

REPORTABLE (19)

ZIMBABWE REVENUE AUTHORITY
v
WARINGA INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, MAKARAU JA & BHUNU JA
HARARE, MARCH 1, 2018 & FEBRUARY 22, 2019

T. Magwaliba, for the appellant

Majachani, for the respondent

BHUNU JA: This is an appeal against the judgment of the Fiscal Appeal Court setting aside the classification and revaluation by the appellant’s Commissioner of Customs and Excise of a 2006 white box van Iveco 40C14 motor vehicle. The respondent imported the motor vehicle in question through the Plumtree Border Post on 23 August 2013. It’s clearing agent declared the motor vehicle as a “2006 IVECO DAILY BOX VAN MODIFIED AS AN AMBULANCE”. That much is not in dispute. What is in dispute is the proper classification of the motor vehicle in question for the purposes of calculating customs duty payable to the fiscus.

The customs officer initially classified the motor vehicle as a minibus falling under Customs Tariff heading 87.02 and revalued it upwards in terms of s 111 of the Customs and Excise Act [*Chapter 23:02*]. Dissatisfied with that assessment and revaluation,

the respondent appealed to the Regional Manager who held that the customs officer's classification was wrong. He accordingly reclassified it as a goods carrying motor vehicle under tariff heading 87.04 of the Customs and Excise (Tariff) Notice 2012 Statutory Instrument 112 of 2012. The respondent again disputed that classification and revaluation on the basis that what it had imported was an ambulance passenger carrying motor vehicle which should have been classified under tariff heading 87.03 of the above Statutory Instrument. It then appealed to the Commissioner without success.

Aggrieved by the dismissal of its appeal by the Commissioner, the respondent successfully appealed to the Fiscal Appeal Court which on 10 November 2015 issued the following order:

“I am satisfied that The Commissioner wrongly classified the motor vehicle under heading 87.04. He should have classified it under heading 87.03. Accordingly it is ordered that:

1. The appeal is allowed.
2. The classification imposed by the Commissioner of customs and Excise is set aside.
3. The matter is remitted back (sic) to the Commissioner for the reclassification of the motor vehicle in accordance with the terms of this judgment.
4. Each party shall bear its own costs.”

The crisp issue for determination is whether the court *a quo* correctly found that the motor vehicle in issue is an ambulance which is a passenger carrying motor vehicle falling under tariff heading 87.03 and not a goods carrying motor vehicle falling under tariff heading 87.04.

The classification of goods for purposes of duty is governed by s 87 of the Customs and Excise Act [*Chapter 23:02*] which provides as follows:

“87 Classification of goods for customs purposes

- (1) For the purpose of determining the customs duty payable in respect of any goods that are imported, the Commissioner or an officer shall classify such goods into the appropriate tariff headings, subheadings or codes in accordance with any rules set out in the customs tariff, paying due regard to—
 - (a) the explanatory notes to the Harmonised Commodity Description and Coding System, issued from time to time by the World Customs Organisation in Brussels; and
 - (b) decisions of the Harmonised Commodity Description and Coding System Committee. [Subsection amended by Act 29 of 1998 and by Act 17 of 1999]
- (2) The Commissioner shall vary or set aside a classification of goods made in terms of subsection (1) if he is satisfied, whether on appeal by the importer of the goods or otherwise, that the classification was incorrect.
- (3) Any classification of goods made in terms of this section shall be binding on the importer of the goods, subject to an appeal—
 - (a) to the Commissioner, where the classification was made by an officer; or
 - (b) to the Fiscal Appeal Court in terms of the Fiscal Appeal Court Act [Chapter 23:05], where the classification was made, varied or confirmed by the Commissioner”.

It is clear that The Commissioner and his subordinates are strictly bound by the provisions of s 87 and the relevant rules. For that reason, they have no discretion outside the section as read with the prescribed rules. It therefore follows, that the commissioner’s classification of goods must fall squarely within the dictates of s 87 and the rules, doing otherwise would be illegal.

Heading 8703 provides for the description of motor vehicles falling under that heading as follows:

**“87.03 – 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
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The heading also includes:

- (1) **“Motor cars** (e.g., limousines, taxis, sports cars and racing cars).

(2) **Specialised transport vehicles such as ambulances, prison vans and hearses.**

(6)
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The classification of certain motor vehicles in this heading is determined by certain features which indicate that the vehicles are principally designed for the transport of persons rather than the transport of goods (**heading 87.04**). These features are especially helpful in determining the classification of motor vehicles which generally have a gross vehicle weight rating of less than 5 tonnes and which have a single enclosed interior space comprising an area for the driver and passengers and another area that may be used for the transport of both persons and goods. Included in this category of motor vehicles are those commonly known as “multiple purpose” vehicles (e.g. van-type vehicles, sport utility vehicles, certain pick-up vehicles. The following features are indicative of the design characteristics generally applicable to the vehicles which fall in this heading:

- (a) Presence of windows along the two side panels;
- (b) Presence of sliding, swing-out or lift-up door or
- (c) doors, with windows on the side panel or in the rear;
- (d) Absence of a permanent panel or barrier between the area for the driver and front passengers and the rear area that may be used for the transport of both persons and goods.
- (e) Presence of comfort features and interior finish and fittings throughout the vehicle interior that are associated with the passenger areas of vehicles (e.g., floor carpeting, ventilation, interior lighting, ashtrays)”.

