[2016] UKFTT 0359 (TC)

# TC05114

**Appeal number: TC/2015/04611**
**TC/2015/04650**

*Customs duty – classification – revocation of binding tariff informations – whether imported vehicles should be classified under Commission Implementing Regulation (EU) 2015/221 – yes – whether reference to Court of Justice of the European Union necessary to determine validity of Regulation - yes*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**E.P. BARRUS LIMITED** **Appellants**
**KUBOTA (U.K.) LIMITED**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE THOMAS SCOTT**
**DUNCAN MCBRIDE**

**Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 10 and 11 March 2016**

**Ms Valentina Sloane of Counsel for the Appellants**

**Mr Mark Fell of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. The Appellants appeal against the revocation by HMRC of five binding tariff informations in respect of certain vehicles imported by the Appellants. They argue that the vehicles should be classified as "dumpers" for customs tariff purposes and not, as HMRC maintain, as "motor vehicles for the transportation of goods: other".

2. Further and alternatively, the Appellants contend that the regulation under which HMRC classify the vehicles is invalid, and the question of its validity must be referred to the Court of Justice of the European Union ("**CJEU**").

3. For the reasons below, the appeal against the revocation of the binding tariff informations is dismissed.

4. For the reasons below, the validity of the relevant regulation will be referred to the CJEU.

***Evidence***

5. We were provided with folders containing correspondence between the parties, their respective skeleton arguments, and various documents and colour photographs relating to the technical specifications of the vehicles.

***Summary Chronology***

6. In September 2011 the First-tier Tribunal ("**FTT**") determined an appeal by the Appellants against the classification under binding tariff informations ("**BTIs**") issued by HMRC in respect of two utility vehicles.

7. In that appeal, the Appellants claimed that the two vehicles should be classified for tariff purposes as "dumpers designed for off-highway use" ("**dumpers**"), or alternatively as "agricultural and forestry tractors". HMRC had issued BTIs classifying the vehicles as "motor vehicles for the transportation of goods: other" ("**motor vehicles: other**").

8. The FTT dismissed the appeal.

9. In June 2013 the Upper Tribunal ("**UTT**") heard the Appellants' appeal from that FTT decision. The Appellants contended that the vehicles should properly be classified as dumpers.

10. The UTT allowed the appeal, finding that the vehicles must be classified as dumpers.

11. HMRC did not appeal against the UTT decision.

12. The Appellants applied for and were issued with BTIs from HRMC in late 2013 classifying the vehicles as dumpers.

13. In February 2015 the EU Commission published a Regulation, which entered into force in March 2015, classifying vehicles of a specified description as motor vehicles: other.

14. In March 2015 HMRC revoked the BTIs issued to the Appellants in 2013, and informed the Appellants that the vehicles would subsequently fall within the motor vehicle: other category.

15. Following a request by the Appellants for a statutory review, on 24 July 2015 HMRC informed the Appellants that, following such a review, HMRC's decision to revoke the BTIs was upheld.

16. The Appellants appeal against that review decision, and contend that the vehicles should be classified as dumpers.

### *Legislative Background to Tariff Classification*

17. The EU is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System, commonly referred to as the Harmonized System (the "**HS**"). The HS requires that the customs tariffs and nomenclatures of the contracting states conform to the HS. The HS is administered by the World Customs Organisation.

18. The FTT decision referred to at [8] ([2011]) UKFTT 864(TC)) contains a useful summary of the relevant legislative background to the tariff classification issue. In its decision referred to at [10] ([2013] UKUT 0449 (TCC)), the UTT referred with approval to this summary (at [9]). Neither party takes issue with it, and in view of its usefulness in this appeal it is set out below:

> **"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 GIRs"). 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 title 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 …*
>
> *(c) where 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.*
>
> *[….]*
>
> *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, 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.

**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 1-10661, at paragraphs 23-25:

> 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 1-3657, paragraph 38, and Case C-310/06 FTS International [2007] ECR 1-0000 paragraph 27).
>
> 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 1-311, paragraph 29; Case C-183/06 RUMA [2007] ECR 1-559, paragraph 36; and Case C-142/06 Olicom [2007] ECR 1-0000, paragraph 18).
>
> 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 are an important aid to the interpretation of the scope of the various tariffs headings of the CN (see Kawasaki Motors 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.

**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

(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)

**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.

**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."

## *First Issue – Revocation of the BTIs*

19. Article 12 of Regulation 2913/92 establishing the Community Customs Code (the "**Customs Code**") provides, so far as relevant, that:

"1. The customs authorities shall issue binding tariff information … on written request, acting in accordance with the committee procedure.

2. Binding tariff information … shall be binding on the customs authorities as against the holder of the information only in respect of the tariff classification ….

5. Binding information shall cease to be valid:

(a) in the case of tariff information …

(i) where a regulation is adopted and the information no longer conforms to the law laid down thereby;

(ii) where it is revoked or amended in accordance with Article 9, provided that the revocation or amendment is notified to the holder."

20. Article 9 of the Customs Code provides that:

"1. A decision favourable to the person concerned shall be revoked or amended where, in cases other than those referred to in Article 8 [annulment of decision based on incorrect or incomplete information], one or more of the conditions laid down for its issue were not or are no longer fulfilled.

2. A decision favourable to the person concerned may be revoked where the person to whom it is addressed fails to fulfil an obligation imposed on him under that decision".

21. The Customs Code must be read subject to Regulation 2454/93, which lays down provisions for the implementation of the Code. Article 11 of Regulation 2454/93 has the effect of making a binding tariff information issued by the customs authorities in one Member State binding throughout the Community.

22. Article 12.1 of Regulation 2454/93 provides, so far as material, that :

"Upon adoption of one of the acts or measures referred to in Article 12(5) of the Code, the customs authorities shall take the necessary steps to ensure that binding tariff information shall thenceforth be issued only in conformity with the act or measure in question."

23. The Appellants' right of appeal against the revocation of the BTIs by HMRC is based on paragraph 3(1)(c) of the Customs Review and Appeals (Tariff and Origin) Regulations 1997 (SI 1997/534) (the "**CRA Regulations**"). By virtue of paragraph 4 of the CRA Regulations and section 16(8) and (9) of the Finance Act 1994, the HMRC decision to revoke is classified as an "ancillary matter". The powers of this tribunal in relation to such a decision, and a decision on the review of such a decision, are confined to a power "where the tribunal are

satisfied that the Commissioners or other person making the decision could not reasonably have arrived at it" to do one or more of the acts set out in section 16(4) of the Finance Act 1994. Those acts include directing that the decision is to cease to have effect.

