



TC01698

**Appeal number TC/2009/12790
TC/2009/16784**

Binding Tariff Informations – appeal against the classification by HMRC of the Appellants’ imported utility vehicles as motor vehicles for the transport of goods – the Appellants claimed that the vehicles were dumpers or alternatively tractors- appeal dismissed

FIRST-TIER TRIBUNAL

TAX

**(1) E.P.BARRUS LIMITED
(2) KUBOTA (U.K.) LIMITED**

Appellants

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)

Sitting in public at 45 Bedford Square, London WC1 on 28-29 September 2011

Mr M.Angiolini for the Appellant

Mr M.Fell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The Appellants appealed against the classification under binding tariff informations (“BTIs”) issued by HMRC on two utility vehicles (“the Vehicles”), GB 118500303 issued on 18 May 2009 and GB 118924458 issued on 2 October 2009, classifying the Vehicles imported by the Appellants under heading 8704219100 of the Common Nomenclature (“the CN”). This heading is for *Motor vehicles for the transportation of goods. Other, with compression-ignition internal combustion piston engine (diesel or semi diesel). Of a gross weight not exceeding five tonnes: with engines of a cylinder capacity not exceeding 2500 cm².New.*
2. The First Appellant’s appeal relates to the classification of a Cub Cadet Utility Vehicle Big Country (“the Cub Cadet”) under a BTI dated 18 May 2009. The Second Appellant’s appeal relates to the classification of a Kubota Rough Terrain Vehicle 900 (“the Kubota”) under a BTI dated 2 October 2009.
3. The Appellants claimed that the Vehicles should be classified to 8704 10 (*Motor vehicles for the transportation of goods, Dumpers designed for off-highway use*). Alternatively they claimed that the Vehicles should be classified to 8701 90 (*agricultural tractors and forestry tractors*).
4. Both BTIs were upheld on review on 3 July 2009 and 18 November 2009.
5. Ms Glen gave evidence for the First Appellant and Mr McClimont gave evidence for the Second Appellant.
6. This appeal was adjourned with HMRC’s consent on the day it was to be heard in July due to the Appellants’ Counsel, Mr Angiolini, suffering bereavement. Mrs De Albuquerque, the non-legally qualified member was unable to attend the adjourned hearing and the Tribunal was unable to find a replacement. Both parties were consulted and consented to my hearing the appeal on my own.

Background and Facts

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.
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. 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.
- 5 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.
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.
- 10 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.
- 15 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.
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.
- 20 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.
- 25 20. HMRC sought to rely on marketing literature referring to a lower towing capacity. Ms Glen who works for Barrus confirmed that the figures included in the marketing literature were conservative ones which took account of the fact that in the particularly challenging environments in which the Cub Cadet was designed to operate, this might well involve significant incline or particularly uneven terrain. Under those difficult operating conditions, the towing capacity would be reduced
- 30 when compared to even terrain.
21. Ms Glen explained on cross-examination that the Cub Cadet could not be used on golf courses as its tyres would mark the grass. She said that over ninety-five percent of their customers were farmers or gamekeepers who used the Cub Cadet for transporting animal feed and dumping it where the livestock were.
- 35 22. She had spoken to the sales representatives and to customers at trade shows. The cost of the Club Cadet at £14,000 was prohibitive to recreational use and customers bought the vehicle because of its dumping facility. She stated that unless the customer

wanted to use the vehicle for dumping, the customer would just buy a cheap ATV for towing.

23. She said that it was a road legal vehicle but only for short distances between two pieces of land which was owned by the owner of the vehicle. In general the Cub
5 Cadet could not travel at more than twenty-five miles an hour on the highway.

24. On cross-examination she stated that the promotional material had been cautious as to the weight which the Cub Cadet could pull as the end users tended to push to the end of any limits. Although it could pull twice its weight, on certain rough terrain this would be risky because of the terrain. not the vehicle.

10 25. On cross-examination she said that it could be classed as a tractor because it was used to carry goods with a trailer attached if necessary. She stated that their customers did not buy the Cub Cadet from reading the promotional material but wanted a demonstration.

15 26. In cross-examination Mr Fell pointed out to her that the CNENs for 8704 10 and 8704 10 90 referred to dumpers as vehicles which had been specially designed to transport sand, gravel, earth, stones etc and were intended for use in quarries, mines or on building sites. Ms Glen said that whilst the Cub Cadet was not specially designed to transport sand etcetera it was designed to carry loads and so these could include sand. She said that she saw no difference between carrying grain or carrying sand. It
20 was a vehicle designed to carry a range of loads in off-road environments.

27. Mr Fell told Ms Glen that it appeared that the Cub Cadet was sometimes used for dumping and sometimes for towing and Ms Glen stated that she had no statistics regarding the split use. She said that the main use was not just the transport of goods but the unloading of them for which a dumping facility was required.

25 28. Their main customers were farmers and gamekeepers who wanted to carry feed and dump it and all the customers she had spoken to at the trade fairs were only interested in the dumping facility.

30 29. Mr Mc Climont who works for Kubota gave evidence that ninety-five percent of their vehicles were sold to the agricultural, horticultural and forestry sector. They were originally sold in the USA where hunting is very important.

30. There was the option of a towing bar at the front or the bar could be taken from the back and put at the front. It could haul twice its weight but six hundred kilos was advertised as its safe weight because of the warranty provisions.

35 31. All the Kubotas had dumping characteristics although they could also carry goods not suitable for dumping. They were however specially designed to carry loose loads. Although the Kubota did not look like the dumpers illustrated in the CNENs for 8704 10 and 8704 10 90 it was actually the same. He said that without the tipping function it would not sell.

The Legislation

32. The level of customs duties on goods imported from outside the European Community is based on the Customs Tariff of the European Communities. This includes the Combined Nomenclature of goods and the rates and other items of charge normally applicable to goods covered by the Combined Nomenclature as regards customs duties.

33. The Combined Nomenclature uses an eight-digit numerical code to identify a product: the first six digits are those known as the harmonised system (the first four digits being the heading and the fifth and sixth being sub-headings); the seventh and eighth digits are further sub-headings.

34. The Combined Nomenclature Regulation No 2658/87 provides the legal basis for the Community's Tariff. An annual amendment to this Regulation contains the Combined Nomenclature that is reproduced in the UK Tariff.

35. The legal procedure for tariff classification is contained in Volume 2, Part 1, Section 3 of the UK Tariff. There are six General Interpretative Rules for tariff classification ("the GIR"). These have legal force and are intended to be applied whenever seeking to classify goods within the Combined Nomenclature.

36. Annex 1 of EC Council Regulation 2658/87 contains the General Rules for the Interpretation of the Combined Nomenclature ("the GRIs"). Insofar as relevant for present purposes, the GRIs state as follows:

"Classification of goods in the combined nomenclature shall be governed by the following principles:

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

[...]

3. When ... goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. ...

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail

sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character ...

5 (c) *when goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.*

[...]

10 6. *For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply,*
15 *unless the context requires otherwise.*

37. Products must be classified under the Combined Nomenclature by reference to their objective characteristics and properties, as defined in the headings of the Combined Nomenclature.

20 38. A summary of the relevant principles to be applied in deciding whether a product falls within a particular code is found in recent Case C-486/06 *BVBA Van Landeghem* [2007] ECR I-10661, at paragraphs 23-25:

25 23. First, it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 38, and Case C-310/06 *FTS International* [2007] ECR I-0000, paragraph 27).

