



[2013] UKUT 0449 (TCC)
Appeal number: FTC/43/2012

*CUSTOMS DUTY -Binding Tariff Informations-whether imported utility vehicles
should be classified as “dumpers designed for off-highway use”-yes-appeal allowed*

**IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

(1) E.P. BARRUS LIMITED Appellants
(2) KUBOTA (UK) LIMITED

- and -

THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS

**TRIBUNAL: Judge Timothy Herrington
Judge Nicholas Aleksander**

Sitting in public in London on 3 June 2013

Valentina Sloane, Counsel, for the Appellants

**Mark Fell, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents, the Commissioners of Her
Majesty’s Revenue and Customs (“HMRC”)**

DECISION

Introduction

1. This is the Appellants' appeal from a decision ("the Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") dismissing the Appellants' appeal against Binding Tariff Informations issued by HMRC in respect of two types of vehicle imported by the Appellants under heading 8704219100 of the Common Nomenclature

2. The issue in these proceedings is the correct classification under EU law of the vehicles in question, namely:

(1) The Cub Cadet Utility Vehicle Big Country ("the Cub Cadet"), which is imported by the First Appellant and was classified under a Binding Tariff Information ("BTI") dated 18 May 2009; and

(2) The Kubota Rough Terrain Vehicle 900 ("the Kubota"), which is imported by the Second Appellant and was classified under a BTI dated 2 October 2009.

These vehicles are referred to in this decision together as "the Vehicles".

3. It is common ground that the Vehicles are classified at the four-digit level under heading 87 04 as "Motor vehicles for the transport of goods". The issue in the proceedings is whether, at the six digit level, they are classified under the specific subheading 87 04 10 "Dumpers designed for off-highway use" (as contended by the Appellants) or under the residual subheading 87 04 21 "Other, with compression-ignition internal combustion piston engine" (as contended by HMRC).

4. The Appellants contend that the FTT erred in law by failing to apply the correct legal test in that it was required, but failed, to classify the Vehicles by reference to their objective characteristics. Instead, the Appellants contend, the FTT classified the Vehicles by reference to factors which are legally irrelevant. When the correct legal test is applied to the FTT's findings on the objective characteristics of the Vehicles the Appellants contend that it is clear that the correct classification of the Vehicles under EU law is under subheading 87 04 10.

5. HMRC contend that the FTT correctly classified the Vehicles, its reasoning being that although the Vehicles have tippers (an essential characteristic of a dumper) it is not the case that the primary or dominant purpose of the Vehicles is dumping.

Relevant Facts

6. The FTT made clear findings of fact as to the inherent characteristics of the Vehicles and these were set out in paragraphs 7 to 19 of the Decision as follows:

"7. The Vehicles are small utility vehicles, powered by an engine located under the bonnet at the front, with space for the driver and a passenger in the middle and a flat bedded cargo space at the rear.

8. Due to their design, they are intended exclusively or principally for use off-highway use, particularly in environments with very rough terrain. This would therefore include construction sites and any other site involving such rough terrain.
- 5 9. They are fitted with a sturdy flat-bed tipping body, designed essentially for the transport and tipping of any kind of material within limited spaces.
- 10 10. The Cub Cadet has a cargo bed with a manual tipper which can be used to tip up the cargo bed. The Kubota comes in four different versions. All four have a cargo bed and three of them have a hydraulic tipper.
11. The vehicles are constructed of a strong steel frame (the Cub Cadet) or special high intensity material (the Kubota), designed to give them a strong body, capable of withstanding the rigours of working in rough terrain environment.
12. They are four wheel drive designed to adapt to the roughest of terrains and high inclines, such as those found on building site, quarries, farms and forests.
- 15 13. The driver cabs are fitted as standard with a full roll over protection frame (“ROPS”), again designed to protect the drivers when working on such rough terrain.
14. They are fitted as standard with off-road earth moving tyres, designed especially for such rough terrain and over soft ground. They have a high ground clearance and short wheel base, as necessary for working in the environment in which they are designed to operate.
- 20 15. They have a limited speed of 25mph and a high brake capacity with Wet-type disc brakes, which provide enhanced stopping ability that does not drop off with wear.
16. Due to their sturdy construction their tare weight/payload ratio does not exceed 1:1:6.
- 25 17. They are fitted with special suspension systems designed for off-road use on the roughest of terrains.
18. They are fitted as standard with a coupling device, plus the Cub Cadet is fitted with a front hitch as well, designed to pull other vehicles or machinery.
- 30 19. They are capable of towing a non-braked trailer of twice their weight on an even surface, as demonstrated by video evidence submitted to HMRC, showing the Cub Cadet towing two identical vehicles without difficulty and as confirmed by the witnesses.”

