

A CONSIDERATION OF WHAT CONSTITUTES THE CORE PRINCIPLES OF CUSTOMS DUTY AND EXCISE DUTY: A SOUTH AFRICAN PERSPECTIVE

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Abstract

The mere mention of the word “*duty*”, following that of “*customs*” and “*excise*,” ignites the debate as to whether it is a “*duty*”, a “*tax*”, or a “*levy*”. Questioning the distinction, an emotive debate at best, could provide the absurd response that a “*duty*” is a “*tax*” that you “*levy*”.ⁱ Accepting that customs duty and excise duty are essentially taxes, the more pertinent a question is: what are the core principles of these taxes? These taxes are dealt with as collectives due to their historical alignment as many a Customs and Excise Department can attest to. Due to the administrative nature of these taxes it is easy to get bogged down in the administrative provisions whilst ignoring its core principles, which this study defines to be classification (*tariff*), valuation (*import/manufacture*) and origin (*country*).

1. INTRODUCTION

Customs duties and excise duties are indirect taxes which imply that the taxes are levied on a transaction, irrespective of the circumstances of the buyer and the seller. Another distinction is that indirect taxes are those whose incidence is shiftedⁱⁱ so that the consumer, and not the manufacturer of the goods, pays the tax.

The administrative nature of customs duty and excise duty is an undisputed fact. This is attributable to the movement of merchandise goods on various vehicles and vessels, into and out of warehouses, and across borders etc. The levying of such tax activity satisfies even the narrow definition of “*tax*”, since it is a compulsory payment to government that does not constitute consideration for a service.ⁱⁱⁱ

(a) Customs duties

Customs duties, said to date back to the time of the Egyptian pharaohs, were first levied in South Africa in 1678 (335 years ago) in what was then the Cape Colony.^{iv} It was imposed on all goods brought into the Colony by ships’ crew and offered there for sale.^v

The imposition of customs duties essentially fulfils a dual purpose:

- “*Fiscal measure*” - meaning the intention is to generate revenue for the government. The term “*fiscal measure*” is derived from the word “*fiscus*”, which was used by the Romans as the name of the personal treasury of the Emperors of Rome. The word literally means “*basket*” or “*purse*”.
- “*Protective measure*” - the intention is to protect a domestic industry against imported goods. Imported goods are subject to customs duties, which increases its cost to the consumer, rendering them less competitive against locally manufactured goods.^{vi}

An argument can also be made for customs duty to serve as a policy development instrument, in that it encourages the manufacturing of, for example, certain motor vehicles whilst allowing for the importation of other models. In such instances customs duty is used in conjunction with other customs provisions and policy measures.

(b) Excise duties

The concept of excise originates from the Dutch, which called it “*accijns*”.^{vii} The word is presumed to

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In this paper reference to “customs duty” would also apply to “excise duty” unless otherwise stated.

have been derived from the Latin “*accensav*”.^{viii} An excise duty is an inland duty as it is levied on goods manufactured in South Africa (*domestic*), which is intended for consumption in South Africa (*home consumption*).

Excise duties were first levied in South Africa in 1878 (*135 years ago*) in what was then the Cape Colony, 200 years after customs duties were first imposed in the Colony.^{ix} An excise duty of 1 shilling per gallon was imposed on all spirits produced in the Cape Colony.^x

An excise duty differs from a customs duty in that an excise duty is imposed on domestically manufactured goods, whilst a customs duty is imposed on imported goods.

(c) Operating in a rule-based system

It can be argued that the preserve of human evolution is founded in rules having been created to ensure compliance, order, and coherence. Athens applied customs duties well before the time of Julius Caesar.^{xi} Where a tax must be collected, there will be disputes over rates and methods – the Roman customs collector was accused of “*unfair conduct and vexatious proceedings*” against the Roman merchants who were said to have commonly engaged in smuggling to avoid customs duties.^{xii} Although countries are to a large extent independent, with only a few territories still existing, international trade rules and regulations transcend international borders.

This is enforced by the establishment of the Customs Cooperation Council (CCC) known as the World Customs Organisation (WCO)^{xiii} and the World Trade Organisation (WTO)^{xiv}, responsible for the regulation and administration of the international trade rules and regulations.

The WTO is a “*rules-base*”: its rules are negotiated agreements^{xv} of which there are twenty one (21)^{xvi} agreements of which two (2) are specifically pertinent to customs:

- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (*customs valuation*)^{xvii}; and
- Agreement on Rules of Origin.

