

(control

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(control programs) and the programs required to perform various tasks (application programs) are stored in the memory unit of the CPU or on other storage devices such as magnetic disk or tape units connected to the CPU. The control unit uses the control program to co-ordinate the functioning of the machines which cumulatively are the data processing system."

I turn now to heading 84.53 and sub-heading 84.53.10.

They read:

"84.5 3 AUTOMATIC DATA PROCESSING MACHINES

AND UNITS THEREOF; MAGNETIC OR OPTICAL READERS, MACHINES FOR TRANSCRIBING DATA ON TO DATA MEDIA IN CODED FORM AND MACHINES FOR PROCESSING SUCH DATA, NOT ELSEWHERE SPECIFIED OR INCLUDED: 84.53.10 Automatic digital data processing machines and units thereof (connectable)"

Included in the Notes to Chapter 84 is the following

paragraph

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paragraph:

"3. - (A) For the purposes of heading No. 84.53, the expression 'automatic data processing machines' means: (a) Digital machines having storages capable of storing not only the processing program or programs and the data to be processed but also a program for translating the formal programming language in which the programs are written into machine language. These machines must have a main storage which is directly accessible for the execution of a program and which has a capacity at least sufficient to store those parts of the processing and translating programs and the data immediately necessary for the current processing run. They must also be able themselves, on the basis of the instructions contained in the initial program, to modify,

by

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by logical decision, its execution during the processing run;

(b) Analogue machines capable of simulating mathematical models and comprising at least: analogue elements, control elements and programming elements;

(c) Hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements.

(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separately-housed units. A unit is to be regarded as being a part of the complete system if it meets all the following conditions:

(a) it is connectable to the central processing unit either directly or through one or more other units;

(b) it is specifically designed as part of such a system (it must, in particular, unless it is a power 27

power supply unit), be able to accept or deliver data in a form (code or signals) which can be used by the system). Such units imported separately are also to be classified in heading No. 84.53.

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5. "

The following is the Brussels Note relating to heading 84.53.

"84.53 - 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.

- (1) AUTOMATIC DATA PROCESSING MACHINES AND UNITS THEREOF Data processing consists in handling information of all kinds, in pre-established logical sequences

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ces and for a specific purpose or purposes.

Automatic data processing machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions (program), furnish data which can be used as such or, in some cases, serve in turn as data for other data processing operations.

The present heading covers data processing machines in which the logical sequence of the operations can be changed from one job to another, and in which the operation can be automatic, that is to say with no manual intervention for the duration of the task. These machines mostly use electronic signals but may also use other technologies (e.g., pneumatic, fluid or optical); some may use combinations of two or more of these technologies.

They may be self-contained, all the elements required for data processing being combined in the same housing, or they may be in the form of systems consisting of a variable

number

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number of separately-housed units.

Such machines are described as digital, analogue or hybrid (analogue/digital), according to the method of processing the data.

The present heading also covers separately imported constituent units of the automatic data processing systems described above.

The heading does not cover machines, instruments or apparatus incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines, instruments or apparatus are classified in the headings appropriate to their respective functions or, failing that, in residual headings.

(A) DIGITAL MACHINES

These digital data processing machines have storages, and also stored programs which can be changed from job to job.

Digital

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Digital machines process data in coded form. A code consists of a finite set of characters (binary code, standard six bit ISO code, etc.).

The data input is usually automatic, by the use of data media such as punched cards or tapes, or magnetic tapes, or by direct reading of original documents, etc. There may also be arrangements for manual input by means of keyboards or the input may be furnished directly by certain instruments (e.g., measuring instruments).

The input data are converted by the input units into signals and stored in the storage units.

The digital data processing machines of the present heading must have a sufficient overall storage capacity to enable them to store not only the processing program or programs and the data to be processed, but also a translating program which serves to translate the formal programming language in which the programs are written (Algol, Assembler, Cobol, Fortran, PL/1, RPG, etc.) into machine language.

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Part of the data and program or programs may be temporarily stored in auxiliary storage units such as those using magnetic discs or drums, magnetic tapes, etc. But these machines must have a main storage which is directly accessible for the execution of a particular program and which has a capacity at least sufficient to store those parts of the processing and translating programs and the data immediately necessary for the current processing run.