30 Second, 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 (see C-400/05 *BAS Trucks* [2007] ECR I-311, paragraph 29; Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36; and Case C-142/06 *Olicom* [2007] ECR I-0000, paragraph 18).

35 25. Lastly, according to the Court's case-law, the Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the WCO are an important aid to the interpretation of the scope of the various headings but do not have legally binding force (*BAS Trucks*, paragraph 28). Moreover, although the WCO opinions classifying goods in the HS do not have legally binding force, they amount, as regards the classification of those goods in the CN, to indications which
40 are an important aid to the interpretation of the scope of the various tariff headings of the CN (see *KawasakiMotors Europe*, paragraph 36).

39. It is for the national court to determine the objective characteristics and properties of the product, having regard to their physical appearance, composition and presentation.

5 40. There are three primary sources which are valid aids to the construction of the Combined Nomenclature:

(a) The Explanatory Notes to the Nomenclature of the Customs Co-operation Council (known as Explanatory Notes to the Harmonised System or HSENs), drawn up by the World Customs Organisation

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

(c) Opinions of the World Customs Organisation (known as WCO Opinions)

15 41. HSENs can be used for persuasive, but non-legally binding guidance. It has been held that the explanatory notes in the CNENs and the HSENs 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 HSEN and CNEN notes will be ignored if they are incompatible with the provisions of the Combined Nomenclature.

20 42. A WCO Opinion is also a valid aid to the construction of the Combined Nomenclature but must be set aside if the interpretation is incompatible with the wording of the Combined Nomenclature or manifestly goes beyond the discretion conferred on the WCO.

43. The terms of the relevant headings of the Combined Nomenclature appear in Chapter 87 and are:

25 *8701*
TRACTORS (OTHER THAN TRACTORS OF HEADING NO. 87.09.):
....
Agricultural tractors (excluding pedestrian-controlled tractors) and forestry tractors, wheeled
....
30 *8704*
MOTOR VEHICLES FOR THE TRANSPORT OF GOODS:

44. The terms of the relevant headings of the Combined Nomenclature in respect of dumpers appear also in Chapter 87:

35 *8704*
MOTOR VEHICLES FOR THE TRANSPORT OF GOODS:
Dumpers designed for off-highway use:
....
Other, with compression-ignition combustion piston engine (diesel or semi-diesel)

40

45. Note 2 to Chapter 87 provides:

For the purposes of this chapter, 'tractors' means vehicles constructed essentially for hauling or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods

46. The HSENS to Chapter 87 of the Combined Nomenclature provide the following guidance as to the meaning of "tractors"

For the purposes of this heading, tractors means wheeled or track-laying vehicles constructed essentially for hauling or pushing another vehicle, appliance or load. They may contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods, or provision for fitting with working tools as a subsidiary function.

....

The heading covers tractors (other than tractors of the type used on railway station platforms, falling in heading 87.09) of various types (tractors for agricultural or forestry work, road tractors, heavy duty tractors for constructional engineering work, winch tractors, etc.), whatever their mode of propulsion (internal combustion piston engine, electric motor, etc.). It also includes tractors which can be used both on rails and on road, but not those which are designed exclusively for use on rails.

The tractors of this heading may be fitted with coachwork (a body) or may have seats for the crew or a driving cab. They may be equipped with a tool box, with provision for raising or lowering agricultural implements, with a coupling device for trailers or semi-trailers (e.g., on mechanical horses and similar tractive units), or with a power take-off for driving machines such as threshers and circular saws.

The chassis of a tractor may be mounted on wheels, on tracks or on a combination of wheels and tracks. In the last case, only the front steering axle is fitted with wheels.

....

The heading includes tractors fitted with winches (e.g., as used for hauling out bogged-down vehicles; for up-rooting and hauling trees; or for the remote haulage of agricultural implements).

47. The HSENS to Chapter 87 of the Combined Nomenclature provide the following guidance as to the classification of vehicles under 8704

This heading covers in particular:

Ordinary lorries (trucks) and vans (flat, tarpaulin-covered, closed, etc.); delivery trucks and vans of all kinds, removal vans; lorries (trucks) with automatic discharging devices (tipping lorries (trucks), etc.), tankers (whether or not fitted with pumps); refrigerated or insulated lorries (trucks); multi-floored lorries (trucks) for the transport of acid in carboys, cylinders of butane, etc.; dropframe heavy-duty lorries (trucks) with loading ramps for the transport of tanks, lifting or excavating machinery, electrical transformers, etc.; lorries (trucks) specially constructed for the transport of fresh concrete, other than concrete-mixer lorries (trucks) of heading 87.05; refuse collectors whether or not fitted with loading, compressing, damping, etc., devices.

5 The classification of certain vehicles in this heading is determined by certain
features which indicate that the vehicles are designed for the transport of
goods rather than for the transport of persons (heading 97.03). These features
are especially helpful in determining the classification of motor vehicles,
generally vehicles having a gross weight rating of less than 5 tonnes, which
10 have either a separate closed rear area or an open rear platform normally
used for the transport of goods, but may have rear bench-type seats that are
without safety seat belts, anchor points or passenger amenities and that fold
flat against the sides to permit full use of the rear platform for the transport of
goods. Included in this category of vehicles are those commonly known as
“multipurpose” vehicles (e.g. van-type vehicles, pick-up type vehicles and
certain sports utility vehicles). The following features are indicative of the
design characteristics generally applicable to the vehicles which fall in this
heading:

- 15 (a) Presence of bench-type seats without safety equipment (e.g. safety seat
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
20 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);
- 25 (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 vehicles);
- (d) Presence of a permanent panel or barrier between the area for the driver
and front passengers and the rear area;
- 30 (e) Absence of comfort features and interior finish and fittings in the cargo bed
area which are associated with the passenger areas of vehicles (e.g. floor
carpeting, ventilation, interior lighting, ashtrays).

48. The CNENs for 8701 9011 and 8701 90 90 provide as follows

These subheadings include so-called ‘all terrain vehicles’, designed to be used
as tractors, with the following characteristics:

- 35 — a single seat for the driver;
- a standard towing hitch;
- steered by means of a handlebar with two grips incorporating the controls;
- steering is achieved by turning the two front wheels and is based on a
motor-cartype steering system (Ackerman principle);
- 40 — brakes on all wheels;
- an automatic clutch and a reverse gear;
- an engine specially designed for use in difficult terrain and capable in low
ratio of delivering sufficient power to tow attached equipment;
- the power is transmitted to the wheels by shafts and not with a chain;
- 45 — the tyres fitted to all the vehicles have a deep tread design suitable for rough
terrain;
- a towing capacity of a non-braked trailer of twice their own weight or more.

If they meet all of the above characteristics and are in accordance with the
Explanatory Notes to subheading 8701 90 11 to 8701 90 50 the vehicles are to
50 be classified as agricultural or forestry tractors.

49. The CNENs for 8701 90 11 to 8701 90 50 provide as follows:

Agricultural tractors (excluding pedestrian-controlled tractors) and forestry tractors, wheeled

5 *These subheadings cover agricultural or forestry tractors having at least three wheels and obviously intended, given their construction and equipment, to be used for agricultural, horticultural or forestry purposes. Vehicles of this type only have a limited maximum speed (in general, not more than 25 km per hour on the highway).*

10 *Agricultural tractors are generally equipped with a hydraulic device enabling agricultural machinery (harrows, ploughs, etc.) to be raised or lowered, a power take-off enabling the power of the engine to be used to operate other machines or implements, and a coupling device for trailers. They may also be fitted with a hydraulic device intended to operate handling equipment (hay loaders, manure loaders, etc.) when these may be considered to be accessories.*

15 *These subheadings also cover specially built agricultural tractors such as raised-chassis tractors (straddle tractors) used in vineyards and nurseries, and hill tractors and tool-carrying tractors.*

20 *A further feature of forestry tractors is the presence of a permanently attached winch enabling timber to be hauled.*

25 *In accordance with note 2 to this chapter, tractors falling in these subheadings may also incorporate certain modifications enabling them, in line with their main purpose, to carry agricultural or forestry machinery, tools, fertilisers, seeds, etc.*

50. The HSEN's to Chapter 87 of the Combined Nomenclature provide the following guidance as to the meaning of Dumpers:

30 *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 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.*

35 ...

