

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG PROVINCIAL DIVISION PRETORIA

CASE NUMBER: 16254/08

In the matter between:

SMITH MINING EQUIPMENT (PTY) LTD

And

**THE COMMISSIONER: SOUTH AFRICAN
REVENUE SERVICE**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. YES NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO. YES NO.

(3) REVISED.

3/7/09
DATE

[Signature]
SIGNATURE

Respondent

JUDGMENT

INTRODUCTION

1. On the 25th January 2007 the respondent classified an imported utility vehicle, known as the Kubota RTV 900, for duty purposes under Tariff Heading 8704.21.80 of Part 1 of Schedule No 1 to the Customs and Excise Act 91 of 1964, ("the Act").
2. The applicant is the importer of the vehicle and seeks an order setting aside this classification, alternatively an order compelling the respondent to issue a new determination classifying the vehicle for duty purposes under Tariff Heading 8709.19 of Part 1 of Schedule No 1 to the Act; together with an appropriate costs order.
3. The respondent opposes the application.

THE PARTIES

4. The applicant is Smith Mining Equipment (Pty) Ltd, a company with limited liability, duly incorporated in terms of the Company Laws of South Africa with principal place of business at 2 Lascelles Road,

Meadowbrook, Edenvale. The applicant imports the Kubota RTV 900 Utility Vehicle ("the vehicle").

5. The respondent is the Commissioner for the South African Revenue Service, charged with the administration of the Act, with principal offices at 299 Bronkhorst Street, Nieuw Muckleneuk, Pretoria.

THE ISSUE

6. As set out in the introduction, the question for the Court's decision is the correctness or otherwise of the respondent's determination of the Tariff Heading 8704.21.80 as the most appropriate heading for the imposition of duty upon the vehicle. If the determination is correct, the vehicle will attract 30% duty.
7. The applicant contends that the appropriate Tariff Heading for the determination of duty upon the vehicle is TH 8709.19, which would render the vehicle free of duty.
8. Under the heading applied by the respondent, the vehicle is classified as one for the transport of goods, whereas the applicant's preferred heading would classify the vehicle as a self-propelled works truck.
9. The Explanatory Notes to Tariff Heading 87.04 are headed **"MOTOR VEHICLES DESIGNED FOR THE TRANSPORT OF GOODS"**.
This heading includes dumpers and other trucks powered by diesel engines or spark-ignition internal combustion engines with a gross vehicle weight that may or may not exceed 20 tonnes, with sub-classifications that do or do not exceed 5 tonnes of g.v.w.
10. Several defining features listed in these Notes include
 - a) Bench – type seats without safety belts and with fold-away seats for passengers in the rear area;
 - b) A separate cabin for the driver and passengers and a separate open platform with side panels and a drop-down tailgate;

- c) The absence of rear-view windows on side panels with sliding, swing-out or lift-up doors for the loading of goods;
 - d) The presence of a permanent barrier between the area for the driver and passengers and the rear area;
 - e) The absence of comfort features for the passengers.
11. Motor vehicle chassis fitted with an engine and cab are also included under this heading.
12. The Explanatory Notes to Tariff Heading 87.09, the heading contended for by the applicant, is headed:
- "Works trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short-distance transport of goods; tractors of the type used on railway station platforms; parts of the foregoing vehicles."**
13. The heading acknowledges that these vehicles may be of many types and sizes and propelled by combustion engines, electricity or other engines.
14. They are defined as being generally unsuited for the transport of passengers or for the transport of goods by road or other public ways, with a top speed generally not exceeding 30 to 35 km/h when laden, a turning radius approximately equal to the length of the vehicle and the absence of a closed driving cab.
15. The question whether the respondent was correct in concluding that the former Tariff Heading is the most appropriate classification for the vehicle must therefore be decided with reference to the type, description and nature of the vehicle and the purpose for which it was imported.