The data are processed according to one of the stored programs. Apart from the characteristics described above, the machines of the present heading must also be able themselves, on the basis of the instructions contained in the initial program, to modify, by logical decision, the execution of that program during the processing run.

Digital data processing machines usually consist of a number of separately-housed inter-connected units. They form a 'system'.

A complete digital data processing system must
comprise

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comprise, at least:

- (1) A central processing unit which generally incorporates the main storage, the arithmetical and logical elements and the control elements; in some cases, however, these elements may be in the form of separate units.

- (2) An input unit which receives input data and converts them into signals which can be processed by the machine*.
- (3) An output unit which converts the signals provided by the machine into an intelligible form (printed text, graphs, displays, etc.) or into coded data for further use (processing, control, etc.).

Two of these units (input and output units, for example) may be combined in one single unit.

These systems may include remote input and output units in the form of data terminals.

Such systems may also include peripheral units, apart

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apart from the input and output units, designed to. increase the capacity of the system, for instance, by expanding one or more of the functions of the central unit

Such units are inserted between the input and the output units (start and end of the system), although adapting and converting units (channel adaptors and signal converters) may occasionally be connected before the input unit or after the output unit.

A unit is to be regarded as being a part of the complete digital data processing system, if it satisfies the following conditions:

- (a) It is connectable to the central processing unit, either directly or through one or more other units; and
- (b) It is specifically designed as part of such a system. It cannot be considered as such unless, in particular, it is capable of accepting or delivering data in a form (code or signals) which can

be

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be used by the system. (This last condition does not apply to power supply units which, although specifically designed as parts of data processing systems, do not use the coded form).

The interconnections may be made by material means (e.g., cables) or by non-material means (e.g., radio or optical links).

Appliances such as measuring or checking instruments adapted by the addition of devices (signal converters, for example), which enable them to be connected directly to a data processing machine, are, in particular, not to be regarded as specifically designed as parts of automatic data processing systems. Such appliances fall to be classified in their own appropriate heading.

Digital data processing machines are put to many uses, for example, in industry, in trade, in scientific research and in public and private administrations."

(The paragraph which I have underlined was

introduced 35

introduced by amendment in June 1979. It will be referred to as "the 1979 amendment"). Counsel for the Commissioner said that a distinction was to be drawn between "a general all-purpose programmable computer" and "a specialised machine or system" specially designed for a specific purpose. He submitted that heading 84.53 "clearly refers to general or all-purpose computers and not to specialised machines or systems". This distinction is not drawn either in the heading, or in the Chapter Note, or in the Brussels Note. The only passage to which counsel could refer in support of his submission was the statement in the relative Brussels Note that

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"The present heading covers data processing machines in which the logical sequence of the operations can be changed from one job to another "

That characteristic does not distinguish all-purpose computers from special purpose computers: it distinguishes computers whose program can be changed, and those whose operation is limited to a single program, e.g. a pocket calculator.

Nor does the 1979 amendment provide any support for the submission. In terms of that amendment

"The heading (sc. 84.53) does not cover machines, instruments or apparatus incorporating or working in conjunction with an automatic data

processing

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processing machine and performing a specific function "

That has nothing to do with a distinction between all-purpose and special purpose computers and systems. Pointing away from counsel's submission that the heading covers only general all-purpose computers and not specialised machines, are two statements in the Brussels Note: one is that "Data processing consists in handling information of all kinds for a specific purpose or purposes"; and the other is the last paragraph which reads:

"Digital data processing machines are put to many uses, for example, in industry, in trade, in scientific research and in public and private administrations."

(My emphasis.)

Prof 38 Prof. Bornman, a professor and head of the Department of Computer Science and Information Systems at the University of South Africa, who furnished an affidavit on behalf of the Commissioner, put the distinction drawn by counsel in a somewhat different way. He said that, in the light of what he had said earlier in regard to automatic data processing machines,

" it is clear that,

on the whole, I find myself in respectful disagreement with the deponents to the Applicant's affidavits, mainly on question of 'nomenclature'. They use terms such as 'automatic data processing' in relation to a machine, device, unit or system whether or not such machine, device, unit or system performs a specific function or not.

They

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They also employ the term to denote both automatic data processing machines proper and machines which employ the techniques of automatic data processing in performing their functions and either operate in conjunction with an automatic data processing machine or have an automatic data processing device incorporated in them. That would merely be a matter

of

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of choice of words, unless one wishes to be specific about the nature and function of the device, machine or system in question, in which case the terminology employed by the said deponents is unhelpful."