Subheading 8704.10

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

- 40
- 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;*
 - lack of axle suspension;*

45

 - high braking capacity;*
 - limited speed and area of operation;*
 - special earth-moving tyres;*

- 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

5

51. The CNENs for 8704 10 and 8704 10 90 provide:

1. *These subheadings mainly cover vehicles fitted with a front or rear tipping body or a bottom-opening body that have been specially 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.*

2. *These 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 inside a cab*

52. The opinion of A-G Stix-Hackl, which concluded that Minitracs were to be properly classified as dumpers states as follows:

20 “25. It can be seen from the structure of the CN that within heading 8704 of the CN (motor vehicles for the transport of goods) there is a separate subheading (8704 10 of the CN) for vehicles that can be described as ‘dumpers’. Tipping lorries, on the other hand, are not mentioned separately and must therefore be classified in one of the general subheadings for vehicles (‘other’) (8704 21 to 8704 32 of the CN). The latter subheadings differ according to the type of motorisation and/or the weight of the vehicle. [...]

26. The structure of the tariff headings within heading 8704 of the CN for motor vehicles for the transport of goods shows that subheading 8704 10 of the CN relating to dumpers is a specific heading for vehicles with a certain purpose, off-highway tipping work. However, none of the other subheadings differ according to purpose, but only according to certain technical characteristics (motorisation and weight). This shows that the emphasis in the classification of dumpers is on the purpose of the vehicles and not on the form or functionality of the tipping body.

27. This distinction based on purpose is also consistent with the CN Explanatory Notes and the HS Explanatory Notes on subheading 8704 10.

28. The descriptions contained in the CN Explanatory Notes refer to vehicles that have been manufactured ‘specially’ to transport materials in quarries, mines or on building sites, that is to say special vehicles designed from the outset for off-highway use. The description of the tipping mechanism applies only to conventional dumpers that can be unloaded only to one side. However, the introductory word ‘mainly’ does not, in my opinion, automatically exclude vehicles with a technologically more advanced tipping body from classification as dumpers.

29. In the HS Explanatory Notes, a distinction is drawn between dumpers and tipping lorries on the basis of characteristics that for the most part apply to the

5 contested Minitracs. Nevertheless, the description of the tipping body corresponds to the conventional form. However, the HS Explanatory Notes on subheading 8704 10 of the HS merely state that dumpers can ‘generally’ be distinguished from other vehicles by the characteristics mentioned therein. In addition, it is pointed out in the last sentence that dumpers designed for special purposes (in all cases for off-highway use) are still dumpers within the meaning of subheading 8704 10 of the HS, even if they have only ‘some of the characteristics mentioned above’.

10 30. It cannot therefore be inferred from the CN Explanatory Notes or the HS Explanatory Notes that the form or the functionality of the tipping body is the decisive characteristic for classification of a vehicle as a dumper. The Explanatory Notes in fact suggest that technical adjustments with respect to the performance of dumpers’ tasks do not preclude classification under subheading 8704 10 of the CN.

15 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 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.

[...]

30 33. The assumption also made by the Commission and the Netherlands Government that the particular manoeuvrability of the Minitracs’ tipping body is a decisive criterion to suggest that dumpers should not be classified as dumpers for customs tariff purposes is refuted by the fact that the possibility of dumping in only one direction is a common factor shared by conventional dumpers and tipping lorries and, for this very reason, should be ruled out as a distinguishing criterion. Since – as explained above – it is apparent from the structure of heading 8704 of the CN that the special purpose of the dumpers (off-highway tipping work) is the decisive criterion for classification under subheading 8704 10 of the CN, the particular manoeuvrability of the tipping body, which merely constitutes a technical advance (more precise loading and dumping of materials under restricted marshalling conditions), cannot be a criterion for precluding classification as a dumper.”

53. The judgement of the ECJ followed the A-G opinion:

45 “31. The wording of that subheading requires that a vehicle meets two conditions to be classifiable thereunder, namely that it is a ‘dumper’ and is designed for use off-highway. While the second condition poses no problem in this case, the CN contains no additional specification relating to the definition of a ‘dumper’.

50 32. It is clear from the descriptions of such vehicles in the explanatory notes 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.

5 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.

10

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.

15

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.”

20

54. The ECJ in Case C-15/05 *Kawasaki*, considered the CN classification of ATVs. The relevant vehicles were described by the ECJ as follows:

25

“26 In that regard, it is stated in the order for reference that ATVs are driven by a cardan shaft. Some are equipped with four-wheel drive (‘4x4’). ATVs of the types KLF 220 and KLF 300 have five forward gears with automatic clutch and one reverse gear. The KLF 300 4x4 also has high/low reduction.

30

27 Vehicles of the types KVF 400, KVF 400 4x4 and KVF 650 4x4 have continuously variable high/low transmission. All these types of ATV also have an automatic clutch and a reverse gear.

35

28 All the vehicles have a braking system on front and rear wheels. Vehicles of the type KLF 220 have drum brakes on all four wheels; vehicles of the types KLF 300, KLF 300 4x4, KVF 300, KVF 300 4x4, KVF 400 and KVF 400 4x4 have disc brakes on the front wheels and drum brakes on the rear wheels; vehicles of the type KVF 650 4x4 have disc brakes on the front wheels and an ‘oil bathed’ braking system on the rear wheels.

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29 All the vehicles are steered by means of a handlebar with two grips incorporating the controls. Their maximum speed is 70 km/h.

30 The engine of these vehicles was specially designed for use in difficult terrain and is capable in low ratio of delivering sufficient power to tow attached equipment. The

towing capacity of the ATVs is 740 kg in the case of the KLF 220, 916 kg in the case of the KLF 300 and over 1 000 kg in the case of the other types.

5 31 The tyres fitted to all the vehicles have a deep tread design suitable for rough terrain. All the vehicles have front and rear shock absorbers. They have a single seat for the driver, consisting of a saddle similar to that on a motorcycle. They are also equipped as standard with a towing hitch on the rear axle and cargo racks. Their maximum load capacity is between 20 kg and 40 kg for the racks mounted on the front of the vehicles and between 30 kg and 70 kg for those mounted on the rear.

10 32 According to Kawasaki, the technical features of the ATVs and their use in conjunction with other equipment, such as trailers or mowers, distinguish them from Sports Utility Vehicles (Sports Quads), which belong to a different branch of industry. ATVs constitute a quality and less expensive alternative to normal tractors.

Appellant's Submissions

15 55. Mr Angiolini submitted that the Vehicles had the essential characteristics of a dumper truck in that they had a tipping hopper designed for the transport and tipping of rubble and any other materials and that, due to their essential features, they were especially designed for off-highway use and, in particular, for use on rough terrain of any sort. This would include construction sites and any other site with uneven or difficult terrain. Accordingly, they fulfilled most or all of the conditions set out in the HSEN for dumper trucks under CN code 870410 and should therefore be classified under that heading, which was the more specific one.

