



Appeal number: UT-2020-000203

CUSTOMS DUTY – tariff classification – whether imported vehicles should be classified as “Motor vehicles for the transportation of goods, Dumpers designed for off-highway use” or “Motor vehicles for the transportation of goods. Other” – application of EU classification regulation 2015/221 – appeal dismissed

**UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)**

KUBOTA (UK) LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE GREG SINFIELD
JUDGE GUY BRANNAN**

Sitting in public at the Royal Courts of Justice, London, on 6 and 7 October 2021

**Steven Cock, The Customs Consultancy Ltd, for the Appellant
Mark Fell, counsel, instructed by the General Counsel and Solicitor to HM Revenue &
Customs, for the Respondents**

DECISION

Introduction

1. Kubota (UK) Limited (“Kubota”) appeals against the decision of the First-tier Tribunal (“FTT”) (Judge Citron and Mr Baker) upholding the classification by the Respondents (“HMRC”) of a utility vehicle called the Rough Terrain Vehicle X900 (“the RTV X900”) under subheading 8704 21 91 of the Combined Nomenclature contained in Annex 1 of EU Council Regulation 2658/87 (“the CN”). HMRC’s classification decision was contained in a binding tariff information (“BTI”) issued on 27 July 2018. A binding tariff information is a written tariff classification of the goods therein specified which is binding on HMRC.

2. Essentially, the FTT upheld HMRC’s position that the RTV X900 should be classified under CN subheading 8704 21 91 (*Motor vehicles for the transportation of goods. Other, with compression-ignition internal combustion piston engine (diesel or semi-diesel)*). Kubota, however, argues that the RTV X900 should be classified under CN subheading 8704 10 10 (*Motor vehicles for the transportation of goods, Dumpers designed for off-highway use*).

3. In summary, the FTT based its decision on the application of EU Classification Regulation 2015/221 (“the Regulation”). The text of the Regulation and the other relevant legislative provisions are set out in an Appendix to this decision. The validity of the Regulation was upheld by the Court of Justice of the European Union (“CJEU”) in *Kubota Case C-545/16 (“Kubota CJEU”)*. The Regulation describes a particular type of vehicle (“the Regulation vehicle”) and classified it under subheading 8704 21 91 rather than as a “dumper”. The FTT applied the Regulation by analogy and found that the RTV X900 was similar to the vehicle described in the Regulation. Accordingly, dismissing Kubota’s appeal, the FTT held that subheading 8704 10 10 was applicable to the RTV X900.

4. We understand that the importation of a vehicle classified under subheading 8704 21 91 carries duty at the rate of 10%, whereas classification under subheading 8704 10 10 attracts duty at the rate of 0%.

5. For the reasons given below, we affirm the decision of the FTT and dismiss the appeal.

Background to the present appeal

6. The background to the present appeal was helpfully explained by Mr Cock, who appeared for Kubota before the FTT and before us.

7. The classification of a predecessor vehicle to the RTV X900, the RTV900, was previously considered by the FTT and the Upper Tribunal in earlier proceedings. Kubota’s appeals were joined with that of E. P. Barrus Ltd, which imported a similar but lighter vehicle known as the “Cub Cadet”.

8. In its earlier decision, [2012] UKFTT 0864 (TC) released on 30 December 2011, the FTT decided that the Cub Cadet and the RTV900 should be classified under subheading 8704 21. On appeal, the Upper Tribunal, in a decision released on 16 September 2013 ([2013] UKUT 449 (TCC)), held that the vehicles were correctly classified as “Dumpers designed for off-highway and highway use” under subheading 8704 10, as Kubota contended.

9. The Upper Tribunal’s decision was not appealed and HMRC issued BTIs in relation to the RTV900 and the Cub Cadet which confirmed their classification under subheading 8704 10.

10. We were informed that inconsistent BTIs were subsequently identified by HMRC elsewhere within the EU. A submission was made on 6 March 2014 to the European Commission’s Customs Code Committee (“the CCC”). We understand that the submission referenced the classification of the Cub Cadet and not the RTV900.

11. Subsequently, on 10 February 2015, the CCC published the Regulation. The Regulation classified the Cub Cadet under CN subheading 8704 21. In other words, the Regulation effectively reversed the decision of the Upper Tribunal in relation to the Cub Cadet, at least as regards the future.

12. Following the publication of the Regulation, HMRC revoked the BTIs that it had issued to Barrus and Kubota for the Cub Cadet and the RTV range respectively.

13. The revocation of the BTIs was challenged by Barrus and Kubota on an appeal to the FTT. The FTT’s decision, [2016] UKFTT 0359 (TC) released on 24 May 2016, confirmed that the vehicles at issue were the subject of the Regulation but referred the validity of the Regulation to the CJEU.

