THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 509/05

Reportable

In the matter between

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE **Appellant**

and

MOTION VEHICLE WHOLESALERS (PTY) LTD **Respondent**

Coram**:** **HARMS, BRAND, CLOETE JJA, THERON and CACHALIA AJJA**

Heard: 5 SEPTEMBER 2006
Delivered: 26 SEPTEMBER 2006

Summary: Revenue – Customs and Excise Act 91 of 1964 – Classification of goods for purposes of customs duty ─ whether vehicles imported by the respondent, with temporary modifications to increase their seating capacity, should be classified as vehicles for the transport of either less than ten persons or of ten or more persons.

Neutral citation: This case may be cited as Commissioner, SA Revenue Service v Motion Vehicle Wholesalers [2006] SCA 119 (RSA)

JUDGMENT

THERON AJA

[1] The sole question in this appeal is whether the vehicles imported by the respondent are, for purposes of customs duty, to be classified as vehicles for the transport of either less than ten persons or of ten persons or more.

[2] The respondent is an importer of Toyota Land Cruiser 100 Series vehicles. The vehicles are manufactured by the Toyota Motor Corporation (TMC) in Japan as eight-seater vehicles comprising two bucket seats in the front row and two bench seats for the second and third rows, with the latter two rows each providing seating for three persons. The third row is attached to the base of the vehicle, by being clipped onto brackets, which are built into and form part of the base of the vehicle. Behind the third row is a luggage compartment. The third row is optional and can be removed. It is common cause that the vehicles, as described, fall to be classified under tariff heading 87.03.[1]

[3] After being manufactured in Japan, the vehicles are modified in Australia. Two additional seats are added in the luggage compartment at the rear of the vehicle, each facing the other. The vehicles are presented, on importation, with these two additional seats. It is common cause that the two

[1] Heading 87.03 read at the time:
'Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars.'

additional seats are removed after customs clearance, returned to Australia for re-use in the same manner and the vehicles are sold as suitable for the transport of eight persons.

[4] On 21 March 1998 the appellant, acting in terms of s 47(9)(a)(i) of the Customs and Excise Act 91 of 1964,[2] issued a determination that the vehicles were classifiable under tariff heading 87.02.[3] Since that date the respondent has imported more than 580 vehicles all of which have been classified under heading 87.02. On 28 November 2003, the appellant revoked the determination and issued a new determination to the effect that the vehicles were classifiable under heading 87.03.

[5] The respondent, in terms of s 47(9)(e),[4] appealed to the High Court against the new determination. R Claassen J found that the goods are to be classified under heading 87.02 and set aside the determination. The appellant appeals to this court against such classification with the leave of this court, the court *a quo* having refused leave to appeal.

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[2] The relevant portion of Section 47(9)(a)(i) provides:
'The Commissioner may in writing determine-
(aa) the tariff headings, tariff subheadings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified.'

[3] Heading 87.02 read at the time:
'Motor vehicles for the transport of ten or more persons, including the driver.'

[4] Section 47(9)(e) reads:
'An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.'

[6] The appellant's case is essentially that the vehicles were superficially modified in Australia in a transparent attempt to bring them within the ambit of heading 87.02 thereby attracting a lower customs duty rate. It is common cause that for each vehicle classified under heading 87.02 instead of under heading 87.03, the respondent saved an amount of R135 000 in customs duties and VAT.

[7] The question to be answered is whether the vehicles were designed for the transport of ten or more persons or whether they were disguised as such as part of a scheme to limit the respondent's liability in respect of the payment of customs duty?

[8] In the accompanying judgment in *Commissioner, SA Revenue Service v Komatsu SA (Pty) Ltd,*[5] I discussed the general principles applicable to tariff classification and the manner in which they are to be applied and interpreted. I do not intend to add to what was stated therein.

[9] Chapter 87, under which the disputed headings resort, covers various types of vehicles, including tractors, passenger vehicles, goods vehicles and special purpose vehicles. The different types of vehicles are grouped together under their respective headings according to their purpose. It is

[5] [2006] SCA 118 (RSA).

clear from the Explanatory Notes to heading 87.03[6] that all vehicles designed for the transport of persons reside thereunder, but for the exclusions. The exclusions relate to vehicles falling under heading 87.02.[7] All vehicles designed for the transport of ten or more persons fall to be classified under heading 87.02. The distinguishing factor between the two headings is the number of persons the vehicle was 'designed' to transport. In other words, the design of the vehicle determining the classification of the goods in this instance.