If I understand Prof. Bornman correctly, he distinguishes between an automatic data processing machine which performs data processing generally, and one which uses the data processing "technique" to perform a specific function. The difference is thus a semantic one

- as Prof. Bornman put it, "a matter of choice of words", or "terminology" or a "question of nomenclature". However clear this distinction may be to professors of Computer Science, I do not think that it is drawn in the language of the heading and the relative

Notes

41 Notes, nor is there anything in the language to suggest that it is only machines of the former kind which are covered by the heading. Finally on the aspect of the interpretation of heading 84.53, there is the question of the meaning of the 1979 amendment. In terms, the amendment deals with machines incorporating or working in conjunction with an automatic data processing machine; it does not deal with machines which are units forming part of a complete automatic data processing system, which are dealt with in paragraph 3(B) of the Chapter Note. If possible the 1979 amendment should be construed so as to be in harmony and not in conflict

with

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with para 3. As TROLLIP JA said in the Thomas Barlow case (supra) at 676 D

"... 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."

Where, therefore, a machine is a unit forming part of a complete system within the meaning of paragraph 3, it is not to be regarded as a machine working in conjunction with an automatic data processing machine under the

1979 amendment.

To sum up on this aspect of the matter.

Heading

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Heading 84.53 covers all data processing machines and all data processing systems, having the features and characteristics set out in para 3 of the Chapter Note. Neither the heading, nor the Chapter Note, nor the Brussels Note distinguishes between all-purpose machines and systems and special purpose machines and systems; or between automatic data processing machines "proper" and automatic data processing machines which "employ the technique of automatic data processing in performing their specific functions". The sole test is whether the machine in question falls within the language of para 3 read with the Brussels Note. In regard to the 1979 amendment, this does not apply to a unit which forms

part 44

part of a complete system as defined in para 3(B).

Heading 84.54

Tariff heading 84.54 reads:

"84.54 OTHER OFFICE MACHINES (FOR

EXAMPLE, HECTOGRAPH OR STENCIL DUPLICATING MACHINES, ADDRESSING MACHINES, COIN-SORTING MACHINES, COIN-COUNTING AND WRAPPING MACHINES, PENCIL-SHARPENING MACHINES, PERFORATING AND STAPLING MACHINES):

84.54.10 Duplicating machines

84.54.20 Addressing machines

84.54.90 Other"

The Brussels Note relating to this heading reads as follows (I have lettered three paragraphs for purposes

of .. 45

of reference):

"84.54 - OTHER OFFICE MACHINES (FOR EXAMPLE, HECTOGRAPH OR STENCIL DUPLICATING MACHINES, ADDRESSING MACHINES, COIN-SORTING MACHINES, COIN-COUNTING AND WRAPPING MACHINES, PENCIL-SHARPENING MACHINES, PERFORATING AND STAPLING MACHINES).

(a) This heading covers all office machines not covered by the preceding three headings or more specifically by any other heading of the Nomenclature.

(b) The term 'office machines' is to be taken in a wide general sense to include all machines used in offices, shops, fac-

ories, workshops, schools, railway

stations, hotels, etc., for doing 'office work' (i.e, work concerning the writing, recording, sorting, filing, etc., of correspondence, documents, forms records, accounts, etc.).

(c) Office machines are classified here only

if

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if they have a base for fixing or for placing on a table, desk, etc. The heading does not cover the hand tools, not having such a base, of Chapter 82.

The machines of the present heading may be hand-operated, mechanically operated or electrically operated (including electromagnetic relay and electronic operated machines)."

(The emphasis is in the original). The Note then states that the heading includes inter alia 18 named machines, including certain duplicating machines, addressing machines, ticket issuing machines and coin-sorting or coin-counting machines. Among the eighteen are

"5. Automatic banknote dispensers operating in conjunction with

an 47

an automatic data processing machine, whether on-line or off-line."