14. In *Kubota CJEU*, the CJEU upheld the validity of the Regulation and made certain observations concerning the scope of subheading 8704 10, which we shall consider in greater detail below.

15. After the CJEU’s decision in *Kubota CJEU*, Barrus conceded that the Cub Cadet was excluded from subheading 8704 10 and withdrew its case.

16. We were informed that Kubota also conceded that, in general, its RTV range of vehicles was also excluded from subheading 8704 10, for various reasons. However, as regards its heaviest model, the RTV900, we understand that Kubota did not accept that it was excluded from subheading 8704 10. Apparently, Kubota determined that all its RTV900 vehicles had been imported under subheading 8704 10 and that, because of the BTI, HMRC could not seek reclassification of those vehicles under subheading 8704 21. Therefore, Kubota had no cause to continue its case regarding the classification of any of the products that were subject to the FTT’s reference to the CJEU.

17. Kubota applied for a BTI in relation to the RTVX900. HMRC’s BTI decision was issued on 27 July 2018 and confirmed HMRC’s view that the RTVX900 was classified under subheading 8704 21.

18. Kubota appealed HMRC's BTI decision to the FTT and the FTT's decision is now the subject of the present appeal.

The FTT's decision

19. References in square brackets are to the FTT's decision unless the context otherwise requires.

Factual Findings

20. FTT's main findings of fact were made in [6]-[11] and were as follows:

"6. The X900 is a relatively compact vehicle - about 6 ½ feet tall, 5 feet wide and 10 feet long. It has seating for the driver and another passenger at the front and, behind the seating, a flat area called the "cargo bed". The seating area is open to the sides - although glass side doors may optionally be added - with a metal "canopy" overhead. An area of steel meshing separates the seating area from the cargo bed. The cargo bed is bounded by low barriers at the sides; the back of the seating area; and a "tailgate" at the back which can be lowered fully to a vertical position or hitched to a horizontal position. The cargo bed is about 5 feet wide, 3½ feet long, and a foot deep. The cargo bed can be tipped up at the end near the seating, using a hydraulic lift, such that, when the tailgate is open, the contents of the cargo bed, if loose, can slide out with the force of gravity. The X900 has towing hitches at the front and back. The tyres and frame of the X900 are such that it can traverse rough terrain.

7. It will be readily apparent to someone observing the X900 that

(1) it is designed to be used to transport both (a) loads that can be unloaded by "dumping" - like loose materials or earth - and (b) loads that need to be unloaded manually because "dumping" them would damage the contents (and/or break the bags in which the materials being transported are contained) - or because they are insufficiently loose to be dumped;

(2) if it is to be used for "dumping", someone must first manually unlatch and lower the tailgate;

(3) it is designed to be used on rough terrain;

(4) it is suitable for use in a range of environments - including farms, building sites, leisure (such as golf clubs) and estate management; and

(5) it is a multi-purpose vehicle, in the sense that it was designed to be used in all the different ways, and settings, described above.

8. More technical details of the X900 (as compared with the Regulation vehicle) can be found at [46] below.

Specific findings regarding the X900

9. It will be readily apparent to someone observing the X900 that it

(1) can transport the following (but has no special adaptations in respect of transporting any of these):

(a) boxes (b) equipment (c) ammunitions (d) animal feed (e) excavated material such as sand, gravel and stone, as well as other material (f) bags, bales, barrels;

(2) can tow a small trailer or towable equipment;

(3) is not suitable for the transportation of live animals (it would be dangerous to do so over rough terrain) - unless the animals were small enough to be held in cages or in an animal trailer; and

(4) has no storage facilities for the transportation of water or other liquids (unless in containers)

10. The X900 can be, and is, used on construction sites.

11. Prior to going into production, the X900's hydraulic tipper was subjected to a test whereby the cargo bed containing 85% of its maximum load was raised and lowered through 10,000 cycles."

There is no challenge to the FTT's findings of fact.

21. At [46] the FTT compared the RTV X900 with the vehicle described in the Regulation, drawing on its findings of fact set out in paragraph 20 above:

<i>Aspect</i>	<i>Differences: Regulation vehicle vs X900</i>
Four wheel drive	None
Utility vehicle	None
Cylinder capacity	X900 larger by 178 cc (898 vs 720 cc)
Net weight	X900 heavier by 330 kg (960kg vs 630kg)
Unbraked towing capacity	X900 has 300 kg less towing capacity (450 kg vs 750 kg)
Dimensions	Immaterial
Cabin	Regulation vehicle has "open" cabin; X900 cabin has wire mesh and steel barrier at the back; overhead covering ("canopy"); open to sides but glass doors can be fitted
Number of seats	None
Roll-over protection frame	None
Cargo bed of strong steel frame with sturdy flat-bed tipping body	None (as evidenced by finding at [11] above, the X900 also has a sturdy tipper)
Tipper type	X900 has hydraulic tipper vs manual tipper in Regulation vehicle
Flat bed capacity	Immaterial
High ground clearance	None
Wheel base size	Immaterial