(d) Value of this research

Customs duty and excise duty have a long history associated with significant revenue generation, but customs duty’s importance as a fiscal measure has diminished significantly in recent years, and is expected to diminish even further.^{xviii} The converse is true for excise duty.

The administration, in accordance to the Act, the Rules, the Schedules and Annexures, tend to be emphasised, rather than concentrating on the goods. Ironically the services associated with the movement of the goods are where the real tax is generated rather than taxing the goods itself.

It could be that the word “*duty*” has distracted from the fact that it really is a “*tax*” and accordingly very little has been written about customs duty and excise duty other than on amendments to the Act, the Rules to the Act, the Schedules to the Act, and effecting a new trade agreement or trade preference in the Annexures to the Schedules to the Act. The core principles of customs duty and excise duty have never been explored.

The literature tend to focus on the secondary issues such as the internal administrative appeals, manifest acquittal system, transit, processing, warehousing, payments, rebates, drawback, refunds to name but only a few.

2. IDENTIFYING THE CORE PRINCIPLES

(a) Accounting for the product

All goods imported into, exported from, or manufactured in South Africa are subject to the provisions of the Customs and Excise Act No.91 of 1964 (“the Act”), incorporating the Rules to the Act, the Schedules to the Act, and the Annexures to the Schedules to Act.^{xix}

Due to the sheer volume of the Act, its Rules, its Schedules (*also known as the Tariff Book*) and the Annexures to the Schedules, the core principles are obscured, amongst the mirage of administrative provisions. But what are the core principles? Literature seems not to concern itself with the collective core principles, but prefer to address them singularly.

There has been no publication in South Africa that alludes to the core principles.

In essence customs duty and excise duty is concerned with the duty liability of the product (*imported, exported, or domestically manufactured*). The duty liability refers to the amount of duty payable.

The answer lies at the heart of trade – the product. Trade is after all concerned with the acquisition of a product from a foreign country for distribution and sale domestically for one or another reason such as availability. With all the administrative provisions the star of the show the product seems to be ignored. So to identify the core principles, the process starts with the product itself not with the associated administration – the paper work.

To establish the core principles, the focus should not be on the administrative provisions contained in the Act, but rather as to the good itself.

The obvious is to establish the nature of the product. In essence this would entail the questions: what it is, what it is made of, and in what state of manufacture it is imported. This would be followed by considering the cost of the goods, what price the goods would attract (*accepted that price is a subjective measure*) and how the price would be paid. Would it be the full monetary value, in kind, or a combination? Where did the imported product originate? Here a distinction needs to be made as to the last physical address from where the goods left (*shipped*), and also the physical address of the factory where the product was manufactured. It should also be considered whether all stages of manufacturing were completed in factory, what part of the manufacture it entailed and also the value of the stage of manufacture in terms of the final product.

(b) Accounting for the World Trade Organisation

The WTO is “*rule based*” with its trade rules being negotiated agreements.^{xx} These agreements cover goods dealt with under the Agreement on Tariffs and Trade (GATT) and services under General Agreement in Trade and Service (GATS) and intellectual properties. The agreements detail the principle of liberalisation and the permitted exceptions.

In reviewing the agreements there are two (2) which are of particular interest in the context of this research:

- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (*customs valuation*); and
- Agreement on Rules of Origin.

The customs valuation agreement is administered by the World Customs Organisation (WCO) and the customs methods are incorporated by WTO member countries in their customs Acts. The agreement on rules of origin merely state three (3) basic types of origin, with the detail formulated by WTO member countries in the trade deliberations.

It is important to observe that the WTO Customs Valuation Agreement only applies to *ad valorem*^{xxi} rates of customs duty and excise duty and not to specific rates of customs duty.

(c) Accounting for the World Customs Organisation

The Harmonised System (HS) Convention was devised by the WTO and internationally introduced on 01 January 1988 (*date that South Africa introduced it*) which makes it 25 years old this year. On 13 April 2013 the WCO announced that the Customs Valuation Agreement celebrated its 33rd year of existence.

The WCO is concerned with matters pertaining to customs duty, and not excise duty, the reason being that customs duty is international, whilst excise duty is a domestic matter.