It was the respondent’s case that it imported the vehicle in question as a decommissioned ambulance intact, as it was principally designed to convey the sick to and from hospital. It was also used to ferry disabled persons and critically ill patients on life support. In proof whereof the respondent relied on the commercial invoice filed of record.

At page 50 of the record of proceedings the importer of the motor vehicle Jetset Freight Services P/L gave a vivid description of the motor vehicle in graphic terms depicting it as an ambulance as follows:

“2006 IVECO DAILY 40V14 BOX VAN MODIFIED INTO AN AMBULANCE

Vehicle is now fitted with a compressor to purify oxygen and fitted with pipes to distribute oxygen through to the patients on board. It has two outlets (valves) which pass through to the oxygen masks and to the patients.

- Vehicle has 6 seats for patients and the driver’s seat is the seventh. It also has 2 pillars for holding a stretcher when transporting bed ridden patients.
- Vehicle has drawers which serve as vomit bags, glove (sic) bags and disinfectant bags.
- Vehicle has a rack above the driver’s head which holds the stretcher.
- Vehicle is also fitted with machine to lift wheel chairs and stretchers for the bed ridden.
- Vehicle is fitted with glass windows on the sides and on the rear.
- The weight of the vehicle is given as 4 800kgs.”

The above description coupled with pictures of the disputed motor vehicle chief among them is annexure ‘F’ at page 37 of the record of proceedings depicting the interior of the motor vehicle adorned with the convenient features and passenger seats installed for the comfort of passengers.

Undoubtedly the description given by the importer and backed up by pictures of the motor vehicle fits that of an ambulance and the prescribed description of motor vehicles falling under heading 87.03.

On the evidence placed before the court *a quo*, it is not in dispute that the motor vehicle in question was manufactured as a box van but was later modified into an ambulance.

At the time of assessment it had been modified into an ambulance and it still bore the modified principal design that made it fit the description of an ambulance.

The appellant's contention is that the respondent did not import an ambulance because its principal design at the time of manufacture was not that of an ambulance but a box van suitable for the carriage of goods falling under tariff code 87.04. . In developing its argument, the appellant forcefully submitted in its heads of argument that,

“having found that the motor vehicle was manufactured as a box van, the inescapable conclusion was that it was principally designed for the carriage of goods. The subsequent modification did not matter in the principle design of the motor vehicle”

The appellant argued further, that because heading 87.04 provides that it applies to all types of vans, the 2006 white box van Iveco 40C14 motor vehicle must be classified under tariff code 87.04.

On the other hand the respondent's contention is that it imported an ambulance because at the time of presentation and assessment by the customs officials it had been modified into an ambulance and it still bore the features of an ambulance which is a passenger carrying motor vehicle falling under tariff code 87.03.

The question to be answered is what did the respondent import on the 23 August 2013? It is common cause that the respondent imported a motor vehicle manufactured as a box van suitable for the conveyance of goods that had been subsequently converted into an ambulance for the conveyance of sick people and the disabled. The respondent bought the motor vehicle long after it had ceased to be a box van and was now an ambulance.

In the absence of fraud, common sense dictates that the respondent could not possibly have imported a box van because as at 23 August 2013 the motor vehicle had ceased to be a box van and was now an ambulance. A perusal of the record of proceedings shows that apart from mere speculation and conjecture, the appellant came nowhere near establishing that the respondent had fraudulently converted a box van into an ambulance for purposes of avoiding duty. For the stronger reason, the appellant was unable to rebut the respondent's assertion that the motor vehicle had been used as an ambulance in its country of origin and was imported as such, bearing the features of an ambulance such as oxygen and stretcher handling facilities.

The appellant's interpretation of the law and classification of the motor vehicle in question is problematic in that it fails to recognise fundamental change. One cannot continue to call a hen an egg simply because at one time it was an egg, nor can a man be called a baby simply because he was born as a baby. Likewise the Commissioner cannot continue to call a motor vehicle a box van after it has been converted into an ambulance.

The *contra fiscum* rule prescribes that the meaning that benefits the individual against the State Treasury should be adopted. See *Sekrtaris Van Binnelandse Inkomste v Raubenheiner* 1969 (4) SA 314 (A). Likewise, in the case of *S v Galguits Garage (Pty) Ltd* 1969 (2) 459 (A), the court held that in cases of doubt, the most favourable interpretation to the tax payer should be adopted. The mere fact that the Customs Officer, the Regional Manager, the Commissioner and the respondent could not agree as to which category the imported vehicle fell casts doubt on the customs officials' classification of the motor vehicle.

The court *a quo* was therefore undoubtedly correct in interpreting the law in favour of the respondent.

In conclusion, I am constrained to remark that in cases of doubt the main function of customs officials is not to make extra money for the State but to facilitate trade, hence doubts must be resolved in favour of the tax payer.

For the foregoing reasons, the learned judge in the court *a quo*'s finding that the motor vehicle presented at the Plumtree border post on 23 August 2013 by the respondent is an ambulance falling under tariff code 87.03 is beyond reproach. That being the case, the appeal can only fail.

It is accordingly ordered that the appeal be and is hereby dismissed with costs.

GWAUNZA DCJ: I agree

MAKARAU JA: I agree

Advocates Chambers, appellant's legal practitioners

Mberi Chamwamurombe Legal Practice, respondent's legal practitioners