Off-road earth moving tyres	None
Wet-type disc brakes	None
Coupling device	None
Front hitch	None
Speed	X900 faster - travels at up to 40 km/hour vs 25 km/hour for Reg vehicle
High brake capacity	None
Designed for off-road use, particularly in rough terrain	None
Presented to be used for a range of functions	None (see finding at [7] above)
Examples of functions	X900 does not present for use in functions of pushing, moving live animals (unless in cages or similar) or transporting water (unless in containers)

The FTT's summary of tariff classification law

22. The FTT at [19] referred to the CJEU judgment in *B.A.S. Trucks v Staatssecretaris van Financien* C-400/05 (“*B.A.S. Trucks*”) at [28] noting, as regards the CN, that the Explanatory Notes drawn up by the Commission and, as regards the harmonised system (“HS”), by the World Customs Organisation are an important aid to the interpretation of the scope of the various headings but do not have legally binding force.

23. The FTT then considered at [20] the CJEU decision in *Kubota CJEU*, particularly the passages at [28]-[37] in which the scope of subheading 8704 10 was considered, before again referring at [21] to *B.A.S. Trucks* at [32], [35]-[36] in relation to that subheading.

24. Next, the FTT set out the case law relating to classification regulations and referred at [23] in particular to the judgment of Lawrence Collins J in *VTech Electronics Plc* [2003] EWHC 59 (Ch) [18]-[22] (“*VTech*”). The FTT set out an extract from the judgment of Lawrence Collins J which included the citation of the comments of Advocate General Mischo in Case C-119/99 *Hewlett Packard BV v Directeur Generale des Douanes* [2001] ECR I-3981 (“*Hewlett Packard*”), to which reference will be made later in this decision.

25. At [25], the FTT referred to the decision of the CJEU in *Anagram International Inc v Inspecteur van de Belastingdienst* Case C-14/05 (“*Anagram*”) which described, in [33], the process of applying a regulation by analogy.

The FTT's analysis

26. The FTT at [39] described the primary question as being whether the RTV X900 was sufficiently similar to the Regulation vehicle such that, applying the Regulation by analogy, the RTV X900 must be classified under 8704 21. Using the language of *Anagram*, the FTT defined its task as being to identify the differences between the Regulation vehicle and the RTV X900 and then decide if those differences affected the “principal characteristics” of the Regulation vehicle. In identifying those “principal characteristics”, the FTT at [41] was assisted by the “reasons” column in the Annex to the Regulation: in particular the first sentence of the second paragraph and the second sentence of the third paragraph.

27. The FTT then went on to consider at [42]-[43] certain difficulties of interpretation in respect of the “reasons” section of the Annex to the Regulation.

28. At [44] the FTT said:

“We conclude that:

(1) “principal characteristics” of the Regulation vehicle identified in the second sentence of the third paragraph under “reasons” are:

(a) that it is “not sturdily built” in the sense of being of relatively modestly physical build, with limited cargo capacity and lacking the driver-protection and other physical attributes one would expect for use in a heavier industrial settings [sic]; and

(b) that it is not designed for the transport of excavated or other materials; and

(2) these characteristics are not “additional” facts about the Regulation vehicle, which were not evident from the “description” column; but rather conclusions drawn from the information in that column.”

29. The FTT also concluded at [45] that *Kubota CJEU* did not establish in [36] that a “principal characteristic” of the Regulation vehicle was that it was not used on construction sites – such that any vehicle, such as the RTV X900, which was used on construction sites, was, for that reason, not sufficiently similar to the Regulation vehicle.

30. After comparing the RTV X900 with the Regulation vehicle at [46] (set out in paragraph 21 above), the FTT concluded at [47] that the differences, viewed in aggregate, did not affect the principal characteristic expressed in the first sentence of the second paragraph of the “reasons” column. Those differences did not, in context, affect the correctness of the general statement that the RTV X900 was designed as a multipurpose vehicle that could be used for a range of functions; and having a 450 kg towing capacity rather than 750 kg did not detract from RTV X900’s presentation for use for hauling trailers.

31. The FTT noted at [48] that several of the differences which it identified arguably affected the principal characteristics expressed in the second sentence of the third paragraph of the “reasons” column first. It was arguable that by being 330 kg heavier, and having a semi-open (rather than fully open) cabin and a hydraulic (rather than

manual) tipper, RTV X900 did not share the Regulation vehicle's characteristics of being (i) not sturdily built and (ii) not designed for the transport of excavated or other materials. The FTT then considered these two issues in turn.

