

W INVESTMENTS (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE 27 and 28 January and 10 November 2015

Classification Appeal

Appellant represented by one of its officers
T Magwaliba for the respondent

KUDYA J: This is an appeal filed in terms of s 18 (1) of the Fiscal Appeals Court Act [*Chapter 23:05*] by the appellant company against the classification and valuation by the respondent of a 2006 white box van Iveco 40C14 the appellant imported into the country on 29 August 2013 through the Plumtree Border Post. The respondent classified the motor vehicle as a goods carrying vehicle under heading 8704 of the Customs and Excise (Tariff) Notice 2012 Statutory Instrument 112/2012 and revaluated the purchase price of the motor vehicle for duty purposes in terms of s 111 of the Customs and Excise Act [*Chapter 23:02*]. The appellant claims that it was a passenger carrying vehicle, which should have been classified under heading 8703 of the same statutory instrument and challenged the basis of the revaluation adopted by the appellant.

The facts

At the appeal hearing the parties produced by consent a consolidated bundle of documents, exhibit 1 consisting of all the pleadings and their attachments. In addition each party called the evidence of a single witness, respectively. The facts were largely common cause.

The appellant purchased the motor vehicle¹ in the United Kingdom on 23 July 2013 purportedly for £2 000.² It was shipped from the English port of Southampton to the

¹ Registration book on pp 34, 69 and 83 of exhibit 1

² Used car invoice no 2231 on pp 43 and 80 of exhibit 1,

Namibian port of Walvis Bay.³ It was cleared from Namibia on 29 August 2013.⁴ The sole witness for the plaintiff drove it from Walvis Bay through Botswana to the Plumtree border post⁵. He presented the vehicle as an ambulance for customs clearance under tariff code 8703 on 29 August 2013 under a removal in bond.⁶ The customs officer who attended to him rejected the invoiced value and surfed the internet to establish the valuation of the motor vehicle in question. Her search disclosed a similar vehicle on sale for £9 950 in the United Kingdom on the eBay website.⁷ It was a 2006 Iveco Seddon Daily 40C14 minibus previously used as an ambulance to ferry disabled wheelchair bound patients. The comparative vehicle in question had a gross vehicle weight of 4 200 kilogrammes instead of 4 800 kilogrammes agreed by the parties and a cylinder capacity of 2 998 cc. The mileage on the comparative vehicle was 78 416 while the import had 202 122 miles. She declined to classify the vehicle as an ambulance in the absence of proof that the appellant was in the health care services industry and classified it under tariff code 8702 “for vehicles for transportation of 10 or more persons”⁸. She levied 60% duty and 15% VAT and imposed an unspecified fine on the higher duty.

On 31 August 2013 the appellant appealed to the station manager. On 5 September 2013 the sole witness submitted a request for classification decision form⁹ at the instance of the station manager. He gave a detailed description of the motor vehicle and attached the vehicle registration book, draft bill of entry¹⁰, a copy of the World Customs Organisation explanatory notes on 8703 and the letter of appeal. On 8 September 2013 the station manager confirmed the correctness of the decision of the customs officer. The vehicle was held under receipt accruing storage charges for the duration of the appeal process. On 10 September 2013¹¹ he further appealed the decision of the station manager to the Regional Manager. On 8 October¹² the Regional Manager overturned the decision of the station manager. He, however, classified the vehicle under tariff code 8704.2190 for “motor vehicles for the

³ Bill of lading on p 84 and bill of entry on p79 of exh 1

⁴ Police clearance, pp 42 and 82, exh 1

⁵ Botswana bill of entry p 78, exh 1

⁶ P 44 and 81, exh 1

⁷ P 74, exhibit 1

⁸ P 79, customs declaration form, exh 1

⁹ P71-72, exh 1

¹⁰ P44m exh 1

¹¹ P73, exh 1

¹² P 86, exh 1

carriage of goods” that attracted duty of 40% and VAT of 15%. On 10 October the appellant appealed to the Commissioner of Customs and Excise.