25 56. He contended that the key feature of the Vehicles was that they were designed for transport and dumping off-road rather than on road. Their key relevant feature which differentiated them from tipping lorries was that tipping lorries were designed for use on road.

57. The main purpose of the Vehicles was for transporting and dumping and therefore due to the design features they should be treated as dumpers.

30 58. Mr Angiolini submitted that it was clear from the relevant HSEs that they sought to differentiate between the terms truck and dumper. Ordinary lorries are described as trucks and are intended for transport on highways and normal roads, whereas dumpers are seen to be expressly different from tipping lorries (trucks) and are intended for use off-highway for the transport and tipping of materials of any sort. It is therefore the essential characteristic of off-highway use which distinguished the two.

35 59. Mr Angiolini submitted that notes describing the characteristics of dumpers used the term "generally" to indicate that there was no requirement for all the factors that are listed to be found in the vehicle under consideration. Rather, the characteristics are seen as indications that a vehicle is to be classified as a dumper.

40 60. He submitted that taking into account the essential characteristics set out in the HSEs, the Vehicles fulfilled most if not all of the factors mentioned in the HSEN as

distinguishing a dumper from a tipping lorry. Accordingly, they should properly be classified as dumpers as that heading is the more specific one and, therefore, in accordance with GIR3, it is the one to be preferred.

5 61. He submitted that the definition of a dumper and the classification under heading 870410 had already been considered in two judgements of the ECJ, both of which fully support the Appellants' contention in this respect.

10 62. In Case C-396/02 *DFDS*, the ECJ was asked to consider the classification of certain vehicles (called "Minitracs"), designed for off-highway use and intended for the transport and loading and unloading of materials. The vehicle, like the Vehicles subject matter of this appeal, was fitted with a flat-bottomed tipper.

63. Mr Angiolini submitted that it was possible to derive certain principles from the opinion of A-G Stix-Hackl in the above case.

15 64. Firstly that the CN Heading for dumpers was a more specific one than the remaining general headings and distinguished dumpers by reference to their purpose (off-highway transport and tipping of materials). If a vehicle fulfilled that purpose, it should therefore be classified as a dumper. Mr Angiolini submitted that the Vehicles clearly fulfilled that purpose. They were designed for off-highway transport and tipping of materials in particularly difficult terrain and fulfilled the majority of the factors set out in the HSEN. The latter were expressed to be characteristics
20 "generally" applicable to dumpers, so the fact that the Vehicle may not fulfil all of those factors, could not exclude them from classification as dumpers.

25 65. Whilst it was correct that, in accordance with the description of the Minitracs, dumpers were intended for use on building sites, the AG did not rely on that particular characteristic in reaching his conclusion but just on the fact that use on such site necessarily implies that the vehicle is designed for off-highway use. In any event, the Vehicles were clearly suitable for use on building sites or indeed any other site and the fact that they were used in other off-highway situations could not be a relevant objective consideration when considering their classification. It was their off-highway tipping purpose which was the decisive criterion.

30 66. In that respect, Mr Angiolini pointed out that neither the CN Heading, nor the HSEN mentioned any requirement for use on building sites, which was only found in the CNEN. Accordingly, the Appellants submitted that it could not be the site of use which was to be determinative, as HMRC seemed to argue as such requirement was not found in the CN Heading or indeed the HSEN and in any event it would not be an
35 objective characteristic of a dumper. Mr Angiolini contended that it would make no sense that certain sites qualified as off-highway whereas others, which were equally off-highway, did not.

40 67. Mr Angiolini contended that tipping lorries were primarily designed for highway transport and their dumping was thus only of secondary importance. Dumpers, on the other hand, were primarily designed for the transport and dumping of materials in off-highway use. That was exactly the purpose of the Vehicles: they were not primarily

designed for the transport of goods over long distances. They were intended for the transport and dumping of goods over short distances and specially designed for off-highway use over rough terrain.

5 68. Mr Angiolini submitted that these principles were fully supported by the judgment of the ECJ in *DFDS* and it was clear from the judgment of the ECJ that the only two essential characteristics to be considered were whether a vehicle was a dumper, that is a vehicle designed for the transport and dumping of “various materials” and that it was designed for off-highway use. The Vehicles clearly fulfilled both of those conditions and were therefore to be classified as dumpers. It was particularly noticeable that, in reaching its conclusion, particularly at paragraph 31, the ECJ made no mention of the site of operation being of any relevance, other than it should be off-highway. It was therefore clear that the site of operation could not be a decisive factor. In any event, the Appellants maintained that the Vehicles, by reference to their objective characteristics, were clearly suitable for use on a building site and therefore, insofar as that were a mandatory requirement, which was denied, they would clearly fulfil it.

69. Mr Angiolini referred to the case of C-400/05 *B.A.S. Trucks*, where the ECJ considered again the definition of dumpers and gave judgment without an AG Opinion. The vehicles considered in that case were described as “*Vehicles fitted with driver cabs and a flat-bottomed tipper for the transport of sand, stones, rubble and such like*”. Mr Angiolini submitted that it was noticeable that nowhere in the judgment was there any mention that the vehicle was designed for use on any particular site or, indeed, that the intended site of use was of any relevance. Mr Angiolini submitted that insofar as relevant, the ECJ in that case stated:

25 “30. As the Court observed in paragraph 31 of *DFDS*, the wording of subheading 8704 10 of the CN requires that a vehicle meets two conditions to be classifiable thereunder, namely be a ‘dumper’ and be designed for use off-highway.

30 31. The only criterion noted by the Netherlands Government to refuse the classification of the vehicles at issue as ‘dumpers’ within the meaning of subheading 8704 10 of the CN is the fact that those trucks are designed to be used not exclusively off-highway, but also on paved, public roads.

35 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. It follows that, as Advocate General Stix-Hackl pointed out in point 33 of her Opinion in *DFDS*, the special purpose of the dumpers is the decisive criterion for classification under subheading 8704 10 of the CN.

40 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 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.”

15 70. Mr Angiolini contended that it was therefore clear from paragraph 36 of the judgement quoted above that the essential characteristic of a dumper was that it had been specifically designed for off-highway use for the transport and the unloading of material. That was precisely for which the Vehicles were specifically designed. It was also clear from that paragraph that the ECJ did not regard the site of operation, provided it was off-highway, as a relevant consideration, contrary to HMRC’s contentions.

20 71. The tipping feature of the Vehicles in itself meant that the Vehicles were designed to transport goods over short journeys and then tip their goods. The key distinction between tipping lorries and dumpers was that a tipping lorry’s primary function was the transport of goods on a highway and their tipping function was secondary whilst a dumper was a tipping lorry designed to work off highway.

72. The Vehicles on the whole were unsuitable for highway use as their tyres and other essential features pointed to use on rough terrain rather than on a tarmac road.

25 73. Mr Angiolini submitted that for all of the above reasons, the Appellants submitted that the only possible conclusion open to this Tribunal was that the Vehicles were properly to be classified as dumpers under heading 8704 10.

30 74. He submitted that further or alternatively, the Vehicles were essentially designed for hauling and pushing other vehicles, appliances or loads. They fulfilled most or all the conditions set out in the CNEN for code 870190 and should therefore be classified as “*Agricultural tractors and forestry tractors*” under that heading.

35 75. The customer profile and use to which they put the Vehicles showed that a large percentage of the customers were agricultural customers who used the Vehicles as small tractors. It was now accepted that the Vehicles could pull twice their own weight on a flat surface and therefore fulfilled the conditions to be regarded as tractors.