32. In relation to sturdiness, the FTT noted at [49] that the RTV X900 did have greater weight, driver protection and a hydraulic tipper that that made it more "sturdy" than the Regulation vehicle but considered that the RTV X900 was virtually identical to the Regulation vehicle in terms of overall dimensions and cargo capacity. Moreover, at [51], the FTT considered that the canopy, steel barrier and meshing provided only patchy protection, especially in relation to loose materials.

33. In relation to whether the RTV X900 was designed for the transport of excavated or other materials, the FTT considered at [52] that the differences between the RTV X900 and the Regulation vehicle were relevant to the non-specialist nature of the Regulation vehicle, in contrast to the 8704 10 classification, which describes special-purpose vehicles – those "specially designed" (using the CJEU's words in *Kubota CJEU* at [31] and [32]) for transporting loose materials. The FTT's view was that the differences did not affect the non-specialist character of the vehicle. The RTV X900 was as much designed for multi-purpose use as the Regulation vehicle and this conclusion was not compromised by its heavier weight, limited driver protection and hydraulic tipper.

34. The FTT therefore concluded at [53] that the differences between the Regulation vehicle and the RTV X900 did not affect the principal characteristics of the vehicle; and therefore, by analogy, the Regulation applied to RTV X900. Kubota's appeal was therefore dismissed.

Grounds of appeal

35. Kubota appealed the FTT's decision on the following grounds:

"1. In paragraphs 31, 35 and 36 of the decision in case C-545/16 [*Kubota CJEU*], the [CJEU] found that the vehicle described in [the Regulation] could not be considered an off-highway dumper because:

- In order to be considered a dumper, it must have the necessary sturdiness for use on construction sites.
- The vehicle must be specially designed to transport sand, gravel, earth, stones, namely loose materials, and intended for use in quarries, mines or on building sites, at roadworks, airports and ports.

2. In paragraphs 7(1) and 10 of the [FTT's] decision ... the [FTT] found as fact that Kubota's RTV-X900:

- Can be, and is, used on construction sites.
- Is designed to be used to transport both (a) loads that can be unloaded by "dumping" –like loose materials or earth –and (b) loads that need to be unloaded manually because "dumping" them would damage the contents.

3. Based on the [FTT's] findings, it is apparent that the RTV-X900 differs significantly from the vehicle described in [the Regulation]. These differences are material to determining whether [the Regulation] can be applied by analogy to the RTV-X900.

4. A classification regulation applies directly only to the particular product being classified and to identical products. See the Opinion of Advocate General Mischo in Case C-119/99 *Hewlett Packard*:

“20. It should be borne in mind that a classification regulation is adopted, as the Commission points out, 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, insofar 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” (emphasis added).”

5. In cases where there is a difference (even an apparently very minor difference) between the product in the regulation and another product at issue in an appeal, [the Regulation] is not directly applicable to the latter: see, for example, Case C-130/02 *Krings* at paragraph 34 and Case C-14/05 *Anagram International Inc* at paragraph 31.

6. The [FTT] concluded that the differences between the vehicle described in [the Regulation] and the RTV-X900 did not affect the principal characteristics of the RTV-X900. However, these differences are the root of the decision in [*Kubota CJEU*]

7. Once the [FTT] [determined] as fact that the RTV-X900 was used on construction sites and that it was designed to transport and dump loose loads, it should have ruled that [the Regulation] could not be applied by analogy to the RTV-X900. The decision of the [FTT], therefore, is internally inconsistent and prone to appeal.”

36. In response to Kubota's grounds of appeal, HMRC sought to uphold the FTT's decision for the reasons given by the FTT but also contended that the reasoning in *Kubota CJEU* in relation to the concept of “dumper” in CN subheading 8704 10 led to the conclusion that the RTV X900 was not a “dumper”.

Principles of the law relating to tariff classification

37. The general principles of law relating to tariff classification were conveniently explained in the judgements of Lawrence Collins J in *VTech* and *Sony Computer Entertainment Europe Ltd. v Customs and Excise [2005] EWHC 1644 (Ch)* [8]-[14] and [23]-[29] and may be summarised as follows:

(1) the tariffs and nomenclatures used by the EU in the CN conform to the Harmonised System administered by the World Customs

Organisation in Brussels, which publishes explanatory notes to the Harmonised System known as “HSEs”;

(2) apart from the HSEs the European Commission also issues explanatory notes of its own to the CN which are known as “CNEs”;

(3) the decisive criterion for the tariff classification of goods must be sought 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 of the CN. The HSEs and the CNEs are an important aid to the interpretation of the scope of the various tariff headings, but do not themselves have legally binding force. The content of the HSEs and CNEs must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions;

(4) the CN contains General Rules for the Interpretation of the CN, known as “GRs”. Unlike the HSEs and the CNEs, they have the force of law.

(5) So far as material to this decision, the GRs provide as follows:

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

(6) It is for the national court to determine the objective characteristics and properties of a given product.