On 21 November 2013 the Commissioner dismissed the appeal and confirmed the determination of the Regional Manager¹³. He held that 8702 was inapplicable as the modified vehicle could only carry a maximum of 9 persons. He classified it under heading 8704.2190 and not 8703 on the ground that the vehicle was designed by the manufacturer to carry goods and not passengers. On 29 December 2013 the appellant notified the respondent of his intention to appeal. After an exchange of correspondence between the parties, the appellant eventually filed its notice of appeal on 12 June 2014 and a further notice and grounds of appeal on 5 August 2014. The respondent replied to both notices on 25 July and 18 September 2014. In addition the respondent raised two preliminary points, which were however abandoned by Mr *Magwaliba*, for the respondent, at the commencement of the appeal hearing.

The state, condition and description of the vehicle on importation at Plumtree border post was common cause. The vehicle was aptly captured in the photographs that form part of the record of proceedings¹⁴ and further described in the request for classification decision form¹⁵. These photographs cover the external rear¹⁶, frontal and left¹⁷ aspects and the internal features¹⁸ of the vehicle. The vehicle consists of a single enclosed interior space comprising an area for the driver and an oxygen purifying compressor in place of the front passenger seat behind which are 6 permanent seats with safety equipment and behind them two stretcher holding pillars. The seats are in two rows, have safety belts and are secured the floor by 5 anchor points. Two pipes connect the oxygen compressor to two oxygen outlets behind the driver’s area. Inside the vehicle on the roof is a ventilator and a rack above the driver’s head that holds a stretcher for the use of bed-ridden patients, and drawers for the storage of gloves, vomit bags, disinfectants and cleaning materials. It is fitted with three glass windows on each side and two glass windows on the rear. The entire interior is carpeted.

It was also common cause that the vehicle was manufactured in the United Kingdom where it was first registered on 22 March 2006. The uncontroverted testimony of the witness called by the appellant was that the vehicle was used in the United Kingdom for the carriage

¹³ P 87 and 89, exh 1

¹⁴ Pp53-59 and p68, exh 1

¹⁵ P71

¹⁶ P 57

¹⁷ P68

¹⁸ Pp 53-56 and 58-59, exh 1

of handicapped and disabled persons from the date of registration until it was decommissioned in 2013. It was further common cause that that the vehicle was purchased by the appellant from a vendor who specialises in selling vans decommissioned by the British Home Office, Prison Services and hospice departments that care for the sick and elderly. The registration book confirms that the vehicle was registered as a National Health Service Vehicle, NHSV. The witness made the poignant remark that there was no motor vehicle assembly line in the world that specifically manufactures ambulances. This was confirmed by the letter of 16 January 2015 from the Allied Health Council of Zimbabwe who indicated that any type of vehicle could be converted into an ambulance. The witness called by the appellant stated that the vehicle was not only principally designed to carry persons but was also designed as an ambulance.

The respondent called the evidence of one of its technical services officers who is a World Customs Organisation accredited tariff classification expert. She was so accredited in July 2013. Zimbabwe is a member of the World Customs Organisation, WCO, an international body responsible for developing the uniform Harmonised Commodity Description and Coding System, HS nomenclature, incorporated into domestic Customs tariff handbooks the world over to classify over 5 000 products. The WCO has also developed explanatory notes, a compendium of classification opinions, the alphabetical index and general rules of interpretation, GRI, that govern the classification of these products. The general code consists of 6 digits but member countries have latitude to create sub codes that clearly define particular products. Zimbabwe has created an 8 digit code tariff handbook, promulgated into law as the Customs and Excise (Tariff) Notice 2012 Statutory Instrument 112/2012. One of the most important general rules of interpretation is GRI 1.