24. Since the tribunal's jurisdiction is a supervisory one, in order to succeed in their appeal against the revocation decision, the Appellants must show that HMRC acted in a way in which no reasonable body of commissioners could have acted, or took into account an irrelevant matter, or disregarded a relevant matter, or otherwise erred in law: in the context of the revocation of BTIs, see the judgment of the UTT in *Invicta Foods Ltd v Revenue and Customs Commissioners* [2016] UKUT 1(TCC) at [50].

***Background to revocation of the BTIs***

25. The factual background to the revocation of the BTIs in 2015 aids understanding of both HMRC's decision to revoke and the Appellants' appeal against HMRC's decision to uphold that revocation on review.

26. As explained further below, the BTIs which were revoked in 2015 related to six vehicles, while the previous appeals by the Appellants to the FTT and UTT related to only one of those vehicles and an earlier version of another. However, it was common ground between the parties that the vehicles which were covered by the BTIs revoked in 2015 were, at the least, substantially similar to those considered by the FTT and the UTT.

27. The UTT determined that, in dismissing the Appellants' appeal against HMRC's categorisation of the vehicles as motor vehicles: other, the FTT had made an error on a point of law. The UTT explained its decision as follows (*E.P. Barrus Ltd and another v Revenue and Customs Commissioners* [2013] UKUT 0449 (TCC)), at [48] and [49]:

> "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, 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 paragraph 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 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 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 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."

28. The UTT then considered the relevant characteristics of the vehicles which were the subject of the appeal, and set out its conclusions as follows (at [53] to [60]):

"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:

(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);

(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

(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 easily 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."

29. HMRC did not appeal the UTT decision, and the Appellants applied for new BTIs for the six vehicles which are the subject of this appeal. In late 2013 HMRC issued BTIs classifying those vehicles, more particularly described at [65] (the "**2013 BTI Vehicles**"), as dumpers.

30. During the course of 2014 the classification of certain utility vehicles was considered by the Customs Code Committee, which is comprised of representatives from each Member State. The purpose of the Committee is to ensure close and effective co-operation between the European Commission and Member States in ensuring the uniform application of the Customs Code.

31. We were provided with the minutes of the meeting of that Committee held on 5 to 8 May 2014. Such minutes are public, and so may be admitted as an aid in interpreting the thinking behind the Committee's decisions. The minutes included the following passage under the heading "Utility vehicles" :

> "Facts:
>
> Divergent classification of small multipurpose utility vehicles equipped with a tipping cargo bed.
>
> The national tribunal in one MS [Member State] decided that such a vehicle is to be classified under CN code 8704-10 as "dumpers designed for off-highway use" (referring to its exclusive or principal off-highway use, the presence of a sturdy flat-bed tipping body designed essentially for the transport and tipping of any kind of material, strong body, protective frame etc).
>
> Other MS issued BTIs for similar vehicles classifying them under CN code 8704-21 as "vehicles for transport of goods" (the BTIs are currently expired but the MS maintain their position).

> Questions and Discussion:
>
> …. Several MS stated that the vehicle in question is a multipurpose utility vehicle and is not comparable to dumpers. There are many types of vehicles for the transport of goods with a strong steel frame. Many of them are intended for off-road use, in addition, MS did not find the current vehicle being very robust.
>
> Dumpers are according to the HSEN sturdily built vehicles with a tipping or bottom opening body, designed for the transport of excavated or other materials. They have a rigid or articulated chassis. The vehicle in question is not specially designed to transport sand, gravel, earth, stones etc. It is rather a multipurpose utility vehicle that can be used for a range of functions, also for winding, pushing, hauling trailers, moving animals, transporting plants, boxes, water and equipment, carrying munitions and transporting feed for animals.
>
> Conclusions:
>
> The majority of MS would classify the vehicles under CN code 8704-21 as "vehicles for the transport of goods". One MS would classify under CN code 8704-10 as "dumpers".
>
> Action points:
>
> The MS who submitted the issue will send a supplement to the submission (similar type of vehicle).
>
> A draft regulation will be presented for discussion at a forthcoming meeting."

32. Such a draft regulation was duly presented at a meeting of the Committee held on 2 to 4 July 2014. The minutes of that meeting record various comments on the draft. It was noted that a draft regulation would be presented for a Committee vote.

33. The regulation drafted by the Committee was enacted as Commission Implementing Regulation (EU) 2015/221 ("**Regulation 2015/221**"). The Annex to the Regulation set out a description of a utility vehicle and classified it under CN code 8704-21-91 as a new motor vehicle for the transport of goods. The terms of the Regulation are considered in detail below.

34. On 2 March 2015 HMRC wrote to the Appellants stating that Regulation 2015/221 covered a vehicle that was similar to those covered by the BTIs issued in late 2013, and that consequently the BTIs were being revoked.

35. The revocation decisions were upheld by HMRC on review in July 2015, and this appeal is against that review decision.

## *Discussion*

36. The request for a reference to the CJEU is dealt with separately below. The first issue is, in substance, the correct classification for tariff purposes of the 2013 BTI Vehicles. Are they, as the Appellants contend, correctly classified as

dumpers, notwithstanding Regulation 2015/221, meaning that the BTIs issued in 2013 should not have been revoked? Or are they, as HMRC contend, correctly classified as motor vehicles: other, meaning that the BTIs were properly revoked?

37. Although we were presented with numerous arguments, and many authorities, by both parties, we consider that this issue essentially turns on a comparison between the objective characteristics of the 2013 BTI Vehicles and the terms of Regulation 2015/221. As we will explain, we consider that certain of the arguments raised by the Appellants relate less to this question than to the validity of the Regulation itself. The latter issue is a matter to be considered only in the context of a possible reference to the CJEU.

38. The starting point in the comparison is Regulation 2015/221. The preamble to the Regulation provides that:

> "(3) pursuant to [the general rules for the interpretation of the Combined Nomenclature], the goods described in column (1) of the table set out in the Annex should be classified under the CN code indicated in column (2), by virtue of the reasons set out in column (3) of that table.
>
> (4) it is appropriate to provide that binding tariff information issued in respect of the goods concerned by this Regulation which does not conform to this Regulation may, for a certain period, continue to be invoked by the holder in accordance with Article 12(6) of Council Regulation (EEC) No 2913/92. That period should be set at 3 months.
>
> (5) The measures provided for in this Regulation are in accordance with the Opinion of the Customs Code Committee …."

