



**TC07734**

*CUSTOMS DUTIES – combined nomenclature – 8704 “motor vehicles for the transport of goods” - appeal against binding tariff information classifying “utility” vehicle as not within 8704 10 “dumpers for off-highway use” – EU classification regulation 2015/221 classified a “utility vehicle” as not a dumper – was the vehicle in question sufficiently similar to the vehicle described in that Regulation? – yes – therefore not a “dumper” – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/05258**

**BETWEEN**

**KUBOTA (U.K.) LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE ZACHARY CITRON  
MR CHARLES BAKER**

**Sitting in public at Taylor House London EC1 on 27-28 February 2020**

**Mr S Cock of the Customs Consultancy Ltd for the Appellant**

**Mr M Fell of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. This appeal was about whether the Kubota RTV-X900 (the “X900”), a “utility vehicle” imported by the appellant company, had been correctly classified in a binding tariff information (“BTI”) under “motor vehicles for the transport of goods - other” – and not under “dumpers designed for off-highway use”. The argument centred on whether the X900 fell within the scope of EU classification regulation 2015/221 (the “Regulation”) classifying a vehicle (the “Regulation vehicle”) under “motor vehicles for the transport of goods - other”. The appeal follows earlier litigation between the parties concerning the correct classification for customs purposes of other vehicles in Kubota’s rough terrain vehicle (RTV) range.

### THE APPEAL

2. HMRC issued a BTI (GB 503899425) in respect of the X900 on 27 July 2018 to a classification within Combined Nomenclature (“CN”) subheading 8704 21 (“Motor vehicles for the transport of goods. Other”).

3. The appellant company notified its appeal against that decision to the Tribunal by notice of appeal dated 12 August 2018. It contended that the X900 should be classified under CN subheading 8704 10 (“Motor vehicles for the transport of goods. Dumpers designed for off-highway use”).

### THE EVIDENCE

4. The evidence included:

- (1) a viewing of an X900 vehicle (held outdoors at a location near Taylor House);
- (2) witness statement and oral evidence of Stuart McClimont, who had been the appellant company’s R&D, Assembly and Inspection Manager. Mr McClimont’s witness statement contained his comments on the following passages in the annex to the Regulation (reproduced in the appendix to this decision): fourth paragraph under “description of the goods”, second sentence (“The vehicle is presented ...” etc); and third paragraph under “reasons” (“The vehicle is not ...” etc);
- (3) witness statement and oral evidence of Julian Payne, director of Shellplant Ltd, an official distributor of new construction equipment for a number of manufacturers, including Kubota (and including the X900); Shellplant sells new and used construction equipment to customers in central, eastern and southern England;
- (4) witness statement and oral evidence of David Harris, officer of HMRC tariff classification service;
- (5) two short promotional videos about the X900;
- (6) a promotional brochure about the X900;
- (7) hearing bundles containing correspondence between the parties and documents relating to earlier proceedings (summarised at [12-16] below)

### FINDINGS OF FACT

5. The appellant company is a subsidiary in the Kubota group, which manufactures a wide variety of vehicles for the agricultural and construction industries. The appellant company imports and distributes Kubota vehicles in the UK and Ireland.

### *Overview of the X900*

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.

#### **OVERVIEW OF EARLIER PROCEEDINGS INVOLVING THE PARTIES AND DIFFERENT VEHICLES**

12. The "first FTT decision" - *EP Barrus Ltd & Kubota (UK) Ltd v HMRC* [2011] UKFTT 864 (TC) - determined the classification of Kubota's RVT900 (note this is not the X900) and EP Barrus Ltd's Cub Cadet utility vehicles. The Tribunal dismissed Kubota's appeal against classification under 8704 21.

13. The Upper Tribunal in *EP Barrus Ltd & Kubota (UK) Ltd v HMRC* [2013] UKUT 0449 (TCC) allowed Kubota's appeal, ruling that the Kubota RVT900 and the Barrus Cub Cadet should be classified under 8704 10 rather than under 8704 21.

14. The Regulation was published in the Official Journal on 13 February 2015 (see [17] below for the background to this).

15. The "second FTT decision" - *EP Barrus Ltd & Kubota (UK) Ltd v HMRC* [2016] UKFTT 0359 (TC) - was an appeal against revocation of BTIs for the Kubota RVT900 and Barrus Cub Cadet based on the Regulation, as well as for other Kubota vehicles (but not the X900). The Tribunal held that these vehicles were within the Regulation; it also made a reference to the Court of Justice of the EU (the "CJEU") as to the validity of the Regulation.

16. The CJEU upheld the validity of the Regulation in *Kubota (UK) Ltd, EP Barrus Ltd v HMRC* Case C-545/16: we refer to this case as *Kubota*.