40 76. He submitted that insofar as other Member States may have classified the Vehicles in a different code from that contended by the Appellants, such BTIs were not binding on the Tribunal and the role of the Tribunal was to apply the CN and any divergent application of the CN should not influence the Tribunal’s interpretation of the relevant CN heading which had to be based on the wording of that heading. He cited the case of *Intermodal Case 495/03*:

“The explanatory notes to the CN and those to the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force. The content of those notes must therefore be compatible with the provisions of the CN and may not alter the meaning of those provisions”.

5 77. Mr Angiolini referred to the case of *BVBA Van Landeghem* [2007] ECR I-10661 and submitted that it contained a succinct summary of the principles to be applied by the Tribunal in deciding whether the Vehicles fell within a particular code.

78. Mr Angiolini submitted that accordingly it was clear that it was the objective characteristics of the Vehicles that were determinative of their classification and that, although both the CNEN and HSEN could assist in the application of a particular CN
10 Heading definition; it was the CN Heading which ultimately was decisive. If the relevant Notes unnecessarily restricted the application of a particular CN Heading or sought to alter its content, it was the latter that must take precedence.

79. Mr Angiolini referred to the ECJ’s description of ATV’s in the case of
15 *Kawasaki*. He submitted that whilst neither of the Vehicles was properly described as an ATV, they shared many of the same essential characteristics. The Appellants therefore submitted that, by analogy, they should be classified in the same manner that is as an agricultural or forestry tractor and that it would be irrational to classify the Vehicles in a different CN Heading from the ATVs which were the subject matter
20 in the case of *Kawasaki*.

80. Mr Angiolini stated that the ECJ went on to consider what the proper classification of the relevant ATVs was, as a Commission Regulation had classified them under CN Code 870321 as vehicles for the transport of passengers. The ECJ went on to conclude that the towing capacity of the ATVs was the objective property
25 which determined whether they were constructed essentially for hauling or pushing another vehicle, appliance or load. It was thus the towing capacity which was the essential characteristic which allows a vehicle to be classified as a “tractor”.

81. Mr Angiolini submitted that in that respect, as the evidence submitted on behalf of the Appellants showed, in reality they are capable of towing or pushing double
30 their weight. That evidence included a video demonstration. HMRC had wrongly rejected that evidence on the basis of the marketing material supplied by the Appellants.

82. The Appellants submitted that in order to establish the objective characteristics of the Vehicles, it was what happened objectively when the Vehicles physically
35 attempted to tow or push double their load which they were able to do and not what the Appellants might say in marketing literature. It was difficult to see how HMRC could continue to maintain that the marketing literature should take precedence over physical reality.

83. Mr Angiolini submitted that in the case of *Kawasaki* the ECJ concluded that, in
40 light of the objective characteristics of the ATVs, most of which are shared by the Vehicles, they should be classified as “Agricultural or forestry tractors”, under headings 87019011 or 87019020, depending on their engine power. As the Vehicles

shared the majority of their objective characteristics with the ATVs which were the subject matter of the *Kawasaki* case, they should likewise be classified under the same heading.

5 84. Further and in any event Mr Angiolini submitted that the Vehicles, which were not strictly speaking ATVs, fulfilled the general description and overall requirements of tractors set out in the HSEs for Code 870190 and those set out in the CNENs for Codes to 8701.9011 to 8701.9050. They should accordingly be classified as agricultural and forestry tractors.

10 85. Additionally the Cub Cadet was in fact type approved by the European Commission as an agricultural tractor pursuant to Directive 2003/37/EC on type approval of agricultural and forestry tractors. The Directive then requires the manufacturers of all agricultural tractors to type approval (see Article 3(1)). That Directive defines tractor in Article 2(J) as:

15 *“tractor’ means any motorised, wheeled or tracked agricultural or forestry tractor having at least two axles and a maximum design speed of not less than 6 km/h, the main function of which lies in its tractive power and which has been especially designed to pull, push, carry and actuate certain interchangeable equipment designed to perform agricultural or forestry work, or to tow agricultural or forestry trailers; it may be adapted to carry a load in the context of agricultural or forestry work and/or*
20 *may be equipped with passenger seats”*

25 86. Mr Angiolini submitted that the above definition was clearly intended to closely match the relevant CN Code and related CNENs. In fact, they were virtually identical: Note 2 to Chapter 87 referred to vehicles *“constructed essentially for hauling or pushing another vehicle, appliance or load”* and the Directive described a tractor as a vehicle *“the main function of which lies in its tractive power and which has been especially designed to pull, push.*

30 87. Mr Angiolini submitted that it would be extremely surprising if the European Commission were to consider something to be an agricultural tractor for the purpose of the Directive but the same vehicle not to be such a tractor for the purpose of the CN. If a vehicle were not a tractor for the purpose of the CN it would necessarily follow that they would also fall outside the definition in the Directive and therefore not require type approval under the Directive. Likewise, if the vehicle is not an agricultural tractor for the purpose of the CN, it would not obtain type approval if they applied for it, as they would, again, fall outside the relevant definition in the
35 Directive.

88. The Appellants therefore submitted that the two EU law provisions: the CN and the Directive, needed to be interpreted consistently and that, at least insofar as the Cub Cadet Vehicle was type-approved as an agricultural or forestry tractor it should likewise be classified under that CN heading.

40 89. Mr Angiolini submitted that *Commission Regulations 799/1999, 1386/2003 and 2147/2004* were not relevant to the classification of the Vehicles and could provide no guidance to the Tribunal in deciding on the proper classification of the Vehicles.

90. The Regulations dealt with different vehicles and could not therefore be determinative of these appeals. It was clear from even the most cursory comparison of the relevant pictures that the vehicles considered by those Regulations shared virtually none of the essential characteristics of the Vehicles.

5 91. The vehicles classified in the above Regulations were ordinary vehicles which could only function on flat or semi-flat surfaces, did not have off-road and/or earth moving tyres and were simply designed to carry goods on such flat or semi flat surfaces. Accordingly, those Regulations had no relevance to the classification of the Vehicles.

10 92. The vehicles classified in the Regulations were not essentially intended to be used off-highway as they could only operate on flat or semi flat surfaces; they did not have the sturdy constructions of the Vehicles; they did not have the high braking capacity of the Vehicles; they did not have special off-road earth moving tyres; they did not have the high clearance and short wheel base of the Vehicles; they had no ROPS
15 protection; and they were not four wheel drive. The vehicles classified in the Regulations were not designed as agricultural or forestry tractors nor did they fulfil any of the conditions set out in the CNENs or HSEs for classification as either dumpers or tractors.

20 93. The Vehicles were specifically designed for off highway use and none of the vehicles in those Regulations were so designed. The Vehicles were intended to be used off road in a variety of environments all of which were effectively rough terrain.

25 94. Due to their construction and the lack of the above essential characteristics of the Vehicles, it was clear that the vehicles dealt with in the Regulations could never be classified as dumpers. Additionally there was no indication of their towing capacity, the most essential characteristic, as found in *Kawasaki*, in deciding whether a vehicle was a tractor.

95. Mr Angiolini submitted that accordingly any comparison between those vehicles and the Vehicles was simply meaningless and should be rejected outright.

30 96. The tipping feature of the Vehicles in itself meant that the Vehicles were designed to transport goods over short journeys and then tip their goods.

97. Mr Angiolini reiterated that although the various notes to the Combined Nomenclature can assist, the heading itself is decisive and if the notes restrict then the heading takes preference.