7. The FTT made further findings of fact (at paragraphs 20 to 31 of the Decision) regarding the uses to which the Vehicles were or may be put, based on an examination of marketing literature and witness evidence from representatives of the Appellants. The Appellants submit that these findings are not relevant to the issue that we have to determine which must be determined by reference purely to the objective characteristics of the Vehicles, as they would appear to a customs officer at the port of entry, but we can summarise these findings as follows:

- (1) Over 95% of customers for the Cub Cadet were farmers or gamekeepers who used the vehicle for transporting animal feed and dumping it where the livestock were so that these customers were only interested in the dumping facility (paragraphs 27 and 28);
- 5 (2) Whilst the Cub Cadet was not specially designed to transport sand, gravel, earth, stones, etc. on building sites, mines or quarries it was designed to carry a range of loads in off-road environments (paragraph 26).
- (3) 95% of the Kubotas sold to the agricultural, horticultural and forestry sector, including for hunting purposes (paragraph 29); and
- 10 (4) All the Kubotas had dumping characteristics although they could also carry goods not suitable for dumping. They are specially designed to carry loose loads (paragraph 31).

8. The FTT made further findings of fact as recorded in its overall findings as follows:

- 15 (1) the Vehicles were used to transport a range of materials which it would not be appropriate to dump, such as equipment or water (paragraph 156); and
- (2) the Vehicles' use went far beyond dumping, and they were used for winding, pushing, hauling trailers, moving animals, transporting plants, boxes, water and equipment, carrying munitions and transporting feed for animals which might feed from a trough (paragraph 162).
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Relevant legislation and guidance

9. The FTT set out a useful summary of the legal background to the EU customs tariffs and the principles to be followed in their interpretation in paragraphs 32 to 42 of the Decision. Neither party takes issue with that summary and we do not need to repeat it in full here.

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10. We observe that classification of goods in the Common Nomenclature (“CN”) under the general rules for its interpretation contained in Annex 1 of EC Council Regulation 2658/87 when goods are *prima facie* classifiable under two or more headings shall be effected such that the heading which provides the most specific description shall be preferred to headings providing a more general description. Where goods cannot be classified on this basis they are to be classified under the heading which occurs last in numerical order among those which equally merit consideration.

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11. As we shall see, the relevant case law establishes that goods must be classified under the CN by reference to their objective characteristics and properties, as defined in the headings of the CN.

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12. Chapter 87 of the CN, as in force at the relevant time that the BTIs were issued, deals with the classification of motor vehicles. CN Code 87 04 deals with motor

vehicles for the transport of goods and it is common ground that the Vehicles meet that classification.

13. Under this heading Code 87 04 10 specifies:

“Dumpers designed for off-highway use”.

5 14. It is common ground that if the Vehicles cannot be correctly classified under this ground they must be classified under the heading 87 04 21:

“Motor vehicles for the transportation of goods: other.”

10 15. It is, as we shall see when we review the authorities, for the national court to determine the objective characteristics and properties of the product, having regard to its physical appearance, composition and presentation. As correctly identified by the FTT, there are other primary sources which are valid aids to the construction of the CN including:

15 (1) The Explanatory Notes to the Nomenclature of the Customs Co-operation Council (known as Explanatory Notes to the Harmonised System or HSEs), drawn up by the World Customs Organisation; and

(2) The Combined Nomenclature Explanatory Notes (known as CNENs), drawn up by the European Commission.

20 16. HSEs can be used for persuasive, but non-legally binding guidance. It has been held that the explanatory notes in the CNENs and the HSEs are an important aid to construction of the scope of the headings of the Combined Nomenclature, albeit that neither is legally binding. The content of HSE and CNEN notes will be ignored if they are incompatible with the provisions of the Combined Nomenclature.

17. The HSEs to Chapter 87 of the CN provide the following guidance as to the meaning of Dumpers:

25 “Dumpers, sturdily built vehicles with a tipping or bottom opening body, designed for the transport of excavated or other materials. These vehicles, which may have a rigid or articulated chassis, are generally fitted with off-the-road wheels and can work over soft ground. Both heavy and light dumpers are included in this group; the latter are
30 sometimes characterised by a two-way seat, two seats facing in opposite directions or by two steering wheels, to enable the vehicles to be steered with the driver facing the body for unloading.

...

Subheading 8704.10

35 These dumpers can generally be distinguished from other vehicles for the transport of goods (in particular, tipping lorries (trucks)) by the following characteristics:

- the dumper body is made of very strong steel sheets; its front part is extended over the driver's cab to protect the cab; the whole or part of the floor slopes upwards towards the rear;
- in some cases the driver's cab is half-width only;
- 5 - lack of axle suspension;
- high braking capacity;
- limited speed and area of operation;
- special earth-moving tyres;
- 10 - because of their sturdy construction the tare weight/payload ration does not exceed 1:1.6;
- the body may be heated by exhaust gases to prevent materials from sticking or freezing."