(7) "the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties": Case C-467/03 *Ikegami Electronics (Europe) GmbH v Oberfinanzdirektion Nürnberg*, March 17, 2005, para 23.

38. Lawrence Collins J in *VTech* at [18]-[22] also explained the general position in relation to classification regulations, such as the Regulation in the present case, as follows:

“18. Article 9 of Council Regulation 2658/87 makes provision for the adoption of regulations concerning, inter alia, the classification of goods in the CN. Such regulations are proposed by the European Commission but must be submitted to the Customs Code Committee, a committee composed of representatives of the Member States and chaired by representatives of the Commission (Council Regulation 2658/87, Article 7).

19. The Customs Code Committee is a body constituted specifically for the purposes of classification, and its composition varies depending on the nature of the product at issue. Where the Committee approves the Commission's proposals, they may be adopted by the Commission; where it does not, they must be communicated to the Council which may take a different decision (Article 10).

20. The consequence is that the Council has conferred upon the Commission, acting in co-operation with the customs experts of the Member States, a broad discretion to define the subject matter of tariff headings falling to be considered for the classification of particular goods. But the power of the Commission to adopt the measures does not authorise it to alter the subject matter of the tariff headings which have been defined on the basis of the harmonised system established by the International Convention whose scope the Community had undertaken not to modify: Case C-309/98 *Holz Geneen v. Oberfinanzdirektion Munchen* [2000] ECR I-1975, para 13.

21. 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.

22. 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 [*Hewlett Packard*], 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)

23. 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 4199, para 17. Unless and until that happens, national courts are of course obliged to give effect to a regulation.”

The CJEU authorities in relation to “dumpers”

39. The CJEU case-law in relation to subheading 8704 10, to which Mr Cock referred in his submissions, comprised the cases of *DFDS* [2004] EUECJ C-396/02 (“*DFDS*”), *BAS Trucks* [2007] EUECJ C-400/05 (“*BAS Trucks*”) and *Kubota CJEU*.

40. From these authorities the following propositions can be derived:

(1) The wording of subheading 8704 10 requires that a vehicle meets two conditions to be classifiable thereunder, namely that it is a “dumper” and is designed for use off-highway. (*DFDS* at [31] and *BAS Trucks* at [30] and *Kubota CJEU* at [28]).

(2) It is clear from the descriptions in the explanatory notes to the CN and the HS that an essential characteristic of dumpers is to have a tipping hopper or an opening bottom for the transport of rubble and various materials. There is, by contrast, no indication in those notes that the form or functioning of the tipping hoppers can constitute, by themselves, decisive criteria for the classification of a vehicle as a dumper. (*DFDS* at [32]).

(3) Subheading 8704 10 of the CN is a specific heading for vehicles designed for a special use, namely use off-highway for the loading and unloading of various materials. The other categories of motor vehicles for the transport of goods are covered by general subheadings which make a distinction on the basis of the specific technical characteristics of those vehicles rather than according to the use made of them. It follows that the special purpose of the dumpers is the decisive criterion for classification under subheading 8704 10 of the CN. (*BAS Trucks* at [32]).

(4) The explanatory notes to the CN relating to subheadings 8704 10 11 to 8704 10 90 describe dumpers as vehicles “specially designed to transport sand, gravel, earth, stones, etc. and ... intended for use in quarries, mines or on building sites, at roadworks, airports and ports”. (*BAS Trucks* at [33]).

(5) The explanatory notes to the HS relating to subheadings 8704 and 8704 10 describe dumpers as vehicles “generally fitted with off-the-road wheels and [able to] work over soft ground”, whose speed and area of operation are limited in comparison with vehicles designed at the outset to be used on paved, public roads and which are in general fitted with special earth-moving tyres. (*BAS Trucks* at [34]).

(6) As a general rule, in the light of the inherent characteristics of the dumpers covered by subheading 8704 10 of the CN, namely off-the-road wheels, special earth-moving tyres and limited speed and area of operation, such vehicles seem to be intended primarily for the transport of materials in quarries, mines or on building sites, that is to say, off-highway. Those characteristics distinguish them from other vehicles intended for the

transport of goods in so far as, unlike those vehicles, they are primarily intended to be driven on ground other than paved, public roads. Therefore, in order to be classifiable under subheading 8704 10 of the CN, dumpers must have been specially designed for off-highway use for the transport and unloading of materials and an essential characteristic of dumpers is to have a tipping hopper or an opening bottom for the transport of those materials. (*BAS Trucks* at [35] and [36] *Kubota CJEU* [31]).

(7) The essential characteristic of the dumpers covered by subheading 8704 10 of the CN does not lie in the fact that they must be incapable of being driven on the highway, but that they are primarily designed to be capable of being driven on ground which is more or less uneven. The fact that dumpers are designed so as to be also capable, incidentally, of being driven on paved, public roads is therefore not a decisive factor for their classification in the CN. (*BAS Trucks* at [38]).