In terms of para (a), if a machine is covered by one of the three preceding headings it is not covered by heading 84.54. If, therefore, a machine falls under heading 84.53, it is not classified under heading 84.54. In terms of para (b) the expression "office machines" is used "in a wide general sense". It includes all machines used in the locations referred to (the list is not comprehensive: it would no doubt include banks and building societies), for doing "office work". That connotes machines used by workers in an office etc. It would not, I conceive, include a

machine

designed

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designed to be used, not by an office worker, but by a customer or client. Para (c) excludes every office machine which does not have a base for fixing or placing "on a table, desk, etc." THE IBM 3624 CONSUMER TRANSACTION FACILITY. The second stage in the process of classification is to consider, as a preliminary to a decision whether it should appropriately be assigned to heading 84.53 or to heading 84.54, the nature and characteristics of the IBM 3624. In the affidavit of Mr. P.P. FULTON, filed on behalf of the company, it is said that the IBM 3624

is' 49

is designed and used as a unit forming part of the IBM

3600 Finance Communication System.

The IBM 3600 is a data processing system with three parts, namely

"12.1 a controller and terminals (referred to as the 3600 sub-system);

12.2 a communication link; and 12.3 a central computing system.

13. The controller and terminals which comprise the system, are the following:

13.1 the IBM 3601 or 3602 Finance Communication Controller;

13.2 " the IBM 3604 keyboard display, the

IBM 3606 and 3608 Financial Service terminals;

13.3 the IBM 3610 document printer;

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13.4 the IBM 3618 Administrative Line Printer; and 13.5 the IBM 3624 Consumer Transaction Facility.

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The 3624 is a unit of the IBM 3600 Finance Communication System, which system is capable of being used by a variety of commercial enterprises and in particular by financial institutions such as banks and Building Societies.

16.1 The 3624, and similar machines, are used by financial institutions to facilitate and expedite banking transactions by their respective customers. A particularly convenient aspect of the 3624 is that it can be used by customers to perform many of an institution's wide variety of functions outside normal

business

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business hours, or within business hours, without having to deal with officials of the institution, such as tellers. In addition it can be used by customers at unmanned locations.

16.2 Using the 3624 and similar machines, financial institutions are now

able to provide a service to their customers which they were unable to provide without the use of computers. We call this an on-line banking service. It allows customers to carry out banking transactions at any location at which a 3624 is installed across the country.

16.3 The on-line banking service allows customers to carry out banking operations at any 3624. For this reason, the customers' records must be stored on a single central computer, rather than retained at a single 3624 terminal. Hence the

3624

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3624 cannot service customer requests except in communication and consultation with the central computer.

17.1 The operation of the

3624 requires that a customer be given an identification card bearing a magnetic strip that contains identification data. When the customer inserts a card into the card reader slot in the 3624, a series of instructions on the display screen guides him step by step through the transactions. When the identification card is inserted the unit requests that the customer's secret personal identification number be entered on the keyboard so that his identity can be established. The customer then selects the transaction which he wishes to perform and completes the necessary keyboard entries for that purpose. The 3624 performs a multiplicity of transactions. On the

basis

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basis of what is said above it

will already have been seen that it -

17.1.1 Reads the information encoded magnetically on the Identification Cards and stores this information in the 3624 Storage. 17.1.2 Checks the PIN (i.e. the personal identification number) number by comparing data entered on the keyboard with the information from the card (previously stored) using a predetermined encryption Algorithm, which is a coded formula. 17.1.3 Guides the customer through transactions by displaying the guidance messages on the display panel. These messages originate from either the internal 3624 program or from the program in the CPU. 17.1.4 Like all computer terminals the 3624 translates customer requests entered by key depressions on the

keyboard

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keyboard into machine-readable electronic impulses which are read and understood by the CPU.

17.2 The customers' orders may result in the completion of any one or more of the following transactions:

17.2.1 the issue of cash; 17.2.2 the issue of vouchers such as travellers' cheques, bonus bonds and travel insurance certificates; 17.2.3 the transfer of funds to other accounts; 17.2.4 the answering of enquiries, for example as to interest earned, exchange rates, the gold price

or any other information contained in the data base of the system;

17.2.5 the furnishing of account information;

17.2.6

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17.2.6 the giving of marketing messages; 17.2.7 the printing of transaction statements;

17.2.8 the acceptance of deposits;

17.2.9 the printing of receipts; 17.2.10 the ordering of cheque books.