The tariff handbook has 6 columns. These are from left to right marked Heading No; Commodity Code also known as the subheading, description of goods, quantity data, and rate of duty divided into two columns of general M.F.N. The heading number has 4 digits, the commodity code has 8 digits, the description describes the commodity, the quantity data is indicated in kilogrammes and the rate of duty is in percentage form. Motor vehicles are classified under Chapter 87 of the tariff handbook. Chapter 87 has 16 headings under which the different groups of motor vehicles are classified. In classifying the vehicle, the customs officer was guided by the headings and required to first answer the question, what is it before proceeding to answer what does it do and if necessary the last question how does it do it. The answer to the first question was derived from visual inspection of the vehicle and scrutiny of

the various import documents presented by the appellant to the customs officer. The import documents comprised the registration book, the used car purchase invoice, the bill of lading, the Namibian police in transit vehicle verification form, the foreign and local bills of entry, the customs road freight manifest and the request for classification decision. All these documents identified the vehicle as a box van. It was common cause that that such a vehicle could only fall under one of three headings, *viz.*, 8702 “motor vehicles for the carriage of ten or more persons including the driver, 8703 “motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702) including station wagons and racing cars” and 8704 “motor vehicles for the transport of goods.” The respondent’s witness stated that classification is not duty driven and so is done from left to right and never from right to left of the tariff handbook. The customs officer determines what the vehicle does by reference to each of the three headings, explanatory notes, relevant section notes, chapter notes, and subheading and sub-chapter notes in the HS nomenclature. Normally the second stage resolves the classification of the vehicle. The customs officer will only proceed to the third question if the answer to the second question yields an inconclusive result.

To her mind, the information availed by the appellant failed to establish the classification of the vehicle under heading 8703. She stated that it was not principally designed for the transport of persons and as a corollary it could also not fall under heading 8702 which caters for vehicles designed for the transport of ten or more persons including the driver. Rather it was designed for the transport of goods under heading 8704. Her opinion, just like the decision of the Commissioner of Customs and Excise of 21 November 2013, was based on the view that a box van is principally designed for the transport of goods and not persons. She conceded in cross examination that ambulances were incorporated into heading 8703 by para (2) of the explanatory notes to that heading. She also conceded that a 2 axle rigid body could be designed to carry persons and not just goods. She admitted a registration book was not designed to provide a full description of all the features on a vehicle or even its use on the date of registration. In my view, the effect of her concessions were firstly that the features on the vehicle on importation, with the exception of 4 additional seats, could have been on the vehicle at the date of registration and secondly that the vehicle could be categorised as a multipurpose vehicle, which thirdly qualified for classification under 8703.

Issues

At the pre-trial hearing of 22 October 2014 three issues were referred to trial. They were:

1. Whether or not s 196 of the Customs and Excise Act [*Chapter 23:02*] is applicable in the present appeal and if so whether or not the appellant complied with the provisions of the said section;
2. Whether or not the principles and rules of interpretation being used by the appellant to classify the vehicle for customs duty purposes are correct
3. Whether or not the issue of valuation of the vehicle should be dealt with by this Honourable Court

Whether or not s 196 of the Customs and Excise Act [Chapter 23:02] is applicable in the present appeal and if so whether or not the appellant complied with the provisions of the said section;

At the commencement of hearing Mr *Magwaliba* correctly conceded that s 196 of the Customs and Excise Act was inapplicable to a classification appeal. Section 196 (1) requires that any civil proceedings be instituted against the Commissioner for any customs and excise acts of commission or omission on 60 days' notice. In my view, the section provides for the initial commencement of civil proceedings as opposed to appeals against classification of goods which are specifically governed by the provisions of s 18 (1 and (3)) of the Fiscal Appeal Court Act. Section 196 does not provide for appeals against classification decisions of Customs officers and the Commissioner. Appeals against such decisions are specifically provided in s 18 (1) of the Fiscal Appeal Act and recognised in s 87 (3) of the Customs and Excise Act. The noting of such an appeal is prescribed by s 18(3) of the Fiscal Appeal Court Act and r 3 of the Fiscal Appeal Rules. The present appeal to this Court follows an elaborate three tier appeal process within the structures of the Commissioner involving a station manager, regional manager and the Commissioner. Such an appeal cannot be categorised as an institution of civil proceedings. The concession was properly made. The appellant was not required to comply with the 60 day notice mandated by s 196(1) of the Customs and Excise Act.