THE DESCRIPTION OF THE VEHICLE

16. The parties are agreed that the vehicle is manufactured by the Kubota Corporation of Osaka in Japan and imported as a multi-purpose vehicle of the type RTV 900 SG-EU KSD.
17. Both parties have annexed photographs of the imported vehicle to their affidavits, the respondent having inspected the vehicle through its tax lawyers.
18. These photos show a sturdy, low-slung, basic load-carrying vehicle with a minimum of creature comforts, used in what appear to be factory, airport or similar surroundings and apparently unregistered for use on a public road, but capable of towing a smaller than average, compact trailer.
19. The applicant emphasizes the vehicle's features that underline its use and usefulness as a factory truck or works vehicle: It is fitted with a 21 horsepower three-cylinder diesel engine; has a cargo bed for transportation of goods; is not fitted with lifting or handling equipment; there is an absence of features or optional extras that would allow the vehicle to be registered for use on a public road, such as doors, a windshield, mirrors, safety belts or a speedometer; the top speed of the vehicle is 40km/h unladen and 30 to 35 km/h when fully laden; its fuel tank has limited capacity; there is no cab and it is fitted with heavy-duty tyres.
20. In answer to the applicant's description, while generally accepting the correctness of this description of the vehicle, the respondent annexed to its answering affidavit a wide-ranging array of pamphlets, internet advertisements and descriptions advocating alternative uses of models in the same range such as gardening and outdoor activities, maintenance of golf courses, recreational activities and the like to

illustrate the fact that the vehicle was not imported as a works truck, but was equally suited to be classified as vehicle that could be registered for use on a public road and was therefore of a type that should be classified as determined by the respondent. In addition, pamphlets and photos of other trucks were annexed to illustrate differences between the various uses these and the vehicle under discussion could be put to.

21. The applicant took grave exception to this approach and launched a comprehensive application to strike out all the material obtained from sources not verified by confirmatory affidavits by properly qualified deponents dealing directly and issuably with the applicant's averments in the founding affidavit. This application is dealt with *infra*.
22. When the vehicle described above is considered against the background of the Tariff Headings, it would seem at first blush that it could be classified under either heading.
23. This fact has been amply illustrated by the extensive debate in the parties' heads of argument and in their submissions to this court of the proper classification of the imported vehicle, the careful analysis of the individual words used in the two Tariff Headings in issue, the copious reference to dictionary meanings of the terminology employed in them and the use to which the imported vehicle is, and could be put.
24. In the light of the court's finding on the correct approach to the classification of the vehicle it is not necessary to deal in detail with the arguments advanced by the parties, although they were of great assistance to the court.
25. In deciding which Tariff Heading is the most appropriate, the court must be guided in the first instance by the correct interpretation of the Headings as assisted by the notes thereto – see: *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 675 D to 676 F; *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (AD) – and

then to determine the objective characteristics of the vehicle at the time of its importation and use those to find the appropriate Tariff Heading, see *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* 2007 (6) SA 545 (SCA) at 549 at [13] to [15].

26. The intention that the importer or manufacturer may have had for the use of the imported article concerned is usually irrelevant and may only assume some importance if the Tariff Heading makes allowance for the consideration of such intention: *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* 2007 (2) SA 157 (SCA).
27. Once these principles are applied, it becomes clear that the vehicle in question is not one imported for purposes of carrying loads on public roads, highways or byways, but as a transporter of goods in a factory or airport setting. The principal features of the vehicle set out above, when considered objectively, are such that they are rather to be sought in works trucks in a factory setting than in goods transporters on a road, open or otherwise.
28. It follows that the applicant is entitled to succeed and that the respondent's determination must be set aside.

THE APPLICATION TO STRIKE OUT

29. If the above reasoning is correct, the respondent erred in annexing the extracts from the websites already referred to as well as the photographs of different trucks in different settings.
30. These documents and the paragraphs referring thereto in the answering affidavit in support of the respondent's position are either opinion evidence not given by a qualified expert or are inadmissible as being irrelevant because the author has neither sworn to an affidavit, nor do the documents shed light on the interpretation the court has to perform.

31. The following documents are therefore struck out:

- a) Annexure LM 14 on pp 272 – 303;
- b) Annexure LM 16 on pp 305 – 317;
- c) Annexure LM 18 On pp386 – 389;
- d) Annexure LM 19 on pp 399 – 419;
- e) Annexure LM 20 on pp 420 – 443;

As well as the following paragraphs in the answering affidavit:

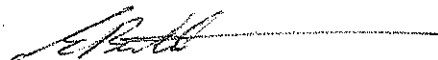
12.2; 13.3; 13.10; 13.11; 13.12; 13.17; 13.18; 13.19.

32. The applicant has sought a punitive costs order, but such is not justified in the court's opinion.
33. The respondent is to pay the applicant's taxed costs of the application to strike out on the party and party scale, such costs to include the costs of two counsel.

THE ORDER IN THE PRINCIPAL APPLICATION

34. An order is granted in terms of prayers 1 and 3 of the Notice of Motion, while prayer 2 is granted, but the words "*alternatively the respondent is ordered to issue a new determination*" are deleted therefrom.
35. The costs are to include the cost of two counsel.

Dated at Pretoria on this 1st day of July 2009.



E Bertelsmann

Judge of the High Court