18. The CNENs for 8704 10 provide:

- 15 "1. These subheadings mainly cover vehicles fitted with a front or rear tipping body or a bottom-opening body that have been specifically designed to transport sand, gravel, earth, stones, etc., and are intended for use in quarries, mines or on building sites, at roadworks, airports and ports. Examples illustrating various types of dumper are given at the end of this note.
- 20 2. These types of subheadings also cover smaller vehicles of the type used on construction sites for carrying earth rubble, fresh cement and concrete, etc. These have a fixed or articulated chassis and two-or four wheeled drive, the dumper hopper being located above one axle and the driver's seat above the other. The driver's seat is not usually
- 25 inside a cab."

19. Finally, there are a number of EC regulations which classify specific vehicles. Regulations of this type, although only binding in relation to an identical vehicle to the one classified, may be used as guidance when applying the tariffs to similar products. Mr Fell relies on the following three regulations to show that the fact that a

30 vehicle has a tipper does not necessarily make it a dumper:

- 35 (1) *Commission Regulation (EC) No 799/1999* which classifies a vehicle with an open load area with a tipper and a device for towing trailers to 8704 21 91 providing that the "vehicles are not essentially designed for hauling or pushing another vehicle, appliance or load" and that they "are not dumper trucks";
- (2) *Commission Regulation (EC) No 1386/2003* which classifies a vehicle with an open load area with a tipper to 8704 31 91 stating "the vehicle is designed essentially for the transport of goods not for hauling or pushing other vehicles"; and
- 40 (3) *Commission Regulation (EC) No 2147/2004* which classifies a vehicle (item 5) with an open load area with a tipper to 8704 21 91 stating that it "is not a dumper truck".

The Decision of the FTT

20. The FTT concluded in paragraph 164 of the Decision:

5 “...that the vehicles were best described as for the transport of goods
and were therefore correctly classified by HMRC under heading
8704219100 of the Common Nomenclature ... This heading is for
motor vehicles for the transportation of goods. Other ...”

21. As submitted by Mr Fell, the reasoning for the FTT’s conclusion was that a
vehicle is only a dumper within the meaning of 8704 10 if and only if (i) it has a
tipper; and (ii) the primary dominant purpose of the vehicle is dumping and on the
10 facts, although the Vehicles have tippers, it not the case that their primary or dominant
purpose is dumping.

22. Although paragraph 160 of the Decision records that when the FTT assessed the
objective characteristics of the Vehicles it was not possible to conclude that the
primary purpose was dumping, it is clear that its overall conclusion was also based on
15 its findings (in paragraphs 156 and 162 of the Decision) as to the wide range of
purposes that the Vehicles were put to which went well beyond dumping. These
findings were based on the witness evidence as to the uses the Vehicles were put and
the marketing material produced. It is also clear that the FTT did not seek to identify
what was the primary use of the Vehicles by looking at their inherent characteristics
20 objectively, its decision was that the primary purpose was not dumping.

The Authorities

23. We were referred to a number of judgments of the European Court of Justice
(“ECJ”) and one decision of the FTT for assistance on how to approach the
classification of vehicles and other products under the CN, and in particular the
25 essential characteristics of a “dumper”.

24. We start with Case C-228/89 *Farfalla Fleming v Hauptzollamt München-West*
[1990] ECR I-3387 where the ECJ considered whether glass paperweights could
qualify for an exemption from customs duty as original works of art as they were
executed by famous glassware artists and served no functional purpose as
30 paperweights. The ECJ confirmed in paragraph 13 of its judgment that the decisive
criterion for the customs classification of goods must be sought generally in their
objective characteristics and qualities.

25. It then went on to state (in paragraph 20) that since the customs authorities can
rely only on objective criteria relating to the external characteristics of goods, even
35 where these goods are hand-made by artists, they must be regarded as goods of a
commercial character because they appear similar to comparable artistes
manufactured industrially or as works of craftsmanship. It therefore found in
paragraph 20 of its judgment as follows:

40 “That conclusion is not invalidated by the fact that the paperweights in
question are produced by hand in limited editions by well-known
artists and are collected by collectors and displayed in museums

5 without ever being used as paperweights. Just as an artistic value which an article may have is not a matter for assessment by the customs authorities, the method employed for producing the article and the actual use for which that article is intended cannot be adopted by those authorities as criteria for tariff classification, since they are factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities. For the same reasons, the price of the article in question is not an appropriate criterion for customs classification.”