(8) According to the explanatory notes to the CN, the subheadings 8704 10 10 to 8704 10 90 cover, in particular, vehicles specially designed to transport sand, gravel, earth, stones, namely loose materials, and intended for use in quarries, mines or on building sites, at roadworks, airports and ports. (*Kubota CJEU* [31]).

41. In *Kubota CJEU*, the CJEU considered the characteristics of the Regulation vehicle as follows:

“33 It is necessary therefore to examine whether the vehicle covered by Regulation 2015/221 is specially designed for such a particular use.

34 In that regard, the wording of that regulation itself states that such a vehicle is equipped with an open cabin and a tipping body with a capacity of 0.4 m³ or, approximately, 400 kg.

35 The vehicle covered by Regulation 2015/221, owing to the fact that it is not very sturdy, has limited cargo capacity, its open cabin has no protection for the driver against loose materials and it is presented to be used for a range of transportation functions for various items such as plants or animals, materials, boxes or munitions.

36 In addition, that vehicle, given its objective technical characteristics and properties cannot be regarded as the same as the vehicles under subheading 8704 10 since it does not have the necessary sturdiness for use on construction sites which is inherent in dumpers (see, to that effect, the judgment of 11 January 2007, *B.A.S. Trucks*, C-400/05, EU: C: 2007:22, paragraph 35).

37 Consequently, the fact that such a vehicle is equipped with a tipper enabling it, additionally, to transport small quantities of loose material, does not call into question the well-foundedness of its classification under subheading 8704 21 91.”

Discussion

42. Mr Cock submitted that, having found that the RTV X900 differed significantly from the vehicle described in the Regulation, the FTT should have determined whether

the vehicle's objective characteristics established whether it was a dumper designed for off-highway and highway use within 8704 10. Instead, the FTT simply assessed the similarity between the vehicle described in the Regulation and the RTV X900.

43. We reject that submission. The FTT addressed the question whether, in view of its findings of fact, the Regulation applied by analogy to the RTV X900. The FTT followed the decision of the CJEU in *Anagram*. In that case the classification regulation described toy balloons as comprising plastic foil on the outside of which was bonded an aluminium layer. The goods in question involved the layering the other way round i.e. the aluminium layer was on the inside. The CJEU said:

“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 that regulation is applicable to Anagram's product by analogy.*” (Emphasis added)

44. Following that approach, the FTT concluded that the RTV X900 was sufficiently similar to the Regulation vehicle that its correct classification should be heading 8704 21 91. We see no error in the FTT's application of the Regulation by analogy. Indeed, it seems to us that this is the most logical approach. In addition, it is clear from the CJEU's jurisprudence that the “reasons “column of the Annex to the Regulation can be used for guidance as to the scope of the Regulation (*Hewlett Packard* at [20]) and that the FTT was correct, in following the CJEU's guidance in *Anagram*, to refer to the principal characteristics of the Regulation vehicle.

45. The Regulation was intended to clarify a difficult case of classification. It would be perverse for the FTT to have ignored the Regulation and simply addressed 8704 10. Effectively, the Regulation reversed, at least in part, the decision of the Upper Tribunal in *EP Barrus Ltd & Kubota (UK) Ltd v HMRC* [2013] UKUT 449 (TCC) and clarified, in relation to a particular product, the boundary between 8704 10 and 8704 21 91. The Regulation was promulgated, as the CJEU in *Kubota CJEU* observed at [12]-[13], in response to the Upper Tribunal's decision. In those circumstances, no criticism can be levelled at the FTT for taking full account of the Regulation and applying it by analogy.

46. Therefore, the FTT in identifying the differences between the Regulation vehicle and the RTV X900 and deciding whether those differences affected the principal characteristics of the Regulation vehicle applied the law correctly.

47. Moreover, the assessment of the differences between the Regulation vehicle and the RTV X900 is a clear example of a case in which the FTT, as the primary fact-finding tribunal, is carrying out an evaluative exercise taking account of all the relevant evidence. It is well-established that an appeal tribunal should not interfere with such a multifactorial assessment except where it is clear either that the evidence does not support the conclusion reached or there has been some other error of law in the approach. In our view, the FTT's decision cannot be regarded as perverse and discloses no such error.

48. Mr Cock criticised the FTT for failing to consider the guidance of Advocate General Mischo, quoted in the judgment of Lawrence Collins J in *VTech* at paragraph 38 above, that "as always where reasoning by analogy is employed great care is called for." In fact, contrary to Mr Cock's submission, the FTT quoted Advocate General Mischo's guidance at [23] in the extract from Lawrence Collins J's judgment in *VTech*, and was obviously aware of the need to be careful. In any event, it seems to us that the FTT, in its careful analysis of the characteristics of the RTV X900 and the Regulation vehicle, did exercise the "great care" which Advocate General Mischo recommended.