The research investigated the possibility that the structure of the WCO, its directorates, committees, technical committees and working party, could allude to the core of customs duties. Though there is no formal statement for the WCO that this is indeed the justification of the committee, the research believes that Committees do represent the core principles of customs duties.

The WCO consists of three (3) directorates:

- Tariff and Trade Affairs;
- Compliance and Facilitation; and
- Capacity Building.

This first directorate, based on its name, is of interest. The directorate, Tariff and Trade Affairs, is responsible for the following Committees and Working Party:

- Harmonized System Committee;
- Harmonized System Revised Sub-Committee;
- The Scientific Sub-Committee;
- Harmonized System Working Party;
- Technical Committee on Customs Valuation; and
- Technical Committee on Rules of Origin.

Table 1. A brief description of the WCO Committees and working party

Source: World Customs Organisation

Harmonized System Committee

The HS Committee performs functions as described in Article 7 of the HS Convention. To that end, the Committee acts under the overall direction of the WCO Council and Policy Commission, with administrative support provided by the WCO Secretariat.

Harmonized System Review Sub-Committee

The Review Sub-Committee acts under the overall direction of the HS Committee with administrative support provided by the WCO Secretariat.

The Scientific Sub-Committee

The Scientific Sub-Committee acts as an advisory body of the Council on questions involving chemical or other scientific matters. In practice, the Sub-Committee acts under the instruction of the Council or any of its Committees or Sub-Committees and it reports back to these WCO bodies.

Harmonized System Working Party

The HS Working Party acts under the overall direction of the HS Committee with administrative support provided by the WCO Secretariat.

Technical Committee on Customs Valuation

The Technical Committee on Customs Valuation is established in accordance with Article 18 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

Technical Committee on Rules of Origin

The Technical Committee on Rules of Origin was established by the WTO Agreement on Rules of Origin (*Origin Agreement*), Article 4.2 (*Institutions*).

(d) Harmonised Customs Tariff

Schedule No.1 Part 1 to the Act specifies the rate of ordinary customs duty, depending on the tariff classification of a product. In table 1 an extract of the header of the ordinary customs duty. The fields, which are of interest, are “*heading/subheading*” and “*rate of duty*”.

The “*heading/subheading*” is essentially a tariff classification of the product and the “*rate of duty*” is determined based on the origin of the imported product. In the instance of an *ad valorem* rate of customs duty, the “*rate of duty*” is calculated based on the customs value of the product.

Table 2: South African Harmonised Customs Tariff (Schedule No.1 Part 1 to the Act)

Source: South African Revenue Service

Heading / Subheading	CD	Article Description	SU	Rate of Duty			
				GEN	EU	EFTA	SADC
13.01		Lac; natural gums, resins, gum-resins and oleoresins (for example, balsams):					
1301.20		- Gum Arabic	kg	15%	Free	5.5%	free

CD Check digit.

SU Statistical Unit.

GEN General / Most Favoured Nation (MFN) rate of duty

EU European Union rate of duty.

EFTA European Free Trade Area.

SADC Southern African Development Community.

(e) Identifying the core principles

Accounting for the International Institutions (*WCO and WTO*), their directorates, committees, technical committees, working party and agreements that they administered, it is concluded that there are three (3) core principles to determine the customs duty liability of a product, namely:

- What the product is (*classification of the product*):
 - In accordance to the Schedule No.1 Part 1 to the Act – also known as the Tariff Book.
 - Tariff classification.
- How much it costs (*value of the product*):
 - Value determined in accordance to methods – valuation methods.
 - Valuation.
- Where it is from (*origin of the import*):
 - From which country does the final products or product inputs emanate?
 - This might be less important in the instance of excise duty, but critical in the instance of customs duty.
 - Origin.

In the subsequent figures tariff classification is denoted by a “*C*”, customs valuation by a “*V*” and origin by an “*O*”. The core customs principles, denoted by a triangle, are indicated with a circle that constitutes customs compliance, which accounts for the credo of most Customs Authorities collection, protection, and facilitation. A rectangle encompasses the circle with the two corners at the top denoting the Act (*Customs and Excise Act*) and the Rules (*to the Customs and Excise Act*), which constitutes the Legal Framework. The two corners at the bottom denote the Standard Operation Procedure (SOP) and the External Policy (EP) of a Customs Authority, and the Forms which denote the Administrative Framework.

(f) Conceptual frame

Though such reference does not exist the research resultant from the paper defined two (2) frameworks namely Legislative Framework and Administrative Framework.