HMRC's Submissions

35 98. HMRC submitted that the Vehicles had correctly been classified as *8704 2191 00 (Motor vehicles for the transportation of goods. Other, with compression-ignition internal combustion piston engine (diesel or semi diesel). Of a gross weight not exceeding five tonnes: with engines of a cylinder capacity not exceeding 2500 cm².New).*

99. HMRC contended that the objective characteristics of the Vehicles demonstrated that they were utility or multi-purpose vehicles which served a range of different purposes under the umbrella of an overall primary purpose of the transport of goods. HMRC accepted that the uses of the Vehicles could include hauling trailers and dumping materials. However, the objective characteristics of the Vehicles did not support the view that the dominant or primary purpose of the Vehicles was to haul trailers or dump materials. Accordingly, the objective characteristics of the Vehicles did not support the two inconsistent classifications of the Vehicles contended for by the Appellants as tractors or dumpers.

100. HMRC submitted that as regards the choice between 8701 and 8704, the choice was between classification of the vehicles as “tractors”, specifically “*agricultural tractors and forestry tractors*” (8701), and classification as “*motor vehicles for the transport of goods*” (8704).

101. Note 2 to Chapter 87 of the Combined Nomenclature defined “tractors” as “*vehicles constructed essentially for hauling or pushing another vehicle appliance or load*”. Accordingly, the question for the Tribunal was whether the Vehicles were constructed essentially for hauling or pushing another vehicle appliance or load, or whether they were motor vehicles for the transport of goods.

102. HMRC submitted that the Vehicles were not constructed essentially for hauling or pushing. The Vehicles did have the functionality to haul. However this functionality was just part of a multiplicity of purposes of the Vehicles. The objective characteristics of the Vehicles did not support the view that they were essentially for pushing or hauling.

103. HMRC submitted that the transportation of goods was a sufficiently dominant purpose to justify classification under 8704. The presence of a cargo bed was a prominent objective characteristic of the Vehicles, which facilitated the transportation of goods. Accordingly, the Vehicles should be classified to 8704, not 8701.

104. HMRC contended that their case was confirmed by the large number of features referred to in the CNENs as features of tractors which are not present in the case of the Vehicles.

105. HMRC pointed to the wording in the CNEN “*agricultural or forestry tractors having at least three wheels and obviously intended, given their construction and equipment, to be used for agricultural, horticultural or forestry purposes. Vehicles of this type only have a limited maximum speed (in general, not more than 25 km per hour on the highway)*”. They observed that the purposes of the Vehicles manifest in their objective characteristics went far beyond use for agricultural, horticultural or forestry purposes. Further the maximum speed of the Vehicles of 40 km per hour greatly exceeded 25 km per hour.

106. Further the Vehicles did not have “*a hydraulic device enabling agricultural machinery (harrows, ploughs, etc.) to be raised or lowered, a power take-off enabling the power of the engine to be used to operate other machines or implements*” as

specified in the CNEN nor “*a hydraulic device intended to operate handling equipment (hay loaders, manure loaders, etc.) when these may be considered to be accessories.*”

5 107. Although the subheadings “*also cover specially built agricultural tractors such as raised-chassis tractors (straddle tractors) used in vineyards and nurseries, and hill tractors and tool-carrying tractors*” the Vehicles did not have these characteristics nor “*the presence of a permanently attached winch enabling timber to be hauled*”.

10 108. HMRC referred to the submission by the Appellants concerning Case C-15/05 *Kawasaki*, in which the ECJ classified an ATV as an agricultural and forestry tractor. The Appellants had submitted that it would be irrational to classify the Vehicles differently from the ATV in *Kawasaki*.

15 109. HMRC contended that for two reasons this argument should be rejected. Firstly it was plain and the Appellants had accepted that the Vehicles were not ATVs. In particular, as the CNENs explained, ATVs were characterised by the following features which the Vehicles did not have: a single seat for the driver; a standard towing hitch; and steering by means of a handle bar. Secondly the primary feature of the Vehicles which prevented them being tractors was their cargo bay. ATVs do not have a cargo bay. In short Mr Fell contended, the comparison drawn by the Appellants between ATVs and the Vehicles was not apposite.

20 110. HMRC submitted that the Appellants had also sought to rely on *Directive 2003/37/EC on type approval of agricultural and forestry tractors*. Article 3(1) of the Directive requires the manufacturers to submit applications for vehicle type-approval to the approval authority of a Member State. The Appellants had stated that the Kubota and the Cub Cadet had both been type-approved as agricultural and forestry tractors. However Article 2(J) of the Directive defines “*tractor*” in the following terms:

30 *‘tractor’ means any motorised, wheeled or tracked agricultural or forestry tractor having at least two axles and a maximum design speed of not less than 6 km/h, the main function of which lies in its tractive power and which has been especially designed to pull, push, carry and actuate certain interchangeable equipment designed to perform agricultural or forestry work, or to tow agricultural or forestry trailers; it may be adapted to carry a load in the context of agricultural or forestry work and/or may be equipped with passenger seats.*

35 The Appellants argued that since the Vehicles had been classified as agricultural and forestry tractors under the Directive, they should also be so classified under the Combined Nomenclature.

40 111. Mr Fell contended that for two reasons, this argument must be rejected. Firstly, the definition of “*tractor*” used in the Directive showed that the term differs in meaning from the term “*tractor*” as it appears in the Combined Nomenclature. The key phrase relied upon by the Appellants is “*especially designed to pull, push*”. However the definition in the Directive also refers to the vehicle being “*especially designed to carry*”. In short the definition of “*tractor*” in the Directive was different

from the concept of a vehicle “*constructed essentially for hauling or pushing*” deployed in 8701 of the Combined Nomenclature.

112. Secondly Mr Fell contended that HMRC and the Tribunal had to make up their own minds as to how the Vehicles should be classified under the Combined
5 Nomenclature. Neither the HMRC nor the Tribunal should allow their views to be distorted by the view taken of the Vehicles by a different public authority in the context of a different piece of legislation. Indeed for the Tribunal to do so would amount to taking into account irrelevant considerations: see *Land Securities plc v Westminster City Council* [1993] 1 WLR 286, *Secretary of State for Trade and
10 Industry v Bairstow* [2003] EWCA Civ 321. For these reasons the Appellants’ contentions regarding the Directive should be rejected.

113. Insofar as the Appellants contended that the Vehicles were dumpers so that 8704
10 applied rather than 8704 21 Mr Fell contended that the concept of a dumper was a purpose based concept. Whilst dumping through the use of a tipper was a part of the purpose or use of at least some of the variants of the Vehicles, it was not a primary
15 purpose, or sufficiently dominant part of the purposes or uses of the Vehicles, to render them dumpers. Rather, their objective characteristics showed the Vehicles to be utility vehicles and/or multi-purpose vehicles, which had a wide range of purposes or uses other than dumping. Given the wide range of purposes and uses manifested in
20 the objective characteristics of the Vehicles, they were not properly categorised as dumpers. As they were not dumpers they fell to be classified as *other* under 8704 21.

114. Mr Fell submitted that in order to determine whether the Vehicles should be classified under 8704 10 or 8704 21, it was necessary to address the concept of
“*dumper*” and whether it applied to the Vehicles. He submitted that there were two
25 inconsistent ways of defining the term dumper.

115. The first approach focused on functionality and might define a dumper as a dumper if and only if it has a tipper on it; and could be used for off-highway use. This definition focused on partial aspects of the form and functionality of the vehicle, identifying aspects of the functions and form of dumpers and defining dumpers solely
30 by reference to those aspects.