39. The terms of the Regulation are as follows:

> "
>
> Article 1
>
> The goods described in in column (1) of the table set out in the Annex shall be classified within the Combined Nomenclature under the CN code indicated in column (2) of that table.
>
> Article 2
>
> Binding tariff information which does not conform to the Regulation may continue to be invoked in accordance with Article 12(6) of Regulation (EEC) No 2913/92 for a period of 3 months from the date of entry into force of this Regulation.
>
> Article 3
>
> This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union.*
>
> This Regulation shall be binding in its entirety and directly applicable in all Member States.
>
> Done at Brussels, 10 February 2015"

40. The Annex to the Regulation comprises a description of the goods (column (1)), the CN code for those goods (column (2)), and "Reasons" (column (3)). Under column (1) there is a reference to an image, which consists of a photographic reproduction of a vehicle.

41. Column (1) (description of the goods) states as follows:

> "A new, four-wheel drive utility vehicle with a compression-ignition internal combustion piston engine (diesel) of a cylinder capacity of 720 $cm^3$, with a net weight (including fluids) of approximately 630 kg, an unbraked towing capacity of 750 kg and with dimensions of approximately 300x160 cm.
>
> The vehicle has an open cabin with two seats (including the driver) fitted with a full roll-over protection frame, a cargo bed constructed of a strong steel frame with a sturdy flat-bed tipping body, with a manual tipper and of a capacity of 0.4 $m^3$ or, approximately, 400 kg. It has a high ground clearance (27 cm) and a wheel base of 198 cm.
>
> It is equipped with off-road earth moving tyres, wet-type disc brakes, a coupling device and a front hitch. The vehicle has a limited speed of 25 km/h, and a high brake capacity.
>
> The vehicle is designed for off-road use, particularly in very rough terrain. The vehicle is presented to be used for a range of functions, for example, pushing, hauling trailers, moving animals, transporting plants, boxes, water and equipment, carrying munitions and transporting feed for animals."

42. The CN code provided in column (2) is 8704 21 91 (new motor vehicle for the transport of goods). Column (3) (Reasons) states as follows:

> "Classification is determined by general rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8704, 8704 21 and 8704 21 91.
>
> The vehicle is designed as a multi-purpose vehicle that can be used for a range of functions in different environments. It has objective characteristics of motor vehicles for transport of goods of heading 8704. (See also the Harmonised System Classification Opinions 8704 31/3 and 8704 90/1.)
>
> The vehicle is not a dumper designed for off-highway use. It is not sturdily built with a tipping or bottom opening body, designed for the transport of excavated or other materials (see also the Harmonised System Explanatory Notes to heading 8704, sixth paragraph, point (1)). Classification under subheading 8704 10 is therefore excluded.
>
> The product is therefore to be classified under CN code 8704 21 91 as a new motor vehicle for the transport of goods."

43. Before considering the relevant law which provides guidance on classification, both in general and specifically in relation to dumpers, it is helpful to summarise the arguments raised by the parties.

44. For the Appellants, Ms Sloane presented the following arguments:

    (a) Since none of the 2013 BTI Vehicles is identical to the vehicle described in Regulation 2015/221, in order for them to be classified under that

Regulation they must be sufficiently similar to the vehicle described in the Regulation.

(b) Case law establishes that caution must be exercised in applying a regulation to a product by analogy in this fashion.

(c) Each of the 2013 BTI Vehicles has significant differences in its characteristics to the vehicle described in the Regulation, so none of them is sufficiently similar to the vehicle described in the Regulation.

(d) The UTT decision establishes clearly that vehicles having the characteristics of the 2013 BTI Vehicles must be classified as dumpers.

(e) HMRC did not appeal the UTT decision, so must be assumed to have identified no error of law in that decision.

(f) The Regulation states (in column (3)) that the vehicle is "designed as a multi-purpose vehicle", and the 2013 BTI Vehicles do not fit this description.

(g) Again in column (3), the Regulation states that the vehicle it describes "is not a dumper" and "is not sturdily built". Neither statement accurately describes the 2013 BTI Vehicles, and this is confirmed by the findings of fact in the UTT judgment.

(h) The 2013 BTI Vehicles are closer in their characteristics to a vehicle called the "Minitrac", which is classified as a dumper.

45. For HRMC, Mr Fell presented the following arguments:

(a) Regulation 2015/221 is binding in law on both HMRC and the Tribunal, barring any determination by the CJEU that is invalid.

(b) It follows from this that, insofar as it conflicts with Regulation 2015/221, the UTT decision is no longer good law, and should not be followed.

(c) All of the 2013 BTI Vehicles are substantially similar to the vehicle described in Regulation 2015/221. Any differences in their objective characteristics to those of the Regulation vehicle are immaterial for classification purposes.

(d) The decision by HRMC not to appeal the UTT decision has no relevance to the issue before the Tribunal.

(e) Regulation 2015/221 was in fact prompted by the UTT decision and based on one of the vehicles dealt with by the FTT and UTT. That is clear from the relevant Minutes, and from the image at the end of the Annex to the Regulation. It was therefore clearly intended by the Customs Code Committee to apply to vehicles such as the 2013 BTI Vehicles.

Interpreting the Regulation so that it did not so apply would be contrary to its clear intended purpose.

(f) Properly interpreted, the descriptive statements in the Regulation identified by the Appellants are not additional factual requirements in relation to the specified vehicle, but simply an explanation that, by virtue of the Regulation, a vehicle possessing the technical specifications in column (1) is not a dumper for classification purposes.

46. In considering the classification of the 2013 BTI Vehicles, we must establish their objective characteristics and properties. The relevant authorities were summarised and analysed by the UTT, at [23] to [40] of their judgment. That analysis remains applicable to the decision which we must make, and is not affected by the fact that Regulation 2015/221 was implemented subsequent to the UTT decision.

47. We need not repeat at length the analysis of the authorities at [23] to [40] of the UTT judgment. It is, however, worth noting two decisions of the European Court of Justice, as it then was ("**ECJ**") which relate to the classification of vehicles as dumpers, namely Case C-396/02 *DFDS BV v Inspecteur der Belastingdienst – Doudanedistrict Rotterdam* [2004] ECR 1-8439 and Case C-486/06 *BAS Trucks BV v Staatssecretaris van Financiën* [2007] ECR 1-6763.