The Legislative Framework refers to the Act, encompassing the Schedules to the Act (*also known as the Tariff Book*), and the Rules to the Act. The Tariff Book is administered by the South African Revenue Service (SARS) but essentially created by the International Trade Administration Commission of South Africa (ITAC) an agency of the Department of Trade and Industry (the *dti*).

The Administrative Framework entails the Standard Operating Procedures (SOP) and External Policies (EP), for internal and external use, which are authored and published by the South African Revenue

Service (SARS). The forms, i.e. customs duty forms, nowadays electronic, are published by SARS and need to be completed by importers of goods.

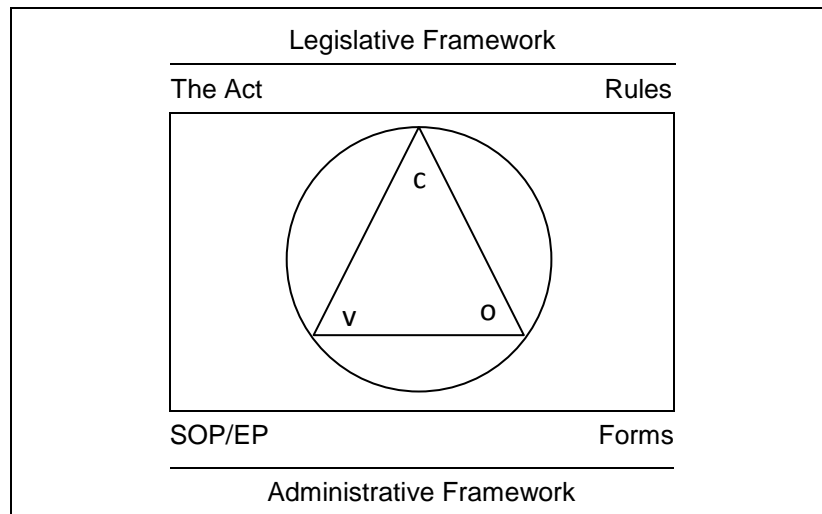


Figure 1. Core principles of customs duty, confined within the customs compliance triangle and the legislative framework and administrative framework rectangle.

Source: Own conceptualisation and design.

3. CLASSIFICATION (TARIFF)^{xxii}

From a customs and excise perspective the nature of the product relates to the classification of the product. In this instance the concern is as to what the product is, and its application. For instance a knife is manufactured to cut things, and not for illegal activities and possibly even murder, does that influence its classification?

The classification converts the product to a numerical classification of the product which serves as the rate of duty applicable to the product (*duty liability*), which then becomes a matter of contention in an effort to reduce such. Tariff classification under the Act must be implemented in accordance with the principles laid down in *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* classification as a three – stage process:

- 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;
- Consideration of the nature and characteristics of those goods; and
- Selection of the headings which is most appropriate to such goods.^{”xxiii}

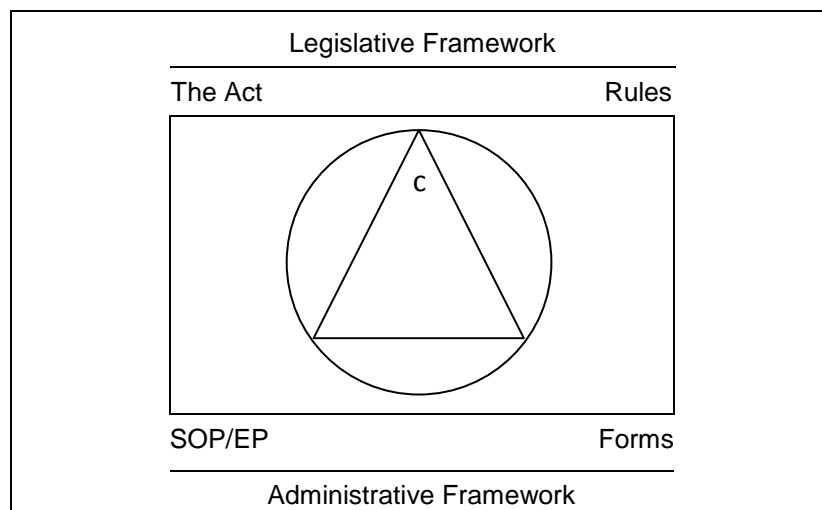


Figure 2. Core principles of customs duty, confined within the customs compliance triangle and the legislative framework and administrative framework rectangle, with the focus on tariff classification denoted as "C".