10 26. In Case C-395/93 *Neckermann* [1994] ECR I-4027 the question arose as to whether garments which were declared on import as pyjamas were correctly re-classified by the customs authorities as upper garments and trousers with the result that higher duty was payable. The Court identified that in the absence of a definition of pyjamas, the objective characteristic of pyjamas, which is capable of distinguishing them from other ensembles, can be sought only in the use for which they were intended, namely to be worn in bed as nightwear. If that objective characteristic can be established at the time of customs clearance the fact that they could be used for other purposes does not preclude them from being classified as pyjamas: see paragraphs 7 and 8 of the judgment. It then went on to say in paragraph 9 that for a garment to be classified as pyjamas for customs purposes:

“... it does not have to be solely or exclusively meant to be worn in bed. It suffices if that is the main use for which it is intended.”

27. The Court went on to say that the mere fact that is a garment was capable of being worn in bed was insufficient: see paragraph 16.

25 28. In Case C-376/07 *Kamino International Logistics BV v Staatssecretaris van Financiën* [2009] the ECJ had to consider the question as to the correct classification of a colour LCD monitor which, although marketed for use with automatic data processing machines, would also have other uses, such as for playing games.

30 29. In this case the ECJ sought to aid its interpretation by reference to the relevant CNENs and HSEs. It also confirmed, in paragraph 63 of its judgment, that a specific classification regulation, which is adopted because the classification of a particular product is such as to give rise to difficulty or to be a matter of dispute, is, in general, to apply to products identical to the one classified. We also observe the opinion of the Advocate General, which appears not to have been disapproved by the Court, with regard to whether a product’s target use or advertising material should be taken into account. This is set out in paragraphs 72 to 75 of his opinion as follows:

40 “72. In my view, there is no doubt that the technical characteristics of the product constitute the fundamental criterion to be taken into account in that connection. In the case of the monitors at issue, it will plainly be characteristics like the resolution, the screen aspect ratio (the width of the screen in relation to its height), the available connectors, the possibility of adjusting the height and screen tilt angle, the presence of certain specific ergonomic features designed to facilitate close ‘desktop’ use and so forth, which the national court will have to analyse in order to determine whether or not the product is normally used in connection with an automatic data-processing system.

73. The possibility of taking account of the product's intended commercial use, in other words its 'target' use, in order to determine its normal use, seems to me to be more problematical. In my view, that option should be excluded.

5 74. It is in fact clear that if significance is attached to elements such as the product's declared use, as indicated on its packaging or in advertising material, there is an increased risk of abuse. In a variety of fields, instances of products which are surreptitiously presented as being intended for uses other than their real use, in order, for example, to circumvent sales bans or rule out producer liability, are in fact anything but infrequent, even though the relevant public is actually perfectly well aware of the
10 real intended use of the products in question.

75. The position set out above seems to me, moreover, to be consistent with the case-law of the Court which, while in principle accepting the possibility of taking a product's intended use into account in order to determine its customs classification, has, nevertheless, stressed that that intended use must be based on specific and
15 objective criteria."

30. A similar approach was taken by the FTT in the recent case of *Honda Motor Europe (UK) Ltd & Others v HMRC* (2013) when it considered the approach to the classification of an all terrain vehicle in paragraphs 74 to 76 of its decision as follows:

20 "74. ... The important criteria are the objective characteristics and properties, the design, not the use. The design comes first and the use follows the design. The Tribunal agrees with the Appellants' submission that the tractors could be used for agricultural as well as other purposes. The customer may use the product for purposes which are different from the purposes from which it is designed. However, it is the purposes for which the product is designed that are relevant.

25 75. The Appellants submit that the product is to be assessed by its objective characteristics as well as its main intended use and the way it is marketed or promoted. The Appellants say that in addition to the characteristics and objective properties of the product the marketing or actual use of the product may be relevant in assessing its intended use. Their point is one of fact. They are suggesting that the main use to which
30 the tractors are put can determine their classification.

76. This argument while interesting is not persuasive. This seems to be putting the cart before the horse since intended use has to be inherent in the objective characteristics and properties of the product and not necessarily determined by the use made of the product by the consumer."

35 The FTT specifically rejected the Appellants' submissions in that case that use of a vehicle can be established from the use a customer makes of a product or from marketing materials: see paragraph 80 of the decision.

31. The question as to whether a vehicle was correctly classified as a dumper truck was considered in Case C-396/02 *DFDS BV v Inspecteur der Belastingdienst —*
40 *Douanedistrict Rotterdam* [2004] ECR I-8439. The vehicles in question were known as "Minitracs" which were vehicles specially designed for off-highway use and intended for the loading and unloading of materials. The issue as to whether they would be classified as dumpers had been called into question because of their

intricate, versatile and precise tipping function that meant that the vehicle did not look like any of the pictures of dumpers set out in the explanatory note to the CN, which all showed vehicles fitted with a front or rear tipping body or a bottom opening body.