Whether or not the issue of valuation of the vehicle should be dealt with by this Honourable Court

The appellant raised the issue of valuation even before lodging the appeal to the Commissioner of Customs and Excise¹⁹ but was advised to await the conclusion of the classification appeal. It presented the valuation appeal to the Commissioner and relied on the free on board transaction value of £2 000 in the commercial invoice for the purchase of the motor vehicle. The Plumtree customs officer apparently did not accept the commercial receipt and imposed a value for an Iveco Seddon ambulance with less than half the mileage on the appellant's motor vehicle that was being advertised on the internet on the eBay website to compute the value for duty purposes. The customs officer substituted the purchase price of £ 6 950 for £2 000 and added the freight 1 charges of £2 090 and other charges of £5 500 on the bill of entry submitted by the agent of the appellant.²⁰

The various methods of valuation of imported goods for duty purposes are set out in Part X of the Customs Act. These encompass the primary method of valuation provided in s 106, the first alternative method in s 107, the second alternative method in s 108, and the final alternative method in s 111 and the method used when the truthfulness of the commercial invoice of the importer is in doubt in s 111A. The primary method relies on the transaction value actual paid or is payable to the imported goods to which is added the various costs and charges associated with the importation that are listed in s 113 (1) and (2) and less the s 113 (3) of the Customs Act costs.

The Commissioner of Customs and Excise did not respond to the valuation appeal. However, the respondent's reply of 24 September 2014 showed that it did not apply the provisions of s 106 of the Customs Act because it was dissatisfied with the genuineness of the hand written used car sale invoice presented by the appellant. The respondent neither used the first and second nor the deductive and computed value methods to revalue the motor vehicle. Rather it used the final method of valuation provided in s 111 (1) (c) of the Customs Act, which provides that:

“111 Fall-back method of valuation: final alternative method

- (1) If the value for duty purposes of any imported goods, other than non-merchandise goods as defined in subsection (1) of section *one hundred and twelve*, cannot be established or determined in terms of sections *one hundred and six* to *one hundred and ten*, the Commissioner shall establish it, subject to this section-

¹⁹ P39 exh 1

²⁰ P 44, exh 1

(c) by using any other reasonable means consistent with the principles and general provisions of the Agreements as the Commissioner considers appropriate in the circumstances of the particular case.”

The agreements are defined in s 2 of the Customs Act. The respondent did not identify the Agreements he relied on in search of the price of an Iveco Seddon ambulance on the eBay website. He overlooked the requirements of s 111 (3) (b) (c) (e) and (g) of the Customs Act. They state that:

“(3) The Commissioner shall not base any determination in terms of subsection (1) on any of the following—
(a).....
(b) a system which provides for the acceptance of the higher of two alternative values; or
(c) the price of goods on the domestic market of the country of exportation of the goods to be valued; or
(d).....
(e) the price of the goods to be valued, when sold for export to a country other than Zimbabwe; or
(f)
(g) arbitrary or fictitious values.”

It was not clear whether the eBay website value was the lower of any alternative values or whether the advertised price was not for the British domestic market. It was not established by the Commissioner whether the advertised price was targeted at some other export market other than Zimbabwe or whether the valuation was anything other than an arbitrary or fictitious value. There was no evidence that s 111(4) was complied with. The importer was not requested to produce such documentary evidence as would assist the customs officer to determine the valuation of the vehicle. The respondent clearly violated the provisions of s 111 (3) (b) (f) and (g). It seems to me that the appellant objected to the valuation. The commissioner was aware of the objection and advised appellant to await the conclusion of the classification appeal. The appellant was unhappy with the pace of these proceedings and appealed against the method used in the face of the commercial invoice issued by the seller. It was within the remit of the Commissioner and his officials to demand more information from the taxpayer. It does not appear this was done. The customs officer prematurely thump sucked a figure improperly relying on s 111.

It seems to me that where a customs officer doubts the veracity of a commercial invoice produced by an importer, he or she may utilize the provisions of s 111A to seek better documentation to establish the purchase value of the imported item. There is much to be said for the complaint of the appellant that the customs officer in question acted in a highhanded manner.