Source: Own conceptualisation and design.

The WCO contend that the Harmonized System evolved out of a need for a standard international Customs nomenclature, which was required to:

- Ensure the systematic classification of goods.
- Classification of all goods on a sound basis.
- Adopt a common Customs language that could be readily understood by users.
- Simplify the negotiation and interpretation of Customs and trade treaties and agreements.
- Facilitate the collection of data to compare statistics.

In an effort to ensure the uniform legal interpretation, the WCO has developed the International Convention on the Harmonized Commodity Description and Coding System, also known as the "Harmonized System" or "HS", which constitute (6) that General Interpretative Rules have been established and need to be applied in hierarchical order.

In South Africa the "General Rules for the Interpretation of this Schedule" can be found in Note A to the General Notes of Schedule No.1. The classification of the goods in Schedule No.1 is governed in accordance to the following Rules.

In essence it is all about the "essential character".

4. VALUATION^{xxiv}

In the words of Oscar Wilde "we know the price of everything, but the value of nothing". What is "value"? "Value" is defined by the Concise Oxford Dictionary as "... worth, desirability; purchasing power; equivalent of a thing ... which may be substituted in exchange for a thing ...". Thus the essential components of value are: desire, need, choice, access and means.

According to the WCO the term "value" reflects the concept of "worth" in respect of the physical movement of goods across national borders, where the importer (could be the buyer) have to make a declaration in respect of the "customs value". The importance of such value declaration is that this value is used in the application of other duties and taxes.

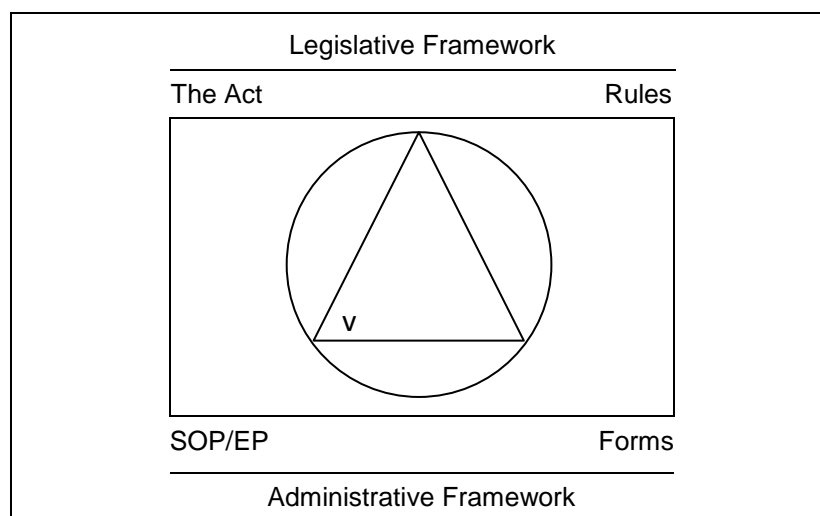


Figure 3. Core principles of customs duty, confined within the customs compliance triangle and the legislative framework and administrative framework rectangle, with the focus on valuation denoted as "V".

Source: Own conceptualisation and design.

The WCO states that value is:

- A measure of the desirability of something.
- A measure of the capacity of an object to be exchanged or sold. It is measurable.
- Is a judgement issue. It represents the quality of a thing.
- It is the evaluation of a thing with reference to its usefulness to society, the amount of work needed to produce it and the relationship between supply and demand.
- Value may be objective or subjective.

The WTO Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (*WTO Valuation Agreement*) strives to be a reference for a fair, uniform and neutral system for the valuation of goods for customs purposes, which according to the WTO, is a system that conforms to commercial realities, and which outlaws the use of arbitrary or fictitious customs values.^{xv} The WTO Valuation Agreement also details six (6) methods of valuation, which needs to be applied in hierarchal order.

In essence it is all about the “*price paid or payable*”.

5. ORIGIN

What is the “*origin*” of any given product? Does “*made in ...*” imply it to be its “*origin*”? One of the defining elements in any trade agreement is the ‘*rules of origin*’ provisions which serve to determine and identify the country from which the imported products originate.

Trade agreements by definition provides for tariff preferences through reduced rates of customs duty dependant on the country of origin and the trade remedies also rely on a product’s country of origin.