48. In *DFDS*, the issue was whether vehicles known as "Minitracs" should be classified as dumpers, and the Court held that the fact that a flat-bed vehicle is equipped with an intricate, versatile and precise tipping function does not exclude its classification as a dumper.

49. *BAS Trucks* primarily concerned the relevance to dumper classification of potential on-road use in addition to off-road use. The Court held that the fact that a truck was designed so as to be capable of being driven not only off-highway but also on paved, public roads could not in itself suffice to preclude classification as a dumper.

50. The approach which we have adopted in this case is to consider the principles suggested by the UTT, in light of the subsequent introduction of Regulation 2015/221. The UTT stated (at [41]):

> "41. In our view the following principles can be derived from the authorities we have reviewed:
>
> (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*);

(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*);

(4) The CNENs and HSENs 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*);

(6) The essential characteristics of a dumper truck are that it has a tipping hopper (however configured) (*DFDS*) and that 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

(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 and dumping of rubble and other materials off-road (*BAS, BVBA*)."

51. In this case, if the 2013 BTI Vehicles fall within Regulation 2015/221, then they are precluded by the terms of the Regulation from being classified as dumpers. In our view, therefore, the primary question is not "are the vehicles dumpers on the basis of case law and non-legally binding guidance?". Rather, it is "do the vehicles fall within Regulation 2015/221?". This distinction matters because even if the 2013 BTI Vehicles have characteristics associated with dumpers, if they fall within Regulation 2015/221 they cannot be classified as such (barring any declaration by the CJEU that the Regulation is invalid).

52. This position is well described by Lawrence Collins J (as he then was) in *VTech Electronics (UK) plc v Commissioners of Customs & Excise* [2003] EWHC 59 (Ch), at [21] to [23]:

"Regulations, including classification regulations, are binding in their entirety from the date of their entry into force: EC Treaty, Article 249 (formerly Article 189). A regulation providing that goods of a specified description are to be classified under a particular CN code: (a) is determinative of the issue of how goods of that specified description should be classified; and (b) may be applicable by analogy to identical or similar products.

It is common ground between the parties that where a Regulation concerns products which are similar to those in issue, then the classification in the Regulation must be followed unless and until there is a declaration from the European Court that the Regulation is invalid. In Case C-119/99 *Hewlett Packard BV v Directeur General des Douanes* [2001] ECR 1-3981, Advocate General Mischo said (in reasoning which was followed and approved by the Court) that classification regulations are adopted "when the classification in the CN of a particular product is such as to give rise to difficulty or to be a matter for dispute" (para 18). He went on:

"20. It should be borne in mind that a classification regulation is adopted … on the advice of the Customs Code Committee when the classification of a particular product is such as to give rise to difficulty or to be a matter for dispute.

21. It is thus not an abstract classification, since the purpose is to resolve the problem to which a particular product gives rise. But, as the Commission points out, the classification regulation has general implications, in so far as it does not apply to a given undertaking or to a particular transaction, but, in general, to products which are the same as that examined by the Customs Code Committee.

22. The classification regulation constitutes the application of a general rule to a particular case, and thus contains guidance on the interpretation of the rule which can be applied by the authority responsible for the classification of an identical or similar product."

But, he said, the approach adopted by a classification regulation for a particular product could not unhesitatingly and automatically be adopted in the case of a similar product: "on the contrary, as always, where reasoning by analogy is employed great care is called for". (para 24).

Regulations may be declared invalid, but only by the European Court (or, in a direct action commenced by a private party, by the Court of First Instance of the EC) : Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubeck – Ost* [1987] ECR, para 17. Unless and until that happens, national courts are of course obliged to give effect to a regulation."

53. Given this legal position, it is not open to us to approach the question of classification on the basis that the UTT decision to classify the two vehicles it considered as dumpers remains binding in that respect, and takes precedence over Regulation 2015/221. Where, as is clear from the relevant minutes of the Customs Code Committee in this case, it is a decision of a particular Member State which gives rise to a divergence of practice in the classification of a product, the Committee may determine, in effect, to reverse that national decision by a new Regulation.

54. Such a scenario is a function of the role of the Committee in ensuring the uniform application of the Combined Nomenclature. In a UK context, an example of this is the reversal of the decisions of the FTT and UTT in *Photron Europe v Revenue & Customs Commissioners* [2011] UKFTT 334 (TC) and [2012] UKUT 275 (TCC). Those national decisions, on the correct classification of certain high-speed cameras, were subsequently reversed by Commission Implementing Regulation (EU) No 113/2014. The preamble and form of that Regulation (though obviously not its Annex) are materially similar to those of Regulation 2015/221.

55. Before comparing the objective characteristics of the 2013 BTI Vehicles with those set out in Regulation 2015/221, we deal with certain of the other arguments raised by Ms Sloane for the Appellants.

56. As we have already explained, the UTT decision cannot be relied upon to override or avoid Regulation 2015/221. We must assume that the Regulation is valid for classification purposes.

57. As to the significance of HMRC's decision not to appeal the UTT decision, in our view this has no relevance to the issue in this appeal given the legal effect of the Regulation. We note that in any event there may be many reasons why a party chooses not to pursue an appeal against a decision.

58. As regards the relevance of the classification as a dumper of the "Minitrac" vehicle, Ms Sloane argued that the 2013 BTI Vehicles "appear analogous" to the Minitrac. This is a lightweight dumper with a tippable flat-bed which is classified as a dumper pursuant to Commission Implementing Regulation (EU) No 1114/2012. In so far as it is relevant, it is apparent from the Regulation classifying the Minitrac that it is markedly different to the 2013 BTI Vehicles in several respects. In particular the Minitrac moves via a caterpillar track rather than wheels, is considerably heavier, has a very significantly lower maximum speed, and has no towing functionality. In our view, the 2013 BTI Vehicles could not properly be described as substantially similar to the Minitrac, and, since each Regulation is specific to the goods classified, the classification of the Minitrac does not assist in determining the issue in this appeal.

59. We turn to the central issue, namely whether or not Regulation 2015/221 applies to the 2013 BTI Vehicles. Since none of those vehicles is completely identical to the vehicle described in Regulation 2015/221, we must determine, by reference to the objective characteristics of the vehicles, whether they are sufficiently similar for the Regulation to apply to them by analogy.