I would have set aside the valuation and directed the Commissioner to conduct a fresh valuation if I was sitting as the High Court. However I sit in this appeal as the President of the Fiscal Appeal Court. Section 119 (1) of the Customs Act bestows jurisdiction on the High Court to determine valuation appeals. The section reads:

“119 Appeals against valuation of goods

- (1) Any person who is aggrieved by any determination of the Commissioner in terms of this Part may, subject to section *one hundred and ninety-six* and after payment of the amount of any duty or tax demanded by the Commissioner in respect of the goods concerned, appeal to the High Court against such determination.
- (2) If on an appeal in terms of this section the High Court determines that a lesser amount was payable by way of duty or tax than the amount actually paid by the appellant in terms of subsection (1), the Commissioner shall refund the amount overpaid in accordance with section *one hundred and twenty-five*.”

The answer to the third issue is that this court has no jurisdiction to determine the valuation appeal. It is therefore improperly before this Court.

Whether or not the principles and rules of interpretation being used by the appellant to classify the vehicle for customs duty purposes are correct

The appellant contended that the motor vehicle was an ambulance principally designed for the transport of persons while the respondent argued that it was a motor vehicle for the transport of goods. The onus of proof lies on the appellant to show on a balance of probabilities that the vehicle should be classified under heading 8703 as an ambulance and not under heading 8704 as a vehicle for the transport of goods.

The starting point in determining the classification of the vehicle lies in s 87(1) of the Customs and Excise Act, which provides that:

“87 Classification of goods for customs purposes

- (1) For the purpose of determining the customs duty payable in respect of any goods that are imported, the Commissioner or an officer shall classify such goods into the appropriate tariff headings, subheadings or codes in accordance with any rules set out in the customs tariff, paying due regard to—
 - (a) the explanatory notes to the Harmonised Commodity Description and Coding System, issued from time to time by the World Customs Organisation in Brussels; and
 - (b) decisions of the Harmonised Commodity Description and Coding System Committee.”

The customs tariff referred to in this subsection is the Customs and Excise (Tariff) Notice, Statutory Instrument SI 111/2012, the customs tariff handbook. The classification of the vehicle into the appropriate tariff heading, subheading or codes is guided by the rules in the handbook and the explanatory notes and the general rules of interpretation, GRI, of the

Harmonised System nomenclature. GRI 1 is the primary rule that governs the classification of goods under the customs tariff handbook and the explanatory notes to the HS nomenclature.

It states that:

“The titles of sections, chapters and sub-chapters are for ease of reference only: for legal purposes, classification shall be determined according to the terms of the heading and any relative section or chapter notes.”

Motor vehicles are classified in Chapter 87 of the customs tariff handbook. It was common cause that the three prospective headings under which the vehicle could fall are 8702 for “motor vehicles for the transport of ten or more persons including the driver”, 8703 for “motor cars and other vehicles principally designed for the transport of person (other than those of heading 8702) including station wagons and racing cars” and 8704 for “motor vehicles for the transport of goods”.

Under heading 8702, “public transport type passenger motor vehicle designed (excluding those that have been modified) to carry not less than 15 and not more than 20 persons including the driver under such conditions as the Commissioner may fix” are classified in subheading 8702.1020. Other vehicles are classified under subheading 8702.1090. In my view though the other is not defined, it must cover firstly public transport type passenger motor vehicles that have been modified to carry not less than 15 and not more than 20 persons including the driver and secondly all vehicles whether modified or not that carry between 10 and 14 people. Code 8702.9020 covers “public transport type passenger motor vehicles designed (excluding those that had been modified) to carry not less than 20 persons including the driver under such conditions as the Commissioner may fix”. Code 8702.9090 covers other vehicles, though undefined it must refer to those modified to carry at least 20 persons and those whether modified or not that carry between 10 and 14 people including the driver. The customs officer who initially dealt with this motor vehicle classified it under 8702.1090 as a public transport type passenger motor vehicle modified to carry a minimum of 15 people and maximum of 20 people inclusive of the driver. The customs officer based her classification on visual inspection. She believed the vehicle would have a maximum capacity of carrying 17 passengers. The first category carries duty at the rate of 15% while the other category carries duty of 60%.