Another complicating factor is that a good could be produced in a number of countries, with the respective country contributing to the manufacturing process. As a result the determination of the origin is not necessarily the last country in which manufacturing occurred.

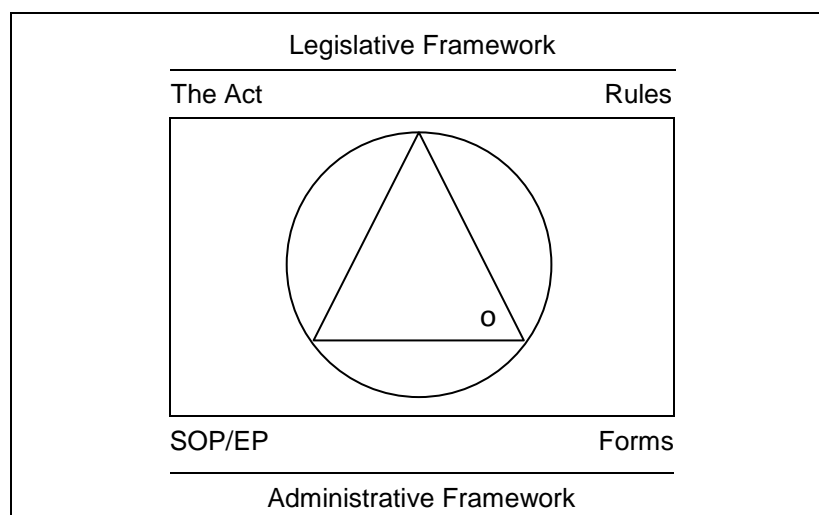


Figure 4. Core principles of customs duty, confined within the customs compliance triangle and the legislative framework and administrative framework rectangle, with the focus on origin denoted as "O".

Source: Own conceptualisation and design.

The WTO Agreement on Rules of Origin requires its members to ensure that their rules of origin are transparent, that they do not have restricting, distorting or disruptive effects on international trade,

that they are administered in a consistent, uniform, impartial and reasonable manner; and that they are based on a positive standard.^{xxvi} There are no rules or methods, but rather basic types of rules of origin.

It is generally accepted that there are three (3) basic types of rules of origin:

- The first is “*wholly produced*”. In the case of these rules, products are regarded as originating in a specific territory if all the materials used in producing the product are from that territory. For example, wheat flour made exclusively from wheat that was grown in a country and milled in that country would be regarded as wholly produced.
- The second is the principle of “*value added in the manufacturing of a product*”. If this principle is applied, the product is normally considered to have originated in a specific country if a specified percentage of the product value has been added there.
- The third type of rule determines origin on the basis of a “*change in tariff classification*”. By using this system, the origin of a product is determined in the country where, as a result of processing, its tariff classification changes.

In essence it is all about “*where the product was manufactured and where it originated from*”. As a rule of thumb, most Customs and Excise Acts state that the country of origin results if 25% value is added (“*25% rule*”) and/or the last process of manufacture occurs in a country.

6. SUMMARY

Table 3. The distinguishing criteria for classification, valuation and origin.

Source: own compilation

Criteria	Classification	Valuation	Origin
Consideration	<i>essential character</i>	<i>price paid or payable</i>	<i>Origination</i>
Agreement	Convention	WTO Agreement	WTO Agreement ¹
Administration	WCO	WCO	WCO ²
Rules/Methods	Rules (6 Rules)	Methods (6 Methods)	Three basic types ³
Determination	TDN	VDN	ODN
Act & Rules	Section 47 (9)	Sections 65 to 74	Section 46 ⁴
Forms	DA314 ⁵	DA55 ⁶	DA59 ⁷

1 Unlike the WTO Valuation Agreement the WTO Origin Agreement sets the terms of engagement, whilst the administration is within the confines of the respective trade agreements and preferences.

2 The preferences are set within the confines of a specific agreement.

3 There are no rules/methods for distinction rather three (3) basic types of rules of origin.

4 Pertaining to customs duty.

4 Application for Tariff Determination.

5 Customs and Excise Valuation Questionnaire.

6 Declaration of Origin (*general form*).

7. CONCLUSION

In the determination of the customs duty liability and the excise duty liability, the main concern relates to the goods itself, its nature (*essential character*), its value (*price paid or payable*) and country of manufacture (*first and final manufacture*). The manufacturing / assembly packaging, insurance, movement and transport associated with the goods, is secondary. It does not relate to the goods itself. Ironically the administrative focus seems more concerned with the secondary than the primary liability.