49. Mr Cock submitted that if the FTT had correctly applied the legal test for "dumpers", found in the jurisprudence of the CJEU, to its findings of fact, it would have been bound to find that the RTV X900 was a dumper. In particular, Mr Cock noted that at [7(1)] the FTT found that the RTV X900 was designed to be used to transport loads that might be unloaded by "dumping" and stated that this included loose material or earth. Secondly, at [7(3)] the FTT concluded that the RTV X900 was: "designed to be used on rough terrain." Thirdly, at [10] the FTT found that: "The [RTV X900] can be, and is, used on construction sites". Accordingly, Mr Cock argued that nothing in the RTV X900's objective characteristics indicated that its intended use was anything other than transporting and dumping a variety of materials in off-highway environments, including construction sites.

50. We reject those submissions. First, as we have already explained, we see no error in the FTT's approach in examining first the Regulation and the characteristics of the Regulation vehicle and comparing the RTV X900 and the Regulation vehicle, rather than starting first by an examination of subheading 8704 10 and then concluding its analysis before considering the Regulation.

51. Secondly, the submission that because the RTV X900 was capable of being used off-road, for transporting material that could be dumped and was used on construction sites it must be a "dumper" is, in our view, incorrect. There is no indication in the factual findings of the FTT that, as the CJEU held in *Kubota CJEU* (at [31]-[33]), the RTV X900 was "specially designed" (i) for the off-highway transport and unloading of materials and (ii) to transport loose materials and intended for use in quarries, mines, building sites, roadworks, airports and ports. On the contrary, at [47] the FTT found the RTV X900 to be a multipurpose vehicle which could be used for a range of purposes

other than transporting and dumping materials in a range of off-highway contexts. Those findings represent findings of fact which cannot be impugned in this Tribunal unless they are perverse. In our view, there was ample evidence before the FTT to justify those findings.

52. Similarly, we reject Mr Cock's submission that because the FTT found that the RTV X900 could be and was used on construction sites, it had the necessary degree of sturdiness to differentiate it from the Regulation vehicle. Mr Cock relied on the comments of the CJEU in *Kubota CJEU* at [36]:

“In addition, [the Regulation vehicle], given its objective technical characteristics and properties cannot be regarded as the same as the vehicles under subheading 8704 10 since it does not have the necessary sturdiness for use on construction sites which is inherent in dumpers (see, to that effect, the judgment of 11 January 2007, *B.A.S. Trucks*, C-400/05, EU:C:2007:22, paragraph 35).”

53. However, we agree with the submission made by Mr Fell, who appeared for HMRC, that the CJEU's observation related to the degree of sturdiness required for a vehicle to qualify as a dumper and not whether the Regulation vehicle could be used on construction sites. In other words, as Mr Fell submitted, a vehicle might lack the necessary sturdiness for use on construction sites which was inherent in dumpers, but still be capable of being used on construction sites.

54. Moreover, again as Mr Fell submitted, it is clear from the FTT's first decision in *Kubota v HMRC* [2011] UKFTT 864 (TC) at [12] and the Upper Tribunal's decision at [2013] UKUT 449 (TCC) at [54(4)] that the vehicles in question could be used on construction sites. Nonetheless, those decisions resulted in the adoption of the Regulation, the validity of which was upheld by the CJEU in *Kubota CJEU*. Therefore, to argue that because the RTV X900 was sufficiently sturdy that it could be used on construction sites this meant that it was a dumper, would undermine the purpose of the Regulation.

55. We therefore conclude that the FTT correctly decided that the RTV X900 should be classified under subheading 8704 21 91.

Conclusion

56. For the reasons given above, we consider that the decision of the FTT discloses no error of law and that, accordingly, this appeal must be dismissed.

Signed on Original

JUDGE GREG SINFIELD

JUDGE GUY BRANNAN

RELEASE DATE: 15 November 2021

APPENDIX

1. The CN, introduced by Regulation No 2658/87, is based on the Harmonised Commodity Description and Coding System ('the HS'), which was drawn up by the Customs Cooperation Council, now the World Customs Organisation (WCO), and established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983. That convention, with its amending protocol of 24 June 1986, was approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).

2. Part One of the CN contains 'preliminary provisions'. Under Section I of that part, which sets out general rules, part A, entitled 'General rules for the interpretation of the [CN]', provides:

"Classification of goods in the [CN] shall be governed by the following principles.