The commodity codes under 8703 are categorised in terms of the cylinder capacity of the motor vehicle. These are vehicles principally designed to carry less than 10 people and include racing cars and station wagons. The vehicle in issue had a cylinder capacity of 2889.

If principally designed as an ambulance it would fall under 8703.2392 or 8703.3292, 8703.3320 or 8703.9020 which attract duty of 5% and if it cannot be classified as an ambulance, a hearse or racing car it would fit the “other” commodity code 8703.2399 or 8703.3390 or 8703.9090 which attract duty of 40%. The appellant maintained to the Commissioner and before this Court that the vehicle was an ambulance which falls for classification under subheading 8703.2392. Lastly, under 8704, by gross vehicle weight, the vehicle would fall in commodity code 8704. 2190 or 8703.3190 that carry duty of 40%.

In determining the classification of a commodity under the customs tariff handbook the Commissioner or his officials are obliged to pay due regard to the explanatory notes. The explanatory notes form part of the interpretation of the HS nomenclature. The explanatory notes under 8703 and 8704 are detailed. They introduce and define specialised transport vehicles that fall to be considered under subheading 8703 and 8704. The World Customs Organisation explanatory notes²¹ *inter alia* incorporate in heading 8703 “specialised transport vehicles such as ambulances”. These explanatory notes identify “certain helpful features on multipurpose vehicles like vans and pick-ups with a gross weight rating of less than 5 tonnes which have a closed interior space comprising an area for the driver and passengers and another area that may be used for the transport of both persons and goods” that distinguish vehicles that are principally designed for the transport of persons under 8703 from vehicles for the transport of goods under 8704. The five “design characteristics” of such multipurpose vehicles that fall under heading 8703 are identified as the:

- (a) Presence of permanent seats with safety equipment (e.g. safety seat belts or anchor points and fittings for installing safety seat belts) for each person or the presence of permanent anchor points and fittings for installing seats and safety equipment in the rear area behind the area for the driver and front passengers which seats may be fixed, fold-away, removable from anchor points or collapsible.
- (b) Presence of rear windows along the two side panels,
- (c) Presence of sliding, swing-out or lift-up doors, with windows on the side panels or in the rear,
- (d) Absence of permanent panel or barrier between the area for the driver and front passengers and the rear area that may be used for the transport of both passengers and goods.

²¹ P xvii 8703-1 and 8703-2

- (e) Presence of comfort features and interior finish and fittings throughout the vehicle interior that are associated with the passenger areas of vehicles e.g. floor carpeting, ventilation, interior lighting.

In contradistinction, multipurpose vehicles like vans of all kinds and pick-ups with a gross vehicle weight of less than 5 tonnes that fall under heading 8704 rather than heading 8703 “have either a separate closed rear area or an open rear platform normally used for the transport of goods and may have rear bench-type seats that are without safety seat belts, anchor points or passenger amenities that fold flat against the sides to permit full use of the rear platform for the transport of goods” bear five “design characteristics”. These are the:

- (a) Presence of bench-type seats without safety equipment (e.g. safety belts or anchor points and fittings for installing safety seat belts) or passenger amenities in the rear area behind the area for the driver and front passengers. Such seats are normally fold-away or collapsible to allow full use of the rear floor (van-type vehicles) or a separate platform (pick-up vehicles) for the transport of goods;
- (b) Presence of a separate cabin for the driver and passengers and a separate open platform with side panels and a drop-down tailgate (pick-up vehicles)
- (c) Absence of rear windows along the two side panels; presence of sliding, swing-out or lift-up door or doors without windows, on the side panels or in the rear for loading and unloading goods (van type-type vehicles);
- (d) Presence of a permanent panel or barrier between the area for the driver and front passengers and the rear area.
- (e) Absence of comfort features and interior finish and fittings in the cargo bed area which are associated with the passenger areas of the vehicles (e.g. floor carpeting, ventilation, interior lighting, and ashtrays).”