17.3 The 3624 is designed to be capable of initiating multiple program determined functions.

18 The customer's use of the 3624 is achieved by way of a special key which, when depressed, enables the customer to 'talk' to any department of the bank. For example if the customer wishes to order a new chequebook he would merely enter the appropriate code number and the message would be relayed to the computer. The following morning the department responsible would obtain a printout containing .

all

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all new chequebook orders.

19.1 The 3624 can only operate when connected to a central processing unit and/or a controller. The 3624 cannot be used except as a component of an on-line banking system, that is it cannot operate off-line. Typically it will operate through an IBM 3601 or 3602 line controller connected to an IBM 370 CPU. The 3624 and the said controllers and the IBM 370 Central Processing Unit are all units of the IBM 3600 Finance Communication System

19.2 However, the 3624 contains programmable storage. It is programmable to the extent that it can and does independently perform a number of tasks (as opposed to transactions) before sending a message to the CPU, for example, validating the customer's personal identity number against

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against his account number as read from his identification card. The programmable storage can also be used, inter alia, to make the 3624 bilingual. The choice of language will be made according to the information contained on the identification card referred to above. The customer, using the identification card, would then get the operating instructions and computer response in the language of his choice. The 3624 can accommodate up to 8 different languages.

20. The 3624 is available in four models.

Two were designed for installation within the institution's banking hall, and two are designed to be built into the wall of a building so that the customer can operate them from outside both during hours when the institution itself is open to business and during hours when it is closed. The 'through the wall models' can also be for 'drive in'

use

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use in that they can be so located that a customer can drive up in his motor car and, without getting out of the car, transact the various transactions he wishes to perform using the 3624."

None of all this is disputed in the answering affidavits

filed on behalf of the Commissioner.

SELECTION OF APPROPRIATE HEADING The decision of the Nomenclature Committee

Counsel for the Commissioner urged that the Court should uphold the determination on the basis of a decision by the Nomenclature Committee at its 40th Session held in June 1978. This decision was recorded as follows:

"DECISIONS OF THE NOMENCLATURE COMMITTEE 1. The Committee re-examined the classification of the above machines

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(sc. 'IBM banknote dispensers') on the basis of details supplied by the manufacturer and information collected by the Secretariat concerning IBM 3614 banknote dispensers.

2. The Committee decided by 20 votes to 2 that, by analogy with its previous decisions concerning Bankomat and NCR banknote dispensers, the IBM banknote dispenser should be classified in heading 84.54, as an office machine."

The IBM 3624 is, it is common cause, in all material respects the same as the IBM 3614 which was the subject of the decision. It was submitted that the decision was a cogent authority: it was directly in point, and was the considered opinion of an international committee, one

60 of whose main tasks, according to the brochure above referred to, include the giving of

"... decisions on the more delicate classification questions raised by administrations or by international organisations "

Whatever may be the status of such a decision so far as customs administrations and international organisations are concerned, it is not, until it is reflected in an Explanatory Note, authoritative in a South African Court. Before that, it is no more than an expression of opinion which involves the interpretation of the relative tariff headings and the Notes relating thereto.

Under our system, questions of interpretation

of 61 of documents are matters of law, and belong exclusively to the Court. On such questions the opinions of witnesses, however eminent or highly qualified, are (except in regard to words which have a special or technical meaning) inadmissible. (See Phipson on Evidence, 13th ed., sec 27-46). So, subject to the exception mentioned, the Courts do not receive opinion evidence, either as to the meaning of a statutory provision (See *Camden (Marquis) v. Inland Revenue Commissioners* (1914) 1 KB 641 (CA at 649-50), or a patent specification (See *Gentiruco v. Firestone SA (Pty) Ltd* 1972(1) SA 589(A) at 617-18), or any other document.

The opinion of a person not called as a

witness

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witness, or of a committee, is similarly inadmissible. The Nomenclature Committee's decision is, therefore, legally irrelevant, and cannot be taken into account in deciding this appeal.

Applicability of heading 84.53 The evidence of the company's deponents (which is not disputed by the Commissioner's deponents save in regard to the semantic niceties referred to above) is that the IBM 3624 is a machine which falls squarely within item 84.53.10 read with para 3 of the relative Chapter Note, and the Brussels Note. The IBM 3600 system is an automatic data processing machine such as is described in para 3(A)(a)

of 63 of the Chapter Note, and it is "a complete digital data processing system" as set out in the Explanatory Note. The IBM 3624 is a unit forming part of that system, and it meets all the conditions set out in para 3(B) and in the Explanatory Note. It is one of a number of separately

housed units of an automatic data processing machine system. It is connectable to the central processing unit. And it is specially designed as part of the system: in particular, it is able to accept and deliver data in a form (codes or signals) which can be used by the system. Although the IBM 3624 performs the function of an automated teller, it does not fall within

the 64 the 1979 amendment, because it is a unit forming part of a complete automatic data processing machine and hence is not a machine working in conjunction with an automatic data machine.