116. The second approach focused on purpose and might define a dumper if and only if it had a tipper; and the primary or dominant purpose of the vehicle was dumping. This definition focused on the purpose of the vehicle by identifying an essential aspect of the functionality of the vehicle, the presence of a tipper, and then going on
35 to identify a purpose related to that functionality by reference to which dumpers are defined.

117. HMRC considered that the purpose-based approach was the correct approach to the definition of “*dumper*”. Mr Fell submitted that this approach was supported by Case C-396/02 *DFDS*. He stated that the opinion of A-G Stix-Hackl delineated a
40 purpose based approach to the definition of “*dumper*” at paragraph 26:

5 “The structure of the tariff headings within the heading 8704 of the CN for motor vehicles for the transport of goods shows that subheading 8704 10 of the CN relating to dumpers is a specific heading for vehicles with a certain purpose, off-highway tipping work. However, none of the other subheadings differ according to purpose, but only according to certain technical characteristics (motorisation and weight). This shows that the emphasis in the classification of dumpers is on the purpose of the vehicles and not on the form or functionality of the tipping body.”

118. HMRC stated that this purposive approach was supported by the judgement of the ECJ in *DFDS*.

10 119. Mr Fell submitted that the approach, taken by the ECJ in *DFDS* in paragraphs 31-35 of the judgement to the definition of dumper, was purposive. An approach based simply on functionality or form was specifically rejected by the ECJ, let alone one based on one selectively chosen function. The presence of a tipper or an opening bottom was a necessary condition, “an essential characteristic”, of a dumper, but it
15 was not a sufficient condition. He submitted that the above approach demonstrated that in order to move from a necessary condition of a dumper to a sufficient condition the purpose of the dumpers must be considered.

20 120. HMRC submitted that in order for a purpose of a vehicle to be sufficient to define it under the purposive approach, that purpose must be more than simply a function the vehicle can perform. There is a weak sense in which any function a vehicle can perform can be said to be a purpose of it. If this type of purpose is relied on, then the purpose-based approach collapses into the functionality approach. Rather, Mr Fell submitted, in order to define a vehicle, a purpose must be the purpose of the vehicle or what the vehicle is for. In the words of A-G Stix-Hackl in *DFDS*, it must be
25 what the vehicle is intended primarily for, not merely a function which is of secondary importance. Accordingly dumpers are defined by the primary or dominant purpose of dumping and not the mere fact that this is one purpose for which they can be used.

30 121. Mr Fell submitted that the HSEs clearly distinguished between dumpers and tipping lorries, regarding them as mutually exclusive, by stating “*dumpers can generally be distinguished from other vehicles for the transport of goods...in particular tipping lorries*. He submitted that this reinforced the incorrectness of the functionality approach, as that approach could not plausibly explain why a tipping lorry was not a dumper. If a dumper was defined by the presence of a tipper, then why
35 was a tipping lorry, which has a tipper, not a dumper? It was not possible to answer this question without referring to the differing purposes of a dumper and a tipping lorry.

40 122. He submitted that the distinction between dumper and tipping lorry demonstrated that the mere fact that a vehicle had a tipper did not make it a dumper and that to determine whether a vehicle with a tipper was a dumper or not, reference must be had to the primary purposes of the vehicle and not merely to its functionality. The reason a tipping lorry was not a dumper was because the dumping purpose is not the primary or dominant purpose of the vehicle. He submitted that this was further underscored by A-G Stix-Hackl in *DFDS*:

5 “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 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.”

123. Mr Fell submitted that it was the differing primary purposes of a dumper and a tipping lorry, which distinguish them.

15 124. Further given that the distinction between a dumper and a tipping lorry is based on purpose rather than functionality, there could be no basis for the contention that the only type of vehicle with a tipper that is not a dumper is a tipping lorry. A dumper is defined by its primary purpose being dumping, not simply by the presence of a tipper. Vehicles with tippers, other than tipping lorries, may be distinguished from dumpers by reference to differing primary purposes.

20 125. Mr Fell submitted that the HSEs and CNENs set out various features which are indicative that a vehicle is a dumper. These features are only indicative - a dumper is defined by its primary purpose of dumping rather than its features. It is nonetheless instructive to examine how many of the features referred to in the HSEs and CNENs are present in the case of the Vehicles.

25 126. The HSEs state that the “*dumper body made of very strong steel sheets...its front part...extended over the driver’s cab to protect the cab...the whole or part of the floor slopes upwards towards the rear*”. The Vehicles’ tippers are made of very strong steel sheets. Other than that, some of the characteristics referred to are not present in the case of the Vehicles.

30 127. The HSEs state that “*in some cases the driver’s cab is half-width only*”. This is not so in the case of the Vehicles whose driver’s cabs extend across the full width of the Vehicles and contain space for a passenger.

128. The HSEs state that there is “*a lack of axle suspension*”. The Cub Cadet has axle suspension. The Kubota does not.

35 129. The Vehicles do have high braking capacity as required by the HSEs.

40 130. The HSEs state that dumpers have “*limited speed and area of operation*”. The Vehicles have a maximum speed of 40 km per hour, arguably in excess of what would be necessary for dumping in a limited area of operation. Further the areas of operation of the Vehicles are not limited. In their various forms the Vehicles are capable of operating in a wide range of areas including construction sites, forestry, shooting ranges and on roads.

131. The HSEs state that dumpers have “*special earth moving tyres*”. The Cub Cadet has earth moving tyres as does the Recreational version of the Kubota. The General Purpose, Worksite and Streetlegal versions of the Kubota do not have earth moving tyres.

5 132. *The body may be heated by exhaust gases*” Mr Fell confirmed that this was not the case with the Vehicles nor were they “*specially designed for working in mines or tunnels, for example those with a bottom-opening body*”.

10 133. Their “*tare weight/payload ratio does not exceed 1:1.6*”. The Vehicles conform to this. Mr Fell concluded that the Vehicles had few of the nine features which the HSEs listed as indicative of a dumper.

15 134. Mr Fell submitted that the Vehicles were not dumpers in accordance with the CNENs. They were utility vehicles and/or multi-purpose vehicles which had a wide range of purposes or uses, under the umbrella of the primary purpose of transporting goods. Whilst dumping through the use of a tipper was a part of the purpose or use of the Vehicles, it was not a sufficiently dominant part of the purposes or uses of the Vehicles as to render them dumpers. Rather, their objective characteristics showed the Vehicles to be utility vehicles and/or multi-purpose vehicles, which had a wide range of purposes or uses beyond dumping. Given the wide range of purposes and uses manifested in the objective characteristics of the Vehicles, they were not properly
20 categorised as dumpers.

25 135. He submitted that the utility, or multi-purpose, nature of the Vehicles was underscored by the range of different purposes for which they could be used. The objective characteristics of the Vehicles supported a number of different purposes and uses, which went far beyond dumping. Winching, hauling, transporting and travelling did not amount to dumping. The Vehicles could be used to transport a range of materials which it would not be appropriate to dump, such as equipment and provisions such as water.

30 136. There was no basis whatsoever to be found in the objective characteristics of the Vehicles for the assertion that one purpose is primary and dominant over the others beyond the overall purpose of the transport of goods. Rather, the objective characteristics of the Vehicles supported the view that they were multi-purpose vehicles with a wide range of different purposes and functions beyond dumping, none of which were dominant or primary. Accordingly the objective characteristics of the Vehicles could not support a categorisation of the Vehicles as dumpers; such a
35 categorisation required an assertion that the primary purpose of the Vehicles was to dump.