5 32. The Court held that the fact that a flatbed vehicle is equipped with an intricate, versatile and precise tipping function does not exclude its classification as a dumper. After noting in paragraph 29 of its judgment that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties, the Court concluded in paragraphs 32 to 35 of
10 its judgment as follows:

15 “32. It is clear from the description of such vehicles in the explanatory note on the CN and the HS that an essential characteristic of dumpers is to have a tipping hopper or an opening bottom for the transport of rubble and various materials. There is, by contrast, no indication in those notes that the form or functioning of the tipping hoppers can constitute, by themselves, decisive criteria for the classification of a vehicle as a dumper.

20 33. The HS explanatory note relating to heading 8704 describes dumpers as ‘sturdily built vehicles’. Even assuming that the criterion of a vehicle’s sturdiness is sufficiently objective to be accepted as a criterion of classification, it cannot however be deduced from such a criterion that an advanced tipping mechanism cannot be sturdy or that the vehicle’s sturdiness is to be judged in the light of the sturdiness of its dumping mechanism.

25 34. So far as subheading 8704 10 is concerned, the CN and HS explanatory notes emphasise expressly by the use of the adverbs ‘generally’ and ‘mainly’ that the criteria are mentioned merely as indications and do not constitute mandatory requirements. The fact that a vehicle is not fitted with a traditionally shaped hopper, or that such hopper can be tipped not only forwards or backwards but also sideways, cannot therefore by itself exclude the classification of the vehicle in question as a dumper.

30 35. More generally, in view of the intended purpose of dumpers, namely the transport and dumping of rubble and various materials, there is nothing in the facts of this case which could lead to the conclusion that modifications to the construction of such vehicles in order to make them better for their intended purpose (particularly by dumping with greater precision in a limited space) can result in their exclusion from classification as dumpers.”

35 33. Miss Sloane relies on the reference in paragraph 32 of the ECJ’s judgment to an essential characteristic of a dumper being the presence of a ‘tipping hopper’ in whatever form and that once there is such a feature the vehicle is potentially a dumper.

40 34. We also observe that because the ECJ refers in paragraph 35 of its judgment to the intended purpose being the transport and dumping of rubble it stated in paragraph 33 of its judgment that the vehicle needed to be sturdily built, that is with strong steel plates.

35. We also observe that the Advocate General, in paragraph 31 of her opinion, indicated how dumpers were to be distinguished from tipping lorries as follows:

5 “31. It may be the case that conventional dumpers are formally distinguished from tipping lorries primarily in that dumpers’ tipping bodies are mainly tub-shaped and tipping lorries’ tipping bodies are flat with four vertical side walls. However, the different forms of tipping body fulfil the different intended purposes. A tipping lorry is designed primarily for highway transport and dumping is thus of secondary importance. Conventional dumpers, on the other hand, are intended primarily for the transport and dumping of materials in off-highway use. If a vehicle – like one of the Minitracs – has
10 a flat body that is tippable in three directions and individually opening vertical side walls, it is not really comprehensible why the tipping body – despite its form – should not also serve for loading and dumping materials in off-highway use, but with the aim of *more precise* loading and dumping.”

15 36. This distinguishing feature of off-highway use was considered by the ECJ in Case C-486/06 *BAS Trucks BV v Staatssecretaris van Financiën* [2007] ECR I-6763 where the question for consideration was whether the fact that the dumpers were, in view of their distinctive characteristics, designed for use on paved public roads as well as for off-road use precluded their classification under 8704 10 of the CN as a dumper. The ECJ held that it did not, its reasoning is set out in paragraphs 32 to 40 of
20 its decision as follows:

25 “32. It is apparent from its wording that subheading 8704 10 of the CN is a specific heading for vehicles designed for a special use, namely use off-highway for the loading and unloading of various materials. The other categories of motor vehicles for the transport of goods are covered by general subheadings which make a distinction on the basis of the specific technical characteristics of those vehicles rather than according to the use made of them.

30 33. The explanatory notes to the combined nomenclature relating to subheadings 8704 10 11 to 8704 10 90 describe dumpers as vehicles ‘specially designed to transport sand, gravel, earth, stones, etc. and ... intended for use in quarries, mines or on building sites, at roadworks, airports and ports’.

35 34. The explanatory notes to the HS relating to subheadings 8704 and 8704 10 describe dumpers as vehicles ‘generally fitted with off-the-road wheels and [able to] work over soft ground’, whose speed and area of operation are limited in comparison with vehicles designed at the outset to be used on paved, public roads and which are in general fitted with special earth-moving tyres.

40 35. As a general rule, in the light of the inherent characteristics of the dumpers covered by subheading 8704 10 of the CN, namely off-the-road wheels, special earth-moving tyres and limited speed and area of operation, such vehicles seem to be intended primarily for the transport of materials in quarries mines or on building sites, that is to say, off-highway. Those characteristics distinguish them from other vehicles intended for the transport of goods in so far as, unlike those vehicles, they are primarily intended to be driven on ground other than paved, public roads.