60. As explained in the Opinion of Advocate General Megozzi in *Staatssecretaris van Financiën v Kamino International Logistics BV* Case C-376/07, at [90]:

> "Even though the Court has generally accepted the possibility of applying a classification regulation by analogy, it did so making clear that this may be done in relation to products "similar" to those mentioned in the regulation, since this "facilitates a coherent interpretation of the CN and the equal treatment of operators." (citing *Krings*)

61. Determining whether or not a particular product is sufficiently similar to the terms of a regulation includes consideration of the reasons given for the classification in the relevant regulation: see *Krings GmbH v Oberfinanzdirekion Nűrnberg* Case C-130/02, at [36]. In *Krings*, the fact that the reasons given referred to one product as composed of 90.1% sugar and 2.5% tea extract and another of 58.1% sugar and 2.2% tea extract was taken by the Court to support application by analogy to the disputed product, which was composed of 64% sugar and only 1.9% tea extract.

62. In comparing the objective characteristics of the 2013 BTI Vehicles to those of the vehicle described in Regulation 2015/221, it is necessary to evaluate the significance of any differences, in aggregate, to the question of application by analogy. An example of such an evaluation is the decision in *Anagram International Inc. v Inspecteur van de Belastingdienst* Case C-14/05. That case concerned whether or not a product should be classified as a toy balloon. The Court determined the applicability by analogy of the relevant regulation by reference to both the reasons given in that regulation (as in *Krings*) and by reference to what it termed the "principal characteristics" of the disputed product (at [31] to [35]):

> "31. In that regard, it should be stated that the product at issue in the main proceedings is admittedly not identical to the product described in point 3 of the table set out

in the Annex to Regulation No 442/2000, in that it does not correspond, in every respect, to the description of the goods contained in that point. Consequently, as the Netherlands Government correctly points out in its written observations, that regulation is not directly applicable to that product.

32 Nevertheless, as the Court has already held, the application by analogy of a classification regulation, such as Regulation No 442/2000, to products similar to those covered by that regulation facilitates a coherent interpretation of the CN and the equal treatment of traders (see *Krings*, paragraph 35).

33. The only difference between the product at issue and the product referred to by the description contained in point 3 of the table set out in the Annex to Regulation No 442/2000 consists in a mere inversion of the materials from which the product is made and, as the Commission also notes, its principal characteristics are not affected. It follows that the regulation is applicable to Anagram's product by analogy.

34. Moreover, that finding is confirmed by the statement of reasons relating to point 3, according to which products may be printed with different motifs, which, in the present case, relate mainly to various festive occasions, without however influencing the classification as a toy balloon.

35. Accordingly, the reply to the first question must be that the classification decided upon by the Commission in Regulation No 442/2000, as regards the product described in point 3 of the table set out in the Annex thereto, is applicable by analogy to gas-filled balloons made of aluminised, bonded plastic foil, the plastic foil forming the inside of the balloon."

63. In applying the guidance given in *Kamino, Krings* and *Anagram*, we have also taken into account the general approach to be taken to classification, referred to at [18], and the case law on the definition of "dumper". However, as set out above, we regard the most pertinent starting point as the applicability or otherwise of Regulation 2015/221. Where that regulation applies to a vehicle, the terms of the regulation specifically preclude classification as a dumper.

64. Were it to be the case that any of the 2013 BTI Vehicles could in principle fall within either Regulation 2015/221 or the dumper classification, we also have regard to the GRIs which apply in interpreting the Combined Nomenclature, and in particular the GRI which states that "the heading which provides the most specific description shall be preferred to headings providing a more general description."

65. The 2013 BTI Vehicles comprise six similar vehicles, one of which is imported by the First Appellant, Barrus, and the other five of which are imported by the Second Appellant, Kubota. The six vehicles are:

a) Barrus Cub Cadet UTV Model MF2O MD;

b) Kubota RTV 900;

c) Kubota RTV 1100;

d) Kubota RTV 400Ci;

e) Kubota RTV 500;

f) Kubota RTV 1140.

66. The FTT and UTT decisions related to vehicle (b) and an earlier version of vehicle (a). While there are some detailed differences between the six vehicles, vehicles (a) and (b) were described by the Appellants' Skeleton Argument for the FTT as "virtually identical". We identify below any relevant differences between each of the six vehicles and the vehicle described in Regulation 2015/221.

67. We deal first with the technical specifications set out in column (1) of the Regulation, and then with the descriptive language in columns (1) and (3), such as that referring to the purpose for which the vehicle is "designed".

68. The parties helpfully prepared and provided to us an agreed Annex setting out in detail the objective characteristics of each of the 2013 BTI Vehicles and any points of distinction relied on by the Appellants as material differences to the relevant characteristics in the Regulation ("**points of distinction**"). The following analysis reflects that agreed Annex.

69. We deal first with the Barrus Cub Cadet MF20 MD. As regards the following objective characteristics, the Appellants did not argue that there was any point of distinction:

a) engine capacity;

b) towing capacity;

c) dimensions;

d) seats;

e) rollover protection;

f) sturdy flat-bed tipper;

g) cargo bed load;

h) high ground clearance;

i) off-road earth moving tyres;

j) coupling device; and

k) speed.

70. The Appellants argued that the following points of distinction arose:

a) weight – the Regulation refers to a weight of 630 kg, and the Barrus vehicle weighs 748 kg; and

b) front hitch – the Regulation refers to a vehicle with a front hitch, which is absent in the Barrus vehicle.

71. Dealing next with vehicles (b) – (f) (the Kubota vehicles), as regards the following objective characteristics, the Appellants did not argue that there was any point of distinction:

a) engine capacity;

b) dimensions;

c) seats;

d) rollover protection;

e) cargo bed load;

f) high ground clearance;

g) off-road earth moving tyres;

h) coupling device; and

i) speed.

72. As regards the Kubota vehicles, the Appellants argued that the following points of distinction arose:

a) weight – the Regulation refers to a weight of 630 kg, while three of the Kubota vehicles are heavier (900 kg, 1120 kg and 1075 kg);

b) towing capacity – the Regulation refers to a towing capacity of 750 kg, while the Kubota vehicles have a lower towing capacity (500 to 590 kg);

c) sturdy flat-bed tipper – the Regulation refers to a manual tipper, while the Kubota vehicles have a hydraulic tipper; and

d) front hitch – the Regulation refers to a front hitch, while the Kubota vehicles have no front hitch.