40 137. Mr Fell submitted that the multi-purpose nature of the Vehicles was in stark contrast to vehicles which can be legitimately characterised as dumpers. Images of such vehicles appear in the CNENs. The images set out: (1) typical dumpers, being large trucks with a tipper on the back; (2) a dumper with a two way seat and two sets of controls; (3) a dumper with a bottom-opening body; and (4) dumpers for construction sites. The objective characteristics of these vehicles plainly supported the

contention that their primary or dominant purpose was the moving and, specifically, dumping of materials. It was equally plain that the objective characteristics of these vehicles could not support the wide range of purposes and uses of the Vehicles.

5 138. The contention by the Appellants that the objective characteristics of a conventional dumper supported its use to transport equipment on a hunting trip or indeed for any conventional recreational purpose was manifestly absurd. Similarly, the contention that the objective characteristics of a conventional dumper supported the purpose of carrying loads it was not appropriate to dump, or the purpose of hauling vehicles was not sustainable.

10 139. Mr Fell contended that the purposes of conventional dumpers and the Vehicles, as manifested in their respective objective characteristics, were so different that the contention that they should all be classified together as dumpers was untenable.

15 140. Mr Fell further contended that the Appellants had undermined the view that the dominant or primary purpose of the Vehicles was dumping, by asserting in their reports that the primary purpose of the Vehicles was to haul or push other vehicles. If this contention was even arguable then this undermined the contention that the primary or dominant purpose of the Vehicle was dumping.

141. Finally Mr Fell referred to various regulations, which provided further support for the approach taken to the classification of the Vehicles by HMRC.

20 142. *Commission Regulation (EC) No 799/1999* 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”. This supported HMRC’s contentions that (1) the fact that the Vehicles have tippers does not make them
25 dumpers; and (2) the fact that the Vehicles are able to haul trailers does not make them a tractor.

30 143. *Commission Regulation (EC) No 1386/2003* classified 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”. This supported HMRC’S contention that the fact that the Vehicles had tippers did not make them dumpers.

35 144. *Commission Regulation (EC) No 2147/2004* classified a vehicle (item 5) with an open load area with a tipper to 8704 21 91 stating that it “is not a dumper truck”. This supported HMRC’s contention that the fact that the Vehicles had tippers did not make them dumpers.

145. Mr Fell concluded that the Vehicles were motor vehicles for the transport of goods, not tractors. Accordingly they should be classified to 8704 under GRI 1 not 8701. The Vehicles were not dumpers. Therefore they should be classified to 8704 21 91 under GRIs 1 and 6 and not 8704 10.

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Findings

146. Note 2 to Chapter 87 of the Combined Nomenclature defines tractors as “*For the purposes of this Chapter, “tractors” means vehicles constructed essentially for hauling or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods.*”

147. GRI 1 states that the titles of sections, chapters and sub-chapters are provided for ease of reference only. GRI 1 also provides the basic rule of classification: namely, that classification of goods is to be determined according to the terms of headings and any relevant section or chapter notes. The subsequent rules are to be applied, but are only to be referred to if GRI 1 does not enable classification to be made. This was confirmed in the Case C-486/06 *BVBA Van Landeghem*.

148. The Tribunal found that the guidance to the meaning of the word “tractor provided by the HSEs to Chapter 87 of the Combined Nomenclature stated that “*For the purposes of this heading, tractors means wheeled or track-laying vehicles constructed essentially for hauling or pushing another vehicle, appliance or load. They may contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods, or provision for fitting with working tools as a subsidiary function*”

149. The Tribunal found that the Vehicles were not constructed essentially for hauling or pushing. Whilst the Vehicles did have the functionality to haul this was just part of a multiplicity of their purposes.

150. Although Mr Angiolini emphasised that many of the Appellants’ customers used the Vehicles as small tractors and submitted that the Vehicles shared many of the same essential characteristics described by the ECJ in the case of *Kawasaki* the Tribunal did not find that this justified their classification as agricultural or forestry tractors.

151. Additionally the Tribunal found that a large number of the factors referred to in the CNENs as features of tractors were not found in the Vehicles. The Tribunal accepted that the CNENs were not legally binding but nevertheless found them an important aid.

152. The Tribunal found that the transportation of goods was a sufficiently dominant purpose to justify classification under 8704. The presence of a cargo bed was a prominent objective characteristic of the Vehicles, which facilitated the transportation of goods.

153. The terms of the relevant headings of the Combined Nomenclature in respect of dumpers appear in Chapter 87 and state “*8704 Motor Vehicles for the Transport of Goods: Dumpers designed for off-highway use*”.

154. The Tribunal found that the Vehicles were designed largely for off-highway use. The Tribunal accepted the Appellants’ contention that the site of use of the Vehicles

was not determinative and the fact that the Vehicles were used largely for agricultural purposes and not on building sites should not affect their classification as dumpers.

5 155. The Tribunal found that despite the submission by HMRC to the contrary the Vehicles had many of the nine features which the HSEs listed as indicative of a dumper.

156. However the Tribunal found that the Vehicles were used to transport a range of materials which it would not be appropriate to dump, such as equipment and water.

10 157. The Tribunal found that by asserting in their reports that the primary purpose of the Vehicles was to haul or push other vehicles and by pleading alternatively that the Vehicles were tractors the Appellants had undermined the contention that the primary or dominant purpose of the Vehicle was dumping.

158. In the *BVBA Van Landeghem* case it was said that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product.

15 159. The burden was on the Appellants to prove that the Vehicles' primary and dominant use was as dumpers for off highway use but the Appellants' arguments were weakened by the assertion in their reports that the primary purpose of the Vehicles was to haul or push other vehicles.

20 160. When the Tribunal assessed the objective characteristics of the Vehicles it was therefore not possible to conclude that the primary purpose was dumping. A-G Stix-Hackl in Case C- 396/02 *DFDS* stated that "the emphasis in the classification of dumpers is on the purpose of the vehicles and not on the form or functionality of the tipping body".

161. The Tribunal accepted the evidence of the Appellants' witnesses that their customers would not have paid the higher price if the Vehicles did not dump but the witnesses too emphasised the hauling and pushing characteristics.

25 162. This evidence showed that the Vehicles' uses went far beyond dumping. They had a wide range of purposes. They were used for winching, pushing, hauling trailers, moving animals, transporting plants, boxes, water and equipment, carrying munitions, transporting feed for the animals which might feed from a trough.

30 163. The Tribunal carefully considered Mr Angiolini's submissions concerning the Vehicles classification as dumpers as that heading was more specific and in accordance with GRI 3 should be preferred. However the Tribunal found that in order for the Vehicles to be classified as dumpers, in the words of A-G Stix-Hackl in *DFDS*, dumping must be what the Vehicles are primarily intended for, not merely a function which is of secondary importance.

35 164. The Tribunal found 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 ("the CN"). This heading is for *Motor vehicles for the transportation of goods. Other, with compression-ignition internal combustion piston*

engine (diesel or semi diesel). Of a gross weight not exceeding five tonnes: with engines of a cylinder capacity not exceeding 2500 cm2. New.

Decision

165. The appeal is dismissed.

5 166. This document contains full findings of fact and reasons for the decision. Any
party dissatisfied with this decision has a right to apply for permission to appeal
against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax
Chamber) Rules 2009. The application must be received by this Tribunal not later
10 than 56 days after this decision is sent to that party. The parties are referred to
“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

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TRIBUNAL JUDGE
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