36. It follows from the foregoing that, in order to be classifiable under subheading 8704 10 of the CN, dumpers must have been specially designed for off-highway use for the transport and unloading of materials.

5 37. However, neither the wording of subheading 8704 10 of the CN nor the explanatory notes to the combined nomenclature and the HS indicate that those dumpers must have been designed in such a way that they can be used exclusively off-highway.

10 38. In contrast to what the Netherlands Government contends, the essential characteristic of the dumpers covered by subheading 8704 10 of the CN does not lie in the fact that they must be incapable of being driven on the highway, but that they are primarily designed to be capable of being driven on ground which is more or less uneven. The fact that dumpers are designed so as to be also capable, incidentally, of being driven on paved, public roads is therefore not a decisive factor for their classification in the CN.

15 39. It follows from the foregoing that the fact that a truck is designed so as to be capable of being driven not only off-highway but also on paved, public roads cannot in itself suffice to preclude that vehicle from classification as a dumper within the meaning of subheading 8704 10 of the CN.

20 40. It is for the national authorities to ascertain on a case-by-case basis, under the court's supervision, whether a truck is designed specifically and primarily for off-highway use or whether, on the contrary, it is designed primarily to be used on paved, public roads. Accordingly, it is appropriate to establish on the basis of all the characteristics of the vehicle concerned whether it has the essential characteristics listed in the relevant explanatory notes to the combined nomenclature and to the HS."

25 37. We observe here, as in *DFDS*, the emphasis on the apparent intended use of vehicles that qualify as dumpers for the transport of materials in quarries mines or on building sites so that it should be apparent to the customs officer looking at the inherent characteristics of the vehicle that objectively the vehicle was designed for that purpose.

30 38. The final case to which we need to refer is Case C-486/06 *BVBA Van Landeghem v Belgische Staat* [2007] ECR I-10661. The question for determination by the ECJ in that case was whether a pick-up truck that had a single enclosed interior space comprising an area for the driver and passengers and another open area that may be used for the transport of both persons and goods was to be classified as a motor vehicle for the transport of goods. The court identified the approach to be taken to the issue in paragraph 29 of its judgment as follows:

"Taking those characteristics and properties into account, it must be examined whether such vehicles, in the light of their general appearance and on the basis of their characteristics as a whole, are principally designed for the transport of persons or of goods."

40 39. In this particular case it concluded in paragraphs 42 and 43 as follows:

"42. Therefore, it follows from the examination of the characteristics of the vehicles described by the national court that the principal intended use of the vehicles at issue in the main proceedings is,

5 according to their general appearance and the entirety of their characteristics, the transport of persons, and those vehicles must be classified under heading 87.03 of the CN. Contrary to the Commission's argument, the classification of the vehicles concerned under heading 87.04 of the CN cannot reasonably be envisaged and therefore the application of General Rule 3(c) laid down in Section 1 A of Part One of the CN is excluded on the basis of its very wording.

10 43. Consequently, the answer to the question posed must be that pick-ups such as those at issue in the main proceedings which consist, on the one hand, of an enclosed cabin for use as a passenger compartment, there being, behind the driver's seat, folding or removable seats with three-point safety belts, and, on the other hand, of a load space which is separated from the cabin, is not higher than 50 centimetres, can be opened only at the rear and has no facilities for attaching a load, which have a luxurious full-option interior (including electrically adjustable leather seats, electrically operated mirrors and windows and a stereo with a CD player), and which are equipped with an anti-lock braking system (ABS), an automatic, 4 to 8 litre, very high-consumption petrol engine, four-wheel drive and deluxe (sports) rims, must be classified, according to their general appearance and the entirety of their characteristics, under heading 87.03 of the CN."

25 40. We accept Miss Sloane's submission that this case demonstrates that the principal intended use of a vehicle can be inferred from the characteristics of the vehicle which can be ascertained by an examination of the appearance of the vehicle and its characteristics as a whole.

41. In our view the following principles can be derived from the authorities we have reviewed:

- 30 (1) The decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters (*DFDS and BAS Trucks*);
- (2) The relevant criteria must be apparent from the external characteristics of the goods so that they can be easily appraised by the customs authorities (*Farfalla Fleming*);
- 35 (3) By the examination of the external characteristics the main purpose of the product must be inferred. It does not matter if there are other purposes for the product (*Neckermann*);
- 40 (4) The CNENs and HSEs should be used as an aid to interpretation as can specific classification regulations, but the latter only in relation to products identical to those specifically classified (*Kamino*);
- (5) Marketing materials and a product's targeted use are not to be taken into account (*Kamino, Honda*);

- 5 (6) The essential characteristics of a dumper truck are that it has a tipping hopper (however configured) (*DFDS*) and that it is primarily but (not exclusively) for off-road use (*BAS*). As dumpers are intended to transport and dump rubble and various materials, on building sites, mines and quarries, they should be sturdily built of strong steel sheets (*BAS*); and
- 10 (7) Consequently, the principal intended purpose of any vehicle (including a dumper truck) can be inferred from an examination of its general approach and its external characteristics. In the case of a dumper truck that purpose is the transportation of dumping of rubble and other materials off-road (*BAS, BVBA*).