The appellant submitted that the vehicle was principally designed to carry persons while Mr *Magwaliba* submitted that the vehicle was designed to ferry goods. The *Oxford Advanced Learner’s dictionary* defines the adverb principally as follows: “chiefly, mainly, mostly, largely, predominantly, first and foremost”. The word design is defined as follows: “plan, blueprint, prototype, outline, and pattern, arrangement, configuration, intention, invent, create, devise, produce, develop”. The words principally designed are transposed in the context of the transportation of persons. The chief or main intention for configuring or arranging the various specifications of the motor vehicle is what is contemplated by the phrase “principally designed”. In my view, the words can be used interchangeably with the

phrase “chiefly or mainly configured or chiefly or mainly arranged”. It seems to me that the production of any vehicle is mostly the prerogative of the manufacturer. The manufacturer of necessity must be sensitive to market trends and needs. In special cases some vehicles are manufactured to the specific requirements of customers. The purpose for which a vehicle is required by the purchaser determines the manner in which such a vehicle is configured by the manufacturer. The contention by the respondent that the overriding principal design that governs the classification of box vans derives from the manufacturer is therefore not correct. The purchaser may input into the design to produce a product that best suits his needs.

In the present matter, the description of the vehicle supplied in the request for classification decision to the Regional Manager was not controverted by the respondent. It was a box van modified into an ambulance. The description as box van appears in all the importation documents presented by the appellant to the respondent. The Commissioner of Customs and Excise relied on the contents of the registration book and the physical examination of the vehicle in classifying the vehicle under subheading 8704. These were the box van body type, the heavy oil, 2-axle-rigid body and I would add the vehicle category N2. In the European Union and in the United Kingdom vehicle category N2 refers to vehicles designed and constructed primarily for the transportation of goods. The vehicle did not have a siren nor the inscription “ambulance” on its body. The concessions made by the technical services officer of the respondent on some of these features, however, debased the classification of the vehicle by the respondent under heading 8704. At best for the respondent the vehicle could be described as a multipurpose vehicle.

The concessions had the unintended consequence of propping up the appellant’s contention that the vehicle was principally designed to carry passengers. There are three features in the registration book which suggest that the vehicle was principally designed to carry passengers. The first is that the vehicle was registered under the National Health Service Vehicle, NHSV taxation class. The second is that some N2 vehicles in the European Union and the United Kingdom are principally designed as “specialised transport vehicles”. The third is the reference to three seats inclusive of the driver in the registration book. The other two seats must have been behind the area of the driver to warrant any mention in the registration book. To my mind, it is unusual to record such items in a registration book. In my view, it was done in order to highlight the unusual principal design of this motor vehicle. The undisputed evidence of the appellant was that the vehicle, purchased from a vendor of decommissioned NHSV, was principally designed to convey the sick to and from hospital. It

was also common cause that it was used to ferry disabled persons and critically ill patients on life support. That the vehicle was an ex-ambulance was confirmed by the used car commercial invoice filed of record. It was also unwittingly confirmed by the customs officer who valued the vehicle on the basis of an ambulance for disabled person he surfed on the eBay website. The fittings in the vehicle were consistent with a health service delivery vehicle. I agree with the contention of the appellant that a siren and ‘ambulance’ inscription are not requirements of the HS nomenclature or Customs Act but of the Road Traffic Act.

The features on the vehicle are more aligned to the five designed characteristics in the 8703 explanatory notes. It had permanent seats and safety equipment rather than bench type seats without safety equipment, one enclosed area rather than a barrier between the drivers’ cabin and the rest of the van, rear windows along the two side panels rather than two panels without such windows and the presence of comfort features like carpets and ventilation rather than their absence. These different and distinct features encompassed the design characteristics listed in the 8703 explanatory notes which are clearly distinguishable from the 8704 design characteristics.

