IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NO: 11074/04

2005-05-26

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED Original judgment was signed by the judge on
DATE 09-06-05 SIGNATURE

In the matter between

MOTION VEHICLE WHOLESALERS Applicant

and

SOUTH AFRICAN REVENUE SERVICES Respondent

J U D G M E N T

CLAASSEN J: On 23 October 2003, the respondent determined that a certain batch of vehicles imported by the applicant falls under tariff heading 87.03 and not 87.02 of part one of schedule one of the Customs and Excise Act of 1964. Hereby he revoked an earlier determination whereby similar vehicles were categorised as falling under tariff heading 87.02.

The two tariff headings read as follows:

"87.02: Motor vehicles for the transport of ten or more persons including the driver. (Then the following note thereon).

This heading covers all motor vehicles designed for the transport of ten persons or more (including the driver)."

And:

"87.03: Motorcars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02) including station wagons and racing cars. (Then the following note that is relevant also appears). This heading covers motor vehicles of various types including amphibious motor vehicles), designed for the transport of persons; it does not however cover the motor vehicles of heading 87.02. The vehicles of this heading may have any type of motor (internal combustion piston engine, electric motor, gas turbine et cetera)."

Tariff heading 87.03 as can be gleaned from the wording above, is therefore a residual category covering what is not covered by 87.02. On behalf of the applicant it is contended that 87.02 is the correct tariff heading whereas respondent pleads that 87.03 is the correct one. Obviously the difference has a huge monetary effect since 87.03 carries a much heavier import levy than 87.02.

The relevant facts are not in issue and may be summarised as follows:

1. Toyota Motor Company (TMC) of Japan exclusively manufactures a Land Cruiser 100 Series of 4x4 vehicles. It is marketed worldwide under various models and names. All have identical chassis' and bodyworks. All models comply with South African standards in respect

of braking system and suspension qualifications and can carry any number up to ten people. TMC manufactures them, albeit for different markets and institutions, as for instance in five, six, eight, nine and ten seater varieties. In each instance the interior layout and configuration may alter as also the type of door at the back.

2. An Australian company got hold of the basic eight seater vehicle and put two extra small seats at the back. The third row of seats had to be moved slightly forward.

3. The modified vehicle was then imported by applicant into South Africa as a vehicle "for the transport of ten or more people".

4. Before actually embarking on this venture, the applicant informed the respondent of its intentions and requested a determination from the respondent. This determination was made in March 2002 and confirmed again later in the same year. It is common cause that each vehicle that was so imported was inspected by or on behalf of the respondent.

5. Applicant also informed respondent that the vehicles are brought into South Africa with the two extra seats. However, as soon as they have landed and have been inspected, the two extra seats are then removed and it is then sold as an eight seater 4x4 luxury vehicle. In fact the seats are even returned to Australia to be fitted into a next batch of vehicles which then receive the same

treatment.

6. After approximately five years of this operation, a certain batch were not released by the respondent and for reasons not relevant, respondent revisited and reexamined the vehicles and made a new determination to the effect that it now fell under tariff heading 87.03.

7. That determination relating to that particular batch is now taken on appeal by the applicant in terms of section 47.9 of the Customs and Excise Act of 1964. It is common cause that this appeal is in actual fact and amounts to a hearing *de novo* and the court can make the determination it decides to be appropriate.

Voluminous photographs were attached to the papers showing how people fit (or according to the respondent do not fit) into this configuration as imported by the applicant. There is also voluminous documents and advertising material relating to this vehicle stating all its qualities, technical and otherwise. It is however common cause that a determination as to the proper tariff heading under which it must fall, must be objectively determined as it stands at the boundary gates of South Africa, regardless of what anyone had subjectively intended or designed it to be.

As Mr Puckrin SC for the respondent stated form must follow function.

In this respect, the main issue between the parties was whether the added seats transfigured and transformed the vehicle into one "for transport of ten or more people" or not.