Discussion

15 42. Mr Fell criticises the Appellants' approach on the basis that their arguments proceed on the basis that a vehicle with a tipper (of whatever description) will be a dumper even if it does not have as its predominant purpose dumping, provided that it is for off-highway use. Mr Fell submits that the approach taken by the FTT to the construction of the term "dumper" is more feasible, that is it would be wrong necessarily to classify as a dumper any vehicle which has as a purpose off-highway transport and dumping, even where dumping is not a dominant or primary purpose and is instead merely a secondary functionality which the vehicle happens to have amongst others.

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25 43. Mr Fell accepts that the predominant purpose has to be assessed on the basis of the objective characteristics of the product itself, and that the intended use of a product can be determinative of its classification if it is inherent in the product and is capable of being assessed on that basis. So, he submits, the exercise carried out by the FTT resulted in a finding that the variety of purposes that the FTT found the vehicles had, were inherent in the product. That finding he submits, was that each vehicle had a flat bottom cargo bed and a hinged rear panel with the capacity to operate in a variety of different environments. He does not accept that the marketing material showing the variety of uses that the vehicles can be put is irrelevant for this purpose. He also submits that we should be slow to interfere with the factual assessment made by the FTT, on the accepted principle that particular deference is to be given to specialist tribunals entrusted with the fact-finding exercise.

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35 44. In support of his submissions that a variety of uses are inherent in the product, Mr Fell referred to the drawings in the CNENs of typical dumper trucks which all show the vehicles concerned having angled-bottomed tippers which he submits is typical of vehicles used to dump rubble and other materials. This contrasted with the vehicles which were the subject of the three regulations referred to in paragraph 19 above. There the pictures of the vehicles concerned showed them to have open tilting load areas with flat bottoms. These vehicles were classified as vehicles designed essentially for the transportation of goods and not as dumper trucks.

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45. We detect that there is not much difference in principle between the parties on the correct legal test. Both accept that the correct classification is to be ascertained on

the basis of the objective characteristics of the vehicles. Miss Sloane submits that on that basis the intended use is the transportation and dumping of materials in an off-highway environment; we do not believe that Miss Sloane takes issue with the proposition that such use must, on the basis of the vehicles' objective characteristics
5 be the primary or predominant purpose. Neither do we understand Mr Fell to take issue with that proposition.

46. We think the difference between the parties lies in the fact that Mr Fell does not put any weight on the fact that the FTT did not make any finding as to what the primary purpose of the Vehicles were; its approach was to determine the issue in the
10 negative by finding that the primary purpose of the vehicles was *not* dumping. In addition Mr Fell's position is that it is legitimate to have regard to the weight put by witnesses testifying as to the objective characteristics of the vehicles on different functional features of the Vehicles when weighing up the different factors. We also take the FTT to have decided that, as they found, the Vehicles had a variety of
15 intended uses such that the transportation and dumping of materials in an off-highway environment did not predominate, then the Vehicles could not be classified as dumpers and Mr Fell invites us not to interfere with that finding.

47. The key to the determination of this appeal is therefore whether we are entitled to interfere with the FTT's findings. Section 12(1) of the Tribunal, Courts and
20 Enforcement Act 2007 ("TCEA") gives the Upper Tribunal that right if it finds that the making of the Decision involved the making of an error on a point of law.

48. We find that the FTT did make such an error. In our view the FTT made its assessment of the correct classification of the Vehicles not only by reference to the objective characteristics inherent in the products, but, as submitted by Miss Sloane,
25 also by reference to the actual use that the Vehicles were put by particular importers and the possible use to which they could be put. In that regard, the evidence on which the findings of fact made in paragraphs 20 to 31 of the Decision, as we have summarised them in paragraph 7 above, went beyond the scope of relevant evidence for the purpose of classification being, as it was, based on witness evidence as to the
30 use that the Vehicles were put and the marketing material that suggested possible uses. The same is true of the further findings of fact referred to in paragraph 8 above. We therefore reject Mr Fell's submission that such evidence can properly assist in the evaluation exercise and follow the reasoning of the FTT in *Honda* and the Advocate General in *Kamino* in this respect.