The conclusion is therefore that tariff heading

84.53 applies to the IBM 3624. Applicability of tariff heading 84.54

Paragraph (a) of the Brussels Note to heading 84.54 makes it clear that where a machine is covered by one of the preceding three headings, it is not covered by heading 84.54. In view of the conclusion just mentioned, therefore, the IBM 3624 is not covered by heading 84.54. There are other reasons why it is not classifiable under heading 84.54,

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It is not an "office machine" even in the "wide general sense" referred to in para (b) of the Note: it is used, not for doing "office work", but, as its full name indicates, by the customers of banks and building societies themselves. Nor does it appear (See Fulton's description quoted above), that the IBM 3624 has "a base for fixing or for placing on a table, desk, etc." as required in para (c). Although one of the main uses of the IBM 3624 in South Africa at present is to issue banknotes, it cannot properly be called an "automatic banknote dispenser". As appears from Fulton's affidavit, the IBM 3624 is far more than an automatic banknote dispenser

and

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and cannot be classified as such:

"24.1.1 The term 'automatic banknote dispenser' implies that such a machine has the sole and specific function of dispensing bank notes only. The IBM 3624 is designed to and can dispense a variety of documents besides bank notes, and even when it is performing that dispensing function it is operating as a unit of an automatic data processing machine. In addition it has all the other functions enumerated above. The dispensing of bank notes is certainly not its principal, sole or specific function.

24.1.2 The 3624 is sometimes referred to as an Automated Teller Machine and is virtually the counterpart of the human teller. It performs many of the functions of the human teller. However it performs further functions of clerks assigned to answer

enquiries

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enquiries regarding account balances and of the ledger clerks who enter the customer's transactions into the bank's books. The function of the 3624 is contained in its descriptive name, namely to perform as a consumer transaction facility and thus enable customers to perform their banking operations without the intervention of a human teller or any other member of the bank's staff.

24.1.3 The 3624 is so designed that it

can continue performing its other functions even if the document dispenser is not operating, as will happen if the supply of bank notes or vouchers contained in the cartridge runs out."

The conclusion is that heading 84.54 is not applicable to the IBM 3624.

CONCLUSION

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In the result the appeal against the Commissioner's determination will be upheld. The company requested that in the event of the Court upholding the appeal, an order should also be made in terms of prayer (c) of the Notice of Motion (for the refund to the company of the sum deposited with the Controller of Customs and Excise, Johannesburg) and in terms of prayer (d) (for the payment of interest on that sum from 7 June 1982, being the date of the deposit). I do not think that an order should be made in terms of prayer (c). The effect of the order to be made will be that the Commissioner's determination will no longer remain in force, so that any amount due in

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in terms thereof will no longer be payable. (See s. 47(9)(b) of the Act.) There is no reason to believe that the Commissioner will not take the appropriate action in this regard. Nor do I think that an order should now be made in terms of prayer (d): it is not clear from the brief argument put forward on behalf of the company that interest will be payable, at any rate from the date mentioned in prayer (d). At the beginning of the hearing the company made an application to this Court for an order condoning and allowing the late service and filing of Volume 6 of the record. This application was supported by the Commissioner. It was granted and the parties agreed that 70 that the costs relating thereto should be costs in the appeal. It will be ordered accordingly. The appeal is upheld with costs, including the costs consequent on the employment of two counsel. The costs relating to the application for condonation are costs in the appeal. The order of the Court a quo is set aside, and there is substituted therefor the following:

"(a) The appeal is upheld with costs, including the costs consequent upon the employment of two counsel. (b) An order is granted that there be substituted for the determination of the Commissioner of Customs and Excise a determination that tariff heading 84.53.10 be the heading under which the

IBM

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IBM 3624 Consumer Transaction Facility shall be classified."

H C Nicolas, AJA)

KOTZÉ, JA) GALGUT, AJA)

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