The next sub issue to determine is whether the appellant proved on a balance of probabilities that the vehicle was an ambulance. An ambulance is defined in the *Concise Oxford Dictionary*²² as “a vehicle equipped for taking the sick or injured to and from hospital”. The parties, however, relied on the Wikipedia definition that defines an ambulance as “a vehicle for transportation for sick or injured people to, from and between places of treatment for an illness or injury and in some instance will also provide out of hospital medical care to the patient. The word is often associated with road going emergency ambulances which form part of an emergency medical service, administrative emergency care to those with acute medical problems. The word ambulance does however extend to a wider range of vehicles other than those with flashing warning lights and sirens including a large number of non-urgent ambulances which are for transport of patients without an urgent acute condition and a wide range of vehicles including trucks, vans, bicycles, motorbikes, station wagons, buses, helicopters, fixed-wing aircraft, boats and even ships”.

The letter from the Registrar of the Allied Health Practitioner Council of 16 January 2015 underscores the fact that any type of vehicle is suitable for use as an ambulance as long as it meets interior measurements of 280 cm long, 145cm wide and 125cm high. The vehicle

²² 10th ed

must be capable of transporting at least one person on a stretcher.²³ The letter confirmed the testimony for the appellant that there was no single standard design for an ambulance. It was common cause that a registration book is a poor source of the attributes of an ambulance. The production of detailed explanatory notes covering specialised transport vehicles such as ambulances show that the World Council Organisation was aware of the difficulties that bedevilled Customs authorities in classifying these vehicles. I am satisfied from the totality of the evidence that the motor vehicle was an ambulance. But even if I were to find that it was an incomplete ambulance, it would still be classified as an ambulance in terms of GRI 2 (a) under subheading 8703.2312 as ambulance with an engine capacity of more than 2 500cc. I, however, hold that the appellant imported an ambulance and it should be classified as such by the Commissioner.

While it may be easy to classify certain vehicles in accordance with their use, there are other vehicles that cannot be so easily categorised. That the latter type of vehicles must have exercised the collective mind of the WCO committee is shown by the production of detailed explanatory notes under heading 8703 and 8704. The type of vehicles listed in the explanatory notes show that box vans formed party of the vehicles that cannot easily be classified by their general technical features as vehicles falling exclusively into one and not the other of the two classifications. In my view, the explanatory notes practically extend the meaning of principally designed found in heading 8703 beyond the narrow meaning advocated by the respondent. The explanatory notes compel the respondent to examine the technical features on the box van as at the date of importation before determining whether it falls for classification under heading 8703 or 8704. In essence the explanatory notes recognise that there is no one cut and dried use for a box van. The differences in classification between the customs officer and her station manager on the one hand and the regional manager and the Commissioner of Customs and Excise on the other which also differed with the classifications of the Namibian and Botswana customs officers demonstrates the challenges Customs officials have in understanding HS nomenclature in regards to box vans. One hopes that all of them are not motivated by raising higher duties than the importer is entitled to pay. If they genuinely do not appreciate their meaning, there is need for continuing education in that regard.

²³ P 4 and 5 of exh 1

It seems to me that the approach that must be adopted by the respondent in classifying box vans is to first apply the narrow meaning. He should then proceed to apply the wider meaning set out in the explanatory notes to arrive at the correct classification. Where the two processes yield the same result, then the classification would no doubt be the correct one. Where however the two processes lead to two different classifications, the classification reached through the narrow meaning must be disregarded in favour of the classification rendered by the explanatory notes.

Costs

I am satisfied that the decision appealed against was not grossly unreasonable. Each party will bear its own costs.

Disposition

In terms of s 87 (7) of the Fiscal Appeal Court Act, this Court may confirm or set aside the classification appealed against and is obliged to refer the matter back to the Commissioner to make a further classification if it sets aside the classification. I am satisfied that the Commissioner wrongly classified the motor vehicle under heading 8704. He should have classified it under 8703. Accordingly, it is ordered that:

1. The appeal is allowed
2. The classification imposed by the Commissioner of Customs and Excise is set aside.
3. The matter is remitted back to the Commissioner for the reclassification of the motor vehicle in accordance with the terms of this judgment.
4. Each party shall bear its own costs