73. In addition to the characteristics set out in the Regulation, the Appellants argued that the 2013 BTI Vehicles possessed two further characteristics consistent with dumper status, namely a lowering tailgate and a tare weight/payload ratio below 1:1.6. Neither characteristic is referred to at all in the Regulation.

74. Ms Sloane also argued that in addition to these technical differences, certain important sections of the descriptive language used in columns (1) and (3) of the Regulation were not an accurate description of the 2013 BTI Vehicles, which further indicated that the Regulation could not properly apply to those vehicles.

75. Ms Sloane identified the following passage from column (1) (description of the goods):

> "The vehicle is presented to be used for a range of functions, for example, pushing, hauling trailers, moving animals, transporting plants, boxes, water and equipment, carrying munitions and transporting feed for animals."

76. Ms Sloane argued that it is not clear what is meant by the vehicle being "presented to be used" for the range of identified functions. The list of

functions, she suggested, appears to be derived from the FTT decision, at [162], which was not endorsed by the UTT. In any event, she argued, HMRC have failed to put forward any evidence that the 2013 BTI Vehicles were "presented to be used" for such functions.

77. In column (3) (reasons), Ms Sloane referred to the following statements:

> "The vehicle is designed as a multi-purpose vehicle that can be used for a range of functions in different environments ….
>
> The vehicle is not a dumper designed for off-highway use. It is not sturdily built with a tipping or bottom opening body, designed for the transport of excavated or other materials ….."

78. Ms Sloane argued that there was no evidence to establish that any of the 2013 BTI Vehicles was "designed as a multi-purpose vehicle". She pointed to the finding of the UTT that the two vehicles which it considered were "designed to load and unload loose loads in an off-road environment" (at [59]).

79. The statement in the Regulation regarding the vehicle not being a dumper, and not being sturdily built etc, could not apply to the 2013 BTI Vehicles, Ms Sloane argued. The UTT have determined that the vehicles were "sturdily built vehicles" (see, in particular [58]), that they had a tipping body ([56]), and that they were designed for the transport of heavy loose material ([57] to [59]).

80. We consider first those differences in the technical characteristics of the Regulation vehicle and the 2013 BTI Vehicles which Ms Sloane suggested were points of distinction such that the Regulation could not apply by analogy. In making that comparison, in accordance with *Anagram* we consider the relevance of those differences to the "principal characteristics" of the product, and have regard to the reasons set out in the Regulation.

81. All six vehicles are heavier than the Regulation vehicle, and unlike the Regulation vehicle, have no front hitch. We do not consider that the weight difference is material to the classification of the vehicles, and we were presented with no evidence to the contrary; nothing suggests that additional weight is itself an indicator of dumper status. As regards the absence of a front hitch, again we regard this as a distinction which does not affect the "principal characteristics" of the Regulation vehicle.

82. As regards the Kubota vehicles only, they have a lower towing capacity than the Regulation vehicle, and a hydraulic tipper (versus the manual tipper in the Regulation). The lower towing capacity is, in our view, more likely to be indicative of a vehicle which is not a dumper than one which is, so, while this is a difference, it does not help Ms Sloane's argument. As regards the tipper mechanism, we find no rationale why this should prevent, or operate towards preventing, application of the Regulation by analogy.

83. Ms Sloane also argued that the 2013 BTI Vehicles possessed two further characteristics consistent with dumper status, namely a lowering tailgate and a

tare weight/payload ratio below 1:1.6. We agree that these characteristics may point towards dumper status when consideration is given to the relevant case law. However, neither characteristic is referred to, in either the positive or the negative, in the Regulation. While that may be relevant in assessing the validity of the Regulation, that is a matter for the CJEU, and not the tribunal. We agree with Mr Fell that there is no onus on the Customs Code Committee in framing a regulation to refer to every conceivable characteristic of the classified product. Further, where a characteristic – in this case a lowering tailgate and a weight payload ratio – is not referred to in any way in the Regulation, by its presence or absence, we are not persuaded that such a characteristic is, in the language used in *Anagram*, one of the "principal characteristics" of the product as determined by the regulation.

84. We turn to Ms Sloane's arguments regarding the inapplicability to the 2013 BTI Vehicles of certain of the descriptive passages in columns (1) and (3) of the Regulation. The first was that the Regulation vehicle is "presented to be used" for a range of functions, with specific examples of such functions given. The second was that the vehicle is "designed as a multi-purpose vehicle …." The third was that the vehicle is not a dumper designed for off-highway use, and "is not sturdily built with a tipping or bottom opening body, designed for the transport of excavated or other materials …".

85. As Mr Fell pointed out, the terminology "presented to be used", while somewhat ambiguous, is found in other tariff classification regulations. Since it is clear that the process of classification should be capable of being carried out easily by the customs authorities, the relevant criteria should be apparent from the product's external characteristics. To the extent that "presented to be used" could be interpreted as referring to a vehicle's marketing materials or intended use, those should not be relevant factors. However, the Regulation does use such language, and we must assume the Regulation is valid (barring a contrary determination by the CJEU). We agree with Mr Fell's suggestion that the terminology is, in effect, simply stating that a vehicle with the specified technical characteristics is apt to be used for functions such as those listed as examples.

86. Ms Sloane asserted that no evidence had been presented establishing that the 2013 BTI Vehicles were presented to be used for such functions. Similarly, there was no evidence to show that they were "designed as a multi-purpose vehicle", and, most significantly, in view of the UTT's findings, it would be wrong to describe the 2013 BTI Vehicles as "not sturdily built, etc".

87. Given the genesis of Regulation 2015/221, and its intended purpose, it would be surprising if it did not apply to classify the 2013 BTI Vehicles. Given our conclusion that the differences in the technical characteristics are insufficient to prevent the Regulation from applying by analogy, it would be even more curious if the reason why the Regulation failed so to apply was that it had, in addition to the technical characteristics, incorporated inappropriate or inapplicable descriptive language.

88. We consider that the descriptive language referred to does not have the effect that the Regulation is inapplicable to the 2013 BTI Vehicles. This conclusion is supported by an interpretation of the relevant language which takes into account its context and which adopts a purposive approach to construction. It is also supported by consideration of the binding nature of the Regulation, and its effect on the UTT decision.