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

3. Heading 8704 of the CN is structured as follows:

'8704	Motor vehicles for the transport of goods:
8704 10	– Dumpers designed for off-highway use:
8704 10 10	– – With compression-ignition internal combustion piston engine (diesel or semi-diesel), or with spark-ignition internal combustion piston engine
8704 10 90	– – other
	– Other, with compression-ignition internal combustion piston engine (diesel or semi-diesel):

8704 21	-- Of a gross vehicle weight not exceeding 5 tonnes;
[...]	[...]
	---- With engines of a cylinder capacity not exceeding 2 500 cm ³ ;
8704 21 91	----- new
[...]	[...]

4. The annex to Regulation 2015/221, adopted pursuant to Article 9(1)(a) of Regulation No 2658/87, classifies the goods described in column 1 of the table in the annex of that regulation under the corresponding CN code referred to in column 2, for the reasons given in column 3 of that table. That annex provides as follows:

'Description of the goods	Classification (CN code)	Reasons
(1)	(2)	(3)
<p>A new, four-wheel drive utility vehicle with a compression-ignition internal combustion piston engine (diesel) of a cylinder capacity of 720 cm³, with a net weight including fluids) of approximately 630 kg, an unbraked towing capacity of 750 kg and with dimensions of approximately 300 x 160 cm.</p> <p>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 m³ or, approximately, 400 kg. It has a high ground clearance (27 cm) and a wheel base of 198 cm.</p> <p>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.</p> <p>The vehicle is designed for off-road use, particularly in very rough terrain. The vehicle is</p>	8704 21 91	<p>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.</p> <p>The vehicle is designed as a multipurpose 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.)</p> <p>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.</p> <p>The product is therefore to be classified under CN code 8704 21 91 as a new motor vehicle for the transport of goods.</p>

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.		
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5. The explanatory notes to the Combined Nomenclature of the European Union of 6 May 2011 (OJ 2011 C 137, p. 1) ('the Explanatory Notes to the CN') provide, as regards code 8704:

8704	<p>Motor vehicles for the transport of goods</p> <p>The explanatory note to heading 8703 applies, <i>mutatis mutandis</i>.</p> <p>For the definition of cylinder capacity, see the HS Explanatory Note to subheadings 8407 31, 8407 32, 8407 33 and 8407 34.</p> <p>This heading includes four-wheel drive, articulated chassis, all-terrain vehicles in which the front section houses a diesel engine and a cab fitted with controls. The rear section consists of a two-wheeled chassis, without equipment, but designed to be fitted with a variety of equipment.</p> <p>This heading does not however include such vehicles when fitted with agricultural or other special purpose equipment (heading 8705).</p>
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<p>8704 10 10 and 8704 10 90</p>	<p>Dumpers designed for off-highway use</p> <p>1.</p> <p>These subheadings mainly cover vehicles fitted with a front or rear tipping body or a bottom-opening body that have been specially designed to transport sand, gravel, earth, stones, etc. and are intended for use in quarries, mines or on building sites, at roadworks, airports and ports. Examples illustrating various types of dumper are given at the end of these notes.</p> <p>2.</p> <p>These subheadings also cover smaller vehicles of the type used on construction sites for carrying earth, rubble, fresh cement and concrete, etc. These have a fixed or articulated chassis and two- or four-wheel drive, the dumper hopper being located above one axle and the driver's seat above the other. The driver's seat is not usually inside a cab.'</p>		<p>1.</p> <p>These subheadings mainly cover vehicles fitted with a front or rear tipping body or a bottom-opening body that have been specially designed to transport sand, gravel, earth, stones, etc. and are intended for use in quarries, mines or on building sites, at roadworks, airports and ports. Examples illustrating various types of dumper are given at the end of these notes.</p>	<p>2.</p>	<p>These subheadings also cover smaller vehicles of the type used on construction sites for carrying earth, rubble, fresh cement and concrete, etc. These have a fixed or articulated chassis and two- or four-wheel drive, the dumper hopper being located above one axle and the driver's seat above the other. The driver's seat is not usually inside a cab.'</p>
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The HS explanatory notes

6. Under Article 6(1) of the international convention referred to in paragraph 5 above, a committee entitled the 'Harmonised System Committee', composed of representatives of each contracting party, was set up under the auspices of the Customs Cooperation Council. One of its tasks, in particular, is to propose amendments to that convention and to prepare explanatory notes ('HS Explanatory Notes'), classification opinions and other advice on the interpretation of the HS.

7. The explanatory notes to the HS are worded as follows as regards subheading 8704 10:

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

- the dumper body is made of very strong steel sheets; its front part is extended over the driver’s cab to protect the cab; the whole or part of the floor slopes upwards towards the rear;
- in some cases, the driver’s cab is half-width only;
- lack of axle suspension;
- high braking capacity;
- limited speed and area of operation;
- special earth-moving tyres;
- because of their sturdy construction, the tare weight/payload ratio does not exceed 1:1.6;
- the body may be heated by exhaust gases to prevent materials from sticking or freezing.