17. The second FTT decision at [30-33] had the following concerning the background to the enactment of the Regulation, which we gratefully adopt here:

30. During the course of 2014 the classification of certain utility vehicles was considered by the Customs Code Committee, which is comprised of representatives from each Member State. The purpose of the Committee is to ensure close and effective co-operation between the European Commission and Member States in ensuring the uniform application of the Customs Code.

31. We were provided with the minutes of the meeting of that Committee held on 5 to 8 May 2014. Such minutes are public, and so may be admitted as an aid in interpreting the thinking behind the Committee's decisions. The minutes included the following passage under the heading "Utility vehicles":

#### "Facts:

Divergent classification of small multipurpose utility vehicles equipped with a tipping cargo bed.

The national tribunal in one MS [Member State] decided that such a vehicle is to be classified under CN code 8704-10 as "dumpers designed for off-highway use" (referring to its exclusive or principal off-highway use, the presence of a sturdy flat-bed tipping body designed essentially for the transport and tipping of any kind of material, strong body, protective frame etc).

Other MS issued BTIs for similar vehicles classifying them under CN code 8704-21 as "vehicles for transport of goods" (the BTIs are currently expired but the MS maintain their position).

#### Questions and Discussion:

.... Several MS stated that the vehicle in question is a multipurpose utility vehicle and is not comparable to dumpers. There are many types of vehicles for the transport of goods with a strong steel frame. Many of them are intended for off-road use, in addition, MS did not find the current vehicle being very robust.

Dumpers are according to the HSEN sturdily built vehicles with a tipping or bottom opening body, designed for the transport of excavated or other materials. They have a rigid or articulated chassis. The vehicle in question is not specially designed to transport sand, gravel, earth, stones etc. It is rather a multipurpose utility vehicle that can be used for a range of functions, also for winding, pushing, hauling trailers, moving animals, transporting plants, boxes, water and equipment, carrying munitions and transporting feed for animals.

Conclusions:

The majority of MS would classify the vehicles under CN code 8704-21 as “vehicles for the transport of goods”. One MS would classify under CN code 8704-10 as “dumpers”.

Action points:

The MS who submitted the issue will send a supplement to the submission (similar type of vehicle).

A draft regulation will be presented for discussion at a forthcoming meeting.”

32. Such a draft regulation was duly presented at a meeting of the Committee held on 2 to 4 July 2014. The minutes of that meeting record various comments on the draft. It was noted that a draft regulation would be presented for a Committee vote.

33. The regulation drafted by the Committee was enacted as [the Regulation]

## LAW

### *Overview of tariff classification law*

18. The CJEU judgement in *Kubota* contains a concise summary of the legal context at [3] to [7] inclusive. The annex to Regulation 2015/221 is set out at [8] of that judgement – it is also set out in the appendix to this decision. The relevant explanatory notes to the CN are set out at [9] in the ECJ’s judgement; and the relevant harmonised system (HS) explanatory notes are explained and set out at [10-11]. Relevant principles of ECJ case law are set out at [25] and [26].

19. As the CJEU said in *B.A.S. Trucks v Staatssecretaris van Financien* at [28], the Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the 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.

### *Case law regarding CN subheading 8704 10*

20. The heart of the CJEU’s judgement in *Kubota* regarding the validity of the Regulation was in just ten short paragraphs, which we reproduce below:

28 It must be recalled that the goods under subheading 8704 10 are, in accordance with the wording of that subheading, 'dumpers designed for off-highway use'. Therefore, the wording requires that a vehicle meets two conditions to be classifiable thereunder, namely that it is a 'dumper' and is designed for use off-highway (judgment of 16 September 2004, *DFDS*, [C-396/02](#), EU:C:2004:536, paragraph 31).

29 As the Commission itself confirms, the vehicle covered by Regulation 2015/221 complies with the condition as to off-highway use, since it is equipped with off-road earth moving tyres and its speed is limited to 25 km/h.

30 It remains to be determined whether such a vehicle also satisfies the condition as to being a 'dumper'.

31 In that regard, it must be recalled that the subheading 8704 10 of the CN is a specific heading for vehicles that are specially designed for off-highway use for the transport and unloading of materials (see, to that effect, the judgment of 11 January 2007, *B.A.S. Trucks*, [C-400/05](#), EU:C:2007:22, paragraph 36) and an essential characteristic of dumpers is to have a tipping hopper or an opening bottom for the transport of those materials (see, to that effect, the judgment of 16 September 2004, *DFDS*, [C-396/02](#), EU:C:2004:536, paragraph 32).

32 Furthermore, 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.

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 m<sup>3</sup> 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.