89. Viewed in context, we consider that the descriptive language is not to be interpreted as, in effect, specifying additional objective characteristics which must be present in a vehicle in order for the Regulation to apply. In other words, were a vehicle to be completely identical in all respects with the technical characteristics in the Regulation, in our view it would not fall outside of the Regulation if it could be shown, for instance, that it was not "designed as a multi-purpose vehicle". The relevant language is, in effect, clarification as to why a vehicle with the specified characteristics is being classified as motor vehicle: other and not as a dumper. The Appellants may disagree with the basis of the classification, and the picture it paints of the 2013 BTI Vehicles, but that does not prevent the Regulation from applying. The paramount significance of the technical characteristics – given the need for customs authorities to easily appraise the relevant criteria from the external characteristics of the goods (*Farfalla Fleming*) – further supports this interpretation.

90. In terms of the purpose of the Regulation, it is clear from the Customs Code Committee minutes to which we have referred that the Regulation was intended to reverse the UTT decision in order to reduce divergence between the classifications being adopted by Member States. In achieving that, in our view it is also reasonable to assume that the Committee had in mind in framing the Regulation the Barrus Cub Cadet vehicle which was considered by the UTT. That is apparent not only from the close similarity between the technical characteristics of that vehicle and the Regulation vehicle, but also from the fact that the photograph included at the end of column (1) of the Annex to the Regulation "purely for information" is a photograph of the Cub Cadet, on which the phrase "Cub Cadet" can be seen.

91. Ms Sloane argued that, even if the Committee had intended to describe the Cub Cadet in the Regulation, if in fact they had done their job badly and misdescribed it, then the Regulation would not apply. Ms Sloane characterised the Regulation as referring to a "hypothetical" vehicle, which might or might not exist, but which in any event did not include any of the 2013 BTI Vehicles.

92. We take the approach that, where more than one interpretation of a regulation is feasible, we should prefer an interpretation which is consistent with the clear purpose of the regulation. That is particularly so where another approach would render the regulation ineffective as to its intended purpose. An example of this approach, in so far as any is needed, is found in *Saarland* Case 187/87, at [19]:

> "Only if Article 37 is interpreted as meaning that the Commission must be provided with general data relating to a plan for the disposal of radioactive waste before definitive authorization for such disposal is granted can that article achieve its purpose. It is to an

> interpretation to that effect, which is such as to ensure that the provision retains its effectiveness, that preference must be given, in accordance with a line of decided cases (judgment of 6 October 1970 in Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825; judgment of 31 March 1971 in Case 22/70 *Commission v Council* [1971] ECR 263; judgment of 5 May 1981 in Case 804/79 *Commission v United Kingdom* [1981] ECR 1045)."

93. A further reason why we reject Ms Sloane's argument as to the effect of the relevant descriptive language is that aspects of the argument amount, in effect, to an assertion that the UTT ruling as to classification remains valid notwithstanding Regulation 2015/221. The Regulation, for instance, states that a vehicle with the stated characteristics "is not sturdily built with a tipping or bottom opening body, designed for the transport of excavated or other materials ….". This statement - which in practical terms reverses the UTT's classification – cannot be challenged, as Ms Sloane sought to do, by relying on UTT findings as to sturdiness. As explained above, the Regulation must be assumed to be valid unless the CJEU determines otherwise.

94. We sympathise in this context with Mr Fell's observation that certain aspects of the Appellants' arguments were, in effect, "a collateral attack on the validity of the Regulation".

95. In relation to the applicability of Regulation 2015/221 to the 2013 BTI Vehicles, HMRC presented us with translations of certain BTIs issued in respect of vehicles by other Member States. Mr Fell suggested that these supported such applicability. We agree with Ms Sloane that, while the Combined Nomenclature must be applied consistently to similar products, it would be necessary for Mr Fell to satisfy us of the objective characteristics of the vehicles dealt with by these BTIs before we could properly assess their similarity to the 2013 BTI Vehicles, and no such evidence was forthcoming. We did not, therefore, consider the effect or relevance of those other BTIs, and in view of our conclusion did not need to do so.

96. We therefore conclude, assuming as we must that Regulation 2015/221 is valid, that the Regulation applies to the 2013 BTI Vehicles.

97. As a result of the implementation of that Regulation, HMRC took the decision that the BTIs should be revoked. That decision was upheld on statutory review. We conclude that HMRC did not act unreasonably in upholding the decision, assuming, as they were bound to do, that the Regulation is valid.

***Request for reference to the Court of Justice of the European Union***

98. In view of our finding on revocation of the BTIs, it is necessary to consider the Appellants' alternative argument, that Regulation 2015/221 is invalid.

99. The European Court of Justice has on several occasions found classification regulations to be wholly or partly invalid. Examples include *F.T.S. International BV* Case C-310/06, *Kawasaki Motors Europe NV* Case C-15/05,

*Jacob Meijer BV* Case C-304/04 and C-305/4, and *Cabletron Systems Ltd* Case C-463/98 and Opinion of Advocate General Jacobs delivered on 1 February 2001.

100. It is clear that the tribunal has no jurisdiction to declare that Community legislation such as Regulation 2015/221 is invalid : *Foto-Frost* Case C314/85 at [20].

101. Nor do the Appellants have the right to challenge the validity of the Regulation directly. That right arises, under Article 263 of the Treaty on the Functioning of the European Union ("**TFEU**") only if a regulation is "of direct and individual concern" to a taxpayer. Here, Regulation 2015/221 is not addressed to the Appellants in particular, and would apply to any person importing a vehicle within the Regulation.

102. In such a situation, national courts must permit individual taxpayers to apply to the national courts for permission to challenge the validity of the regulation before the European Court: see *Unión de Pequeños Agricultores v Council* Case C-50/00 P, at [40].

103. Several decisions of the European Court emphasize the importance of enabling individual taxpayers to challenge the validity of a regulation indirectly, by means of a reference by the national courts to the CJEU under Article 267 TFEU. As stated in *Jégo – Quéré & Cie SA* Case C-236/02, at [29]:

> "It should be noted that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the ECHR (see, in particular, Case 222/84 *Johnston* [1983] ECR 1651, paragraph 18, and Case C-50/00P *Unión de Pequeños Agricultores v Council*[2002] ECR 1-6677, paragraph 397)."