[10] The respondent relies on *Autoware (Pty) Ltd v Secretary for Customs & Excise,*[8] for the contention that the intention of the manufacturer and designer, the modifier and the importer of the vehicles is irrelevant. That is generally correct, but it should be noted that *Autoware* dealt with the difference between a panel van and a station wagon. There was no doubt that

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[6]The Explanatory Notes to heading 87.03 reads:
'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 heading also includes:

1 Motor cars (e.g. saloon cars, hackney carriages, sports cars and racing cars).
2 Specialised transport vehicles such as ambulances, prison vans and hearses.
3 Motor-homes (campers, etc), vehicles for the transport of persons, specially equipped for habitation (with sleeping, cooking, toilet facilities, etc.).
4 Vehicles specially designed for travelling on snow (e.g. snowmobiles).
5 Golf cars and similar vehicles.
6 Four-wheeled motor vehicles with tube chassis, having a motor-car type steering system (e.g. a steering system based on the Ackerman principle).'

(Emphasis added.)

[7] The Explanatory Notes to heading 87.02 reads:
'This heading covers all motor vehicles *designed for the transport of ten persons or more* (including the driver).' (Emphasis added.)

[8] 1975 (4) SA 318 (W).

the vehicles, on importation, were panel vans. The only issue was whether the importer's intention to change them after import into station wagons meant that they had to be classified as the latter. They were indeed constructed and designed as panel vans. In any event, Colman J, with reference to *Secretary for Customs & Excise v Thomas Barlow & Sons Ltd*,[9] accepted that depending on the headings under consideration, 'purpose and intention' may be relevant.[10]

[11] Where a court is confronted with an alleged simulation,[11] it is entitled to take into account all the surrounding circumstances.[12] It has been accepted by this court that a taxpayer may minimise his or her tax liability by arranging his or her tax affairs in a suitable manner. But a court, in considering whether the taxpayer has properly achieved a reduction of the tax, will give effect to the true nature and substance of the transaction and will not be deceived by its form.[13] The same considerations apply to the determination of customs classifications.

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[9] 1970 (2) SA 660 (A).
[10] At 322A-B.
[11] A simulation is 'where parties to a transaction for whatever reason attempt to conceal its true nature by giving it some form different from what they really intend … It is important to emphasise that a transaction which is disguised in this way is essentially a dishonest transaction; the object of … which … is to deceive the outside world'. (Per Scott JA in *Mackay v Fey NO* 2006 (3) SA 182 (SCA) para 26.)
[12] *Erf 3183/1 Ladysmith (Pty) Ltd v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 950I-952C; *Maize Board v Jackson* 2005 (6) SA 592 (SCA) para 1; *Mackay v Fey,* above, n 11, *op cit.*
[13] *Commissioner for Inland Revenue v Conhage (Pty) Ltd (Formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA) para 1. See the authorities cited in n 12 above.

[12] It is common cause that TMC manufactures five, six, eight, nine and ten-seater Land Cruiser 100 Series vehicles. It is also common cause that the vehicles at the centre of this dispute are originally manufactured as eight-seaters. This court is enjoined to determine whether the vehicles are *designed* for the transport of ten or more persons and not merely whether they are *capable* of doing so, as contended by the respondent.

[13] The modification in question is effected in the following manner. The third row is removed from its original factory fitment points. A framework is attached to the middle brackets and another contraption is fitted. The additional seats are not attached or anchored to the vehicle but are kept in place by their base being placed under the framework. The third row is replaced; not onto its original attachment but further forward onto the framework. This results in the leg room between the second and third rows being reduced from 270mm to 90mm. The space between the two extra seats which face each other is 180mm. Counsel for the respondent conceded that if one of these extra seats is occupied it would be difficult and uncomfortable - if not impossible - to accommodate an adult person on the opposite seat.

[14] The allegation made on behalf of the respondent that the vehicles are 'designed, through modification, for the transport of ten persons' is not supported by the evidence. The entire modification process takes no more that five minutes and the cost thereof is negligible. The two additional seats are cheap and are upholstered in material of an inferior quality, very different from the leather used for the rest of the vehicle and not in keeping with a luxury sport utility vehicle. No permanent changes are made to the vehicles enabling them ever to be sold or used as ten-seaters. After importation the whole framework and contraption accommodating the two extra seats is removed. The third row is moved back to its original factory position. The vehicles are sold as eight-seater vehicles, as designed and manufactured in Japan.

[15] It is clear from the objective evidence that the respondent, together with the modifier, has attempted, in a superficial and unsophisticated manner, to conceal the true nature of the vehicles by giving them a *temporary* different form. In other words, they have attempted to disguise vehicles designed for the transport of eight persons as vehicles designed for the transport of ten or more persons, solely for the purpose of evading higher customs duty. The vehicles were modified with the intention of circumventing the Act. The modification was clearly a sham.

[16] In the result the following order is made:

The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel. The order of the court *a quo* is set aside and the following is substituted:

'The application is dismissed with costs, such costs to include those occasioned by the employment of two counsel.'

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L V THERON
ACTING JUDGE OF APPEAL

CONCUR:
HARMS JA
BRAND JA
CLOETE JA
CACHALIA AJA