The research established that there are essentially three (3) core principles of customs duty and excise duty.

- Classification (*tariff classification of the product*)

- The defining concept “*essential character*”.
- International Convention on the Harmonized Commodity Description and Coding System.
- Administered by the WCO.
- The Six (6) General Rules.
- Valuation (*value of the product*)
 - The defining concept “*price paid or payable*”.
 - Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (*The WTO Valuation Agreement*).
 - Administered by the WCO.
 - The Six (6) Methods of Valuation.
- Origin (*origin of the product*)
 - The defining concept “*where the product was manufactured and where it originated from*”.
 - The WTO Agreement on Rules of Origin.
 - Administered by the WCO.
 - Three (3) basic types of rules of origin.

Due to the proliferation of trade agreements and trade preferences and the associated reduction in the rates of customs duty, the significance of customs as a fiscal measure is fast diminishing. The opposite is, however, true of excise duty applied specifically, and prevalent to, goods which are price-inelastic in demand.

The preserve of customs, without a doubt, is customs compliance the core of which being tariff classification, customs valuation, and origin.

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ⁱ “A duty is a tax that you levy.” – First referenced by C.V. de Lange in a guest lecture to the Taxation (Hons) students at the University of Pretoria, 2009.

ⁱⁱ Beltrame & Mehl. 1997 as quotes in Victor Thronyni p 54.

ⁱⁱⁱ Victor Thronyi, Comparative Tax Law. p335.

^{iv} M.H. de Kock, Economic History of South Africa.

^v M.H. de Kock, Economic History of South Africa.

^{vi} SILKE: South African Income Tax 2013.

^{vii} SILKE: South African Income Tax 2013.

^{viii} SILKE: South African Income Tax 2013.

^{ix} M.H. de Kock, Economic History of South Africa.

^x M.H. de Kock, Economic History of South Africa

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- ^{xi} Smith.W. (ed), Dictionary of Greek and Roman Antiques (Boston: Little Brown & Co.1859) p944-45; McCulloch, A treatise on the principles and practical influence of Taxation and the Funding System, 3rd edition, Edinburgh: Adam and Charles Black 1863, p240.
- ^{xii} Smith.W. (ed), Dictionary of Greek and Roman Antiques (Boston: Little Brown & Co.1859) p944-45; McCulloch, A treatise on the principles and practical influence of Taxation and the Funding System, 3rd edition, Edinburgh: Adam and Charles Black 1863, p240.
- ^{xiii} www.wcoond.org (accessed on 16 April 2013).
- ^{xiv} www.wto.org (accessed on 16 April 2013).
- ^{xv} World Trade Organisation, Understanding the WTO (Trading into the Future), 5th edition, July 2011.
- ^{xvi} http://www.wto.org/english/docs_e/legal_e/final_e.htm (access on 01 May 2013).
- ^{xvii} Related ministerial decisions “*Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value*” and “*Decisions on Tests Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires*”.
- ^{xviii} www.treasury.gov.za (access on 16 April 2013).
- ^{xix} Customs and Excise Act No.91 of 1964 is presently subject to being redrafted. On 30 October 2009 the South African Revenue Service (SARS) published the draft Customs Duty Bill, and the draft Customs Administration Bill for comment, (the first phase) with the draft Excise Duty Bill (the second phase) expected for release later that year, but has yet to be released.
- ^{xx} World Trade Organisation, Understanding the WTO (Trading into the Future), 5th edition, July 2011. P23
- ^{xxi} *Ad valorem* means on value.
- ^{xxii} The Harmonised System Convention was introduced international on 01 January 1988, also the day that it became effective in South Africa.
- ^{xxiii} Tariff classification under the Customers and Excise Act must be implemented in accordance with the principles laid down in *International Business Machines SA (Pty) Ltd v CCE 47 SATC 261*
- ^{xxiv} http://www.wto.org/english/tratop_e/cusval_e/cusval_info_e.htm (access on 16 April 2013).
- ^{xxv} World Trade Organisation, Understanding the WTO (Trading into the Future), 5th edition, July 2011. P49
- ^{xxvi} World Trade Organisation, Understanding the WTO (Trading into the Future), 5th edition, July 2011. P50