49. As a result of considering this material the FTT was diverted from its primary
35 task which was to make a finding as to what the intended purpose of the Vehicles was from their objective characteristics. Their overall finding was that the Vehicles were intended for the transport of goods, but this result was arrived at without specifically evaluating whether the objective characteristics of the Vehicles, namely the sturdiness
40 of the construction, the tyres designed for off-road use and the tipper body, taken together meant that the intended purpose could be regarded as dumping even though the Vehicles could also have been used for other purposes. We find that the reason this evaluation was not carried out was because the FTT focussed on the uses to which the Vehicles were or may be put in practice.

50. Having found that there was an error of law on the FTT's part we have to consider whether to exercise the powers in section 12(2) of the TCEA which provide that in this situation:

“The Upper Tribunal –

- 5 (a) may (but need not) set aside the decision of the First-tier Tribunal; and
- (b) if it does, must either –
- (i) remit the case to the First-tier Tribunal with direction for its reconsideration, or
- 10 (ii) re-make the decision,”

51. We are clear that the error of law made by the FTT was material to the conclusions in the Decision. In these circumstances Mr Fell's submissions that we should not interfere highly with the FTT's findings cannot be relevant. We therefore set aside the Decision and allow the appeal.

15 52. As this is a case where there is no dispute on the facts and all the relevant facts (that is those contained in paragraphs 7 to 10 of the Decision as set out in paragraph 6 above) have been found there is no reason for the case to be remitted to the FTT. We propose therefore to remake the decision of the FTT in accordance with section 12(2) TCEA.

20 53. We approach this by first examining the relevant findings of fact made by the FTT which clearly establish the inherent objective characteristics of the Vehicles.

54. In that regard we note that the FTT found the Vehicles had the following characteristics:

- 25 (1) Due to their design they are intended exclusively or principally for use off road (paragraph 8);
- (2) They are fitted with a sturdy flat-bed tipping body designed essentially for the transport and tipping of any kind of material (paragraph 9);
- (3) They are constructed of a strong steel frame (the Cub Cadet) or special high intensity material (the Kubota), designed to give them a strong body, capable of withstanding the rigours of working in rough terrain environment (paragraph 11);
- 30 (4) They can adapt to the roughest terrain such as building sites, quarries, farms and forests (paragraph 12);
- (5) The cabs have a full roll-over protection frame designed to protect the drivers working on rough terrain (paragraph 13); and
- 35 (6) They have off-road moving tyres designed especially for rough terrain and soft ground (paragraph 14)'

55. As the authorities show, we should approach the assessment by comparing these features to the words of the CN, seeking guidance from the relevant CNENs and

HSENs. By reference to the words of the CN itself we can have no doubt that the facts found clearly show the Vehicles were designed for off-highway use.

56. We turn to the CNENs and HSENs for assistance in interpreting the meaning of “dumpers”. As set out in paragraph 18 above, the CNEN emphasises the fact of having a front or rear tipping body. That characteristic is clearly present in the case of the Vehicles. We place no weight, as Mr Fell sought to, on the fact that the tipper in this case is flat-bottomed rather than angled. Whilst in the case of the three regulations referred to in paragraph 19 above the Vehicles concerned, which were not classified as dumpers, had flat bottomed tippers we observe that those tippers did not appear to be of a particularly strong nature and the vehicles concerned did not have the other strengthening features which the Vehicles in this case had. As the case law establishes, the form of the tipper is of no significance but we accept that its design should be looked at in the context of the other features so that the mere fact that the vehicle has a tipper is not conclusive in favour of it being a dumper.

57. We do note, however, that according to the CNENs the tipping body should be specially designed to transport heavy loose material, such as gravel, earth stones, rubble, etc. and is intended to be used on building sites, quarries or mines.

58. We therefore need to consider whether it is apparent from the Vehicles that they are designed so as to be able to carry such materials. The HSENs give us guidance as to what to look for in that regard, in particular the reference to them being “sturdily built vehicles” and the “dumper body is made of very strong steel sheets” and has “special earth moving tyres”. The Vehicles have all of these characteristics. The pictures we have seen of the Vehicles with their tippers raised and which were available to the FTT clearly show this to be the case.

59. Therefore if these characteristics are looked at together what is indicated is a truck which is designed to load and unload loose loads in an off-road environment. The sturdiness of its construction indicates that it can be used to transport rubble and other materials commonly found on building sites, quarries and mines. As a result of this combination of characteristics there is no doubt in our view that the Vehicles can only be classified as dumper trucks and the principal intended purpose of dumping can readily be inferred from those characteristics. The fact that the Vehicles can be used on the highway and can be used for a variety of other purposes does not, as established by the case law, make any difference.

60. We therefore find that the Vehicles must be classified under Code 8704 10 (Motor vehicles for transportation of goods: Dumpers designed for off-highway use) and the appeal is allowed.

TIMOTHY HERRINGTON

NICHOLAS ALEKSANDER

JUDGE OF THE UPPER TRIBUNAL

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RELEASE DATE: 16 SEPTEMBER 2013