On behalf of the respondent it was contended that this modification was purely a stratagem to circumvent tariff heading 87.03 and did not alter the design from an eight to a ten seater vehicle. He based his argument on the following grounds:

1. The two seats are so small and close together and squashed into the back of the vehicle that it cannot be said that it is reasonably intended for the transport of people back there. From some of the photographs, it is clear that two adult men have very great difficulty in sitting back there, however two more or less teenager size persons can fit more comfortably into those seats.
2. The seats are fitted in a more or less haphazard manner without safety belts and proper fastenings.
3. They are removed as soon as the vehicle has passed inspection and sold as an ordinary luxury eight seater four by four.
4. The whole thing is a ruse to circumvent the tariff heading determination.

In answer to this, Mr Joubert SC referred to the following facts *inter alia*:

1. *De facto*, as the vehicle enters the borders, it has ten seats and can carry ten people.
2. The specifications to the extent it may be necessary to comply with SABS standards for such a vehicle, have in fact been met and are accepted as such by SABS.
3. Qualities such as comfort, permanency, success of the

> configuration, its application and the rest are not part of the inquiry, especially since there is no "avoidance clause" in the Customs and Excise Act as there is for instance in the Income Tax Act. Therefore the only test to be executed is by objectively looking at the vehicle as it stands and decide whether it is "for the transport of ten people or more."

Mr Puckrin urged that that approach would open Pandora's box and no one would know where to draw the line. He likened it to the well known student activities of trying to fit as many people as possible into for example a small Volkswagen Beatle or onto a motorbike.

Furthermore, he submitted that if this approach is followed, all the applicant really had to do was to supply the literature of the specific vehicle to the respondent outlining how it intended to do the fittings without actually physically placing the seats into the vehicle.

These arguments do not hold water. Firstly, if any floodgates are opened, the respondent has all the necessary powers to amend or alter or supplant the regulations to cater for each hole in the dike. The reference to the student activities also are inappropriate because this is clearly not what is happening here. It is clearly demonstrated that two people can sit on the two extra seats, albeit not in any kind of comfort. Neither will they be able to travel in comfort for any long distance, however those qualities and qualifications are not part of the regulation and are therefore not applicable.

To my mind the issue is clear. Once the vehicle has been

adapted and fitted with the two extra seats, it is designed "for the transport of ten or more people". (The quote "or more" part of the heading is relevant for these purposes). If that is so, then it clearly falls under tariff heading 87.02. A lot of attention was given to the cases of *The Secretary for Customs and Excise v Thomas Barlow and Sons Limited* 1970 2 SA 660 (A) and *Autoware (Pty) Limited v Secretary for Customs and Excise* 1975 4 SA 318 (W) and the principles annunciated there.

The basic tenets of interpretation and application of the rules of interpretation in this type of case is clearly spelled out and the principles there was not in dispute. However, Mr Puckrin wanted to draw a distinction with respect to the manner in which design and intention of the manufacturer should be applied. I do not see that my interpretation and application as set out above conflicts in anyway with either decision. The subjects of those cases were different to this, as were the relevant tariff headings, but the basic principles remain the same. In the *Autoware* case it is stressed that the function, nature and forms of the vehicle are to be objectively determined.

In view of what is said above, the vehicle in question has ten seats objectively determined since comfort and alike do not play a role and it clearly was "for the transport of ten or more people". (The driver included).

For those reasons the appeal must succeed and the determination of the respondent of 23 October 2002 is set aside and substituted with the determination that the vehicle should be

classified under tariff heading 87.02.90.

Applicant also pleaded for an alternative remedy should the appeal fail. This entailed a review of respondent's decision of 23 October 2002 so as to make the determination only applicable to all vehicles of this type imported after the said date of this specific batch of vehicles. It is common cause that should the appeal succeed, this relief would fall away which it then obviously does.

The last aspect is costs. Both parties agree the case warranted the employment of two counsel. I agree. In certain previous proceedings the costs were reserved. Both parties also agree that in all instances the costs should follow the result.

I therefore make an order in terms of prayers 1 and 2 of the notice of motion dated 28 April 2004 including the costs consequent upon the employment of two counsel.

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