104. Ms Sloane raised several arguments as to the validity of Regulation 2015/221. In summary, those arguments were as follows:

a) The regulation relied on the vehicle being "presented to be used" for a specified range of functions. Such an approach to classification, which effectively takes account of marketing material and alleged actual or potential use, has been found by the courts on several occasions to be impermissible. The UTT's analysis remains good law in this respect, and is one of many cases emphasising the necessity of a regulation being based on objective characteristics.

b) The assertion in column (3) of the Annex to the Regulation that the vehicle is not a dumper designed for off-highway use and is not sturdily built, with a tipping or bottom opening body, designed for the transportation of excavated or other materials is internally inconsistent with the specification set out in column (1). No explanation is given for this inconsistency.

c) In several respects, the reasoning in the regulation is inconsistent with critical findings of fact of the FTT and UTT.

d) Column (3) refers to the HSEN to heading 8704, sixth paragraph, point (1). This appears to be a reference to this feature:

> "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."

However, the ECJ has held that the form of the tipper is immaterial; it has also held that the factors listed in the HSEN are merely indications and not mandatory requirements; the objective of this HSEN requirement is in fact met by the requirements in column (1) that the cargo bed is constructed of a strong steel frame and the vehicle is fitted with a full roll-over protection frame, since these features protect the driver's cab, and the HSEN explicitly states that light dumpers are included and the CNEN has examples of dumpers which do not feature a front part which is extended over the driver's cab.

e) The regulation fails to address the other features set out in the HSEN and CNEN, with which the vehicle does comply, such as the tare weight/payload ratio, which is an objective indicator of sturdiness.

f) The regulation fails to take account of relevant requirements identified by ECJ case law, namely that subheading 8704-10 is for "vehicles designed for a special use, namely use off-highway for the loading and unloading of various materials" (see UTT decision at [36], citing BAS). Even if the regulation is correct in stating that the vehicle is presented to be used for the stated functions, that is consistent with the vehicles being designed for use off-highway for the loading and unloading of various materials.

g) The regulation is difficult to reconcile with Regulation 1114/2012 (Minitracs), classifying a lightweight vehicle with a tippable flatbed as a dumper designed for off-highway use.

h) The regulation fails to recognise that there is no requirement in the HSENs, CNENs or case law that vehicles be used exclusively for transporting and dumping various materials. It is sufficient if that is their main purpose, as discerned from their objective characteristics: *Nechermann Versand AG* C-395/93, cited in the UTT decision at [41].

105. For HMRC, Mr Fell's position as to whether there should be a reference to the CJEU was summarised in his Skeleton Argument:

> "It is ultimately for the Tribunal to decide whether to make a reference to the CJEU. However the Commission suggest the Tribunal should not make one."

106. Mr Fell's position is that the Appellants' arguments summarised above are insufficiently persuasive to meet the threshold that would need to be reached to establish before the CJEU that Regulation 2015/221 is invalid. He referred to the following passage from *VTech* (at [24]):

> "A classification by Commission Regulations is invalid, if the error made by the Commission is "manifest", for example if it is based on an interpretation which is inconsistent with the Community's international obligations, or does not take account of the Explanatory Notes or the GIRs….".

107. The European Court has sometimes expressed the relevant standard in terms that a classification regulation is invalid if it alters the subject matter of the relevant tariff heading: see, for instance, *Raytek* at [29] – [30].

108. In considering whether or not to refer the validity issue to the CJEU, we have taken into account the note "*Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*" (Official Journal of the European Union 2012/C 338/01).

109. This note makes it clear that, whatever the wishes of the parties to the proceedings, it is for the national court or tribunal alone to decide whether to refer a question for a preliminary ruling.

110. The notes contain the following guidance:

> "**References on determination of validity**
>
> 15. Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.
>
> 16. All national courts or tribunals *must* therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that the act may be invalid."

111. In assessing whether or not to refer, we have considered the relevant standard to apply in relation to the Appellants' submissions. Some decided cases describe the threshold for referral in positive terms, others in negative. See, for instance, the following passage from the judgment of Mitting J. in *R (on the application of Telefonica & Others) v Secretary of State for Business and Regulatory Reform* [2007] EWHC 3018 (Admin), at [3] and [4]:

> "[3] … If I am satisfied that the challenge to the validity of the Roaming Regulation is unfounded, I can and should so declare and would give effect to any conclusion by refusing permission. If I consider the issue to be arguable, I cannot determine it myself but may refer it for decision to the European Court of Justice ….
>
> [4] The underlying question therefore is the validity or otherwise of the Roaming Regulation. There is no doubt that it has a significant direct and indirect effect on the business activities of the Claimants. If satisfied that the challenge to its validity is reasonably arguable or, put negatively, not unfounded, I should refer the issue to the European Court …"

112. As Sir Thomas Bingham MR expressed it in *R v International Stock Exchange, ex p Else* [1993] 1 All ER 420, at [426]:

> "If the national court has any real doubt, it should ordinarily refer."

113. It is clear that the issue of the validity of Regulation 2015/221 has a significant direct and indirect effect on the business activities of the Appellants, given the economic consequences to them of the competing tariff classifications.

114. A ruling from the CJEU is necessary in order to enable the tribunal to give judgment, since the tribunal has no jurisdiction to determine the validity of Regulation 2015/221.

115. We consider that the relevant facts and issues have been determined for the purpose of a reference.

116. We are satisfied that certain of the Appellants' challenges to the validity of the Regulation 2015/221 are reasonably arguable, or not unfounded.

117. We decide therefore that we shall make a reference to the Court of Justice of the European Union to seek a preliminary ruling as to the validity of Regulation 2015/221.

***Draft Order for reference***

118. Subject to further consideration of the form of the reference with the assistance of the parties, our provisional view is that the Court should be asked to rule whether Regulation 2015/221 is invalid, on any or all of the bases that it takes into account impermissible factors; is internally inconsistent; does not take proper account of the Explanatory Notes, headings and GIRs, and fails to take account of relevant requirements identified by case law in relation to sub-heading 8704-10.

119. This appeal is now stayed for not more than 40 days from the date of release of this decision to enable the parties to reach agreement, so far as possible, on the form of the proposed questions for reference and accompanying Schedule. If the parties cannot agree, then a hearing will be provisionally listed at the end of that period, although we anticipate that we shall be able to settle the final form of the Order for reference on the papers.

**THOMAS SCOTT**
**TRIBUNAL JUDGE**

**RELEASE DATE: 24 May 2016**