21. The paragraphs from *B.A.S. Trucks* cited above are as follows (with [32] included as well):

32. It is apparent from its wording that 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, as Advocate General Stix-Hackl pointed out in point 33 of her Opinion in *DFDS*, the special purpose of the dumpers is the decisive criterion for classification under subheading 8704 10 of the CN.

35. 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.

36. It follows from the foregoing that, 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.

22. In the paragraph of her opinion in *DFDS* referred to above, Advocate General Stix-Hackl described the “special purpose of the dumpers” as “off-highway tipping work”.

#### *Case law regarding classification regulations*

23. A succinct summary of the law relating to classification regulations was provided by Lawrence Collins J in *VTech Electronics (UK) Plc* [2003] EWHC 59 (Ch):

[18] Article 9 of Council reg 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 reg 2658/87, art 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, art 249 (formerly art 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 Case [C-119/99 Hewlett Packard BV v Directeur Generale des Douanes](#) [2001] ECR I-3981, 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)

24. We note that in *Hewlett Packard BV* itself (the case cited by Lawrence Collins J), it was held that “in the interpretation of a classification regulation, in order to determine its scope, account must be taken inter alia of the reasons given” ([20]). In the classification regulation considered in that case, the “reasons” column contained a statement that the “principal function” of the product in question (a “multifunction facsimile machine” according to the “description” column) was the “telecommunication (facsimile) function”. The court held (at [22]) that it followed from the statement in the “reasons” section that the regulation only applied if the “telecommunication (facsimile) function” was, in fact, the principal function of the machine being classified.

25. Another CJEU case, *Anagram International Inc v Inspecteur van de Belastingdienst – Douanedistrict Rotterdam* (Case C-14/05) cast light on the process of applying a regulation by analogy. In that case – about toy balloons – the classification regulation described the balloons

as comprising plastic foil on the exterior of which an aluminium layer is bonded. The product in question in the case was the other way round. The court said at [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.

### *Brexit*

26. It was common ground that UK's having left the EU on 31 January 2020 and entered a transition period until 31 December 2020 had no impact on these proceedings relating to a BTI issued in July 2018.

### *Jurisdiction*

27. This Tribunal's jurisdiction to entertain an appeal of decisions as to tariff classification embodied in BTIs arises under s16 Finance Act (FA) 1994 which is applied by regulation 3(1)(a) Customs Reviews and Appeals (Tariff and Origin) Regulations 1997/534. Decisions within that regulation are to be treated as if they were mentioned in s13A(2)(a) to (h) FA 1994. Accordingly the Tribunal has full jurisdiction under s16(5) FA 1994, including power to quash or vary the decision under appeal, and substitute its own decision.

28. It is for the appellant to show that the grounds on which its appeal has been brought are established: s16(5) FA 1994.

### **APPELLANT'S ARGUMENTS**

29. The appellant's outline case as to why the X900 differs from the Regulation vehicle was:

- (1) the X900 is sturdily built;
- (2) it has protection for the driver against loose material;
- (3) it is not presented for use for a range of transportation functions for various unsuitable items such as plants, animals or munitions;
- (4) Kubota, a manufacturer of construction equipment, actively markets the X900 for use on construction sites; and
- (5) most importantly, the X900 is used as an off-highway dumper on construction sites.

30. In more detail, the appellant argued that the X900 has the following key differences from the Regulation vehicle:

- (1) It is designed to carry loose loads such as sand, gravel and stones. The Regulation vehicle is not.
- (2) It is designed and marketed for use on construction sites. The Regulation vehicle is not. This is demonstrated by:
  - (a) Kubota's marketing videos where the X900 is depicted working alongside other construction equipment.
  - (b) The X900 has a hydraulic tipper. The Regulation vehicle has a manual tipper.
  - (c) Tests that are carried out on the X900 in relation to the durability of its tipping cargo bay. 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.



- (d) The X900's inherent features, such as:
    - (i) The protective shield between the driver and the load.
    - (ii) A collapsible tailgate, without which loads could not be dumped.
  - (e) As detailed in the witness statement of Julian Payne of Shellplant Limited, the X900s sold by this Kubota dealership typically end up working on construction sites alongside other Kubota products, e.g. excavators and wheeled loaders.
- (3) The Regulation vehicle is equipped to push, the X900 is not.
  - (4) The X900 has a significantly lower towing capacity, 590kg, compared to 700kg for the Regulation Vehicle.
  - (5) The X900 is significantly heavier, 960kg, compared to 630kg for the Regulation Vehicle.
  - (6) The Kubota X900 has a tare weight/payload ratio of below 1:1.6, which is an indication of their sturdy construction. The Regulation does not provide the ratio for that vehicle.
  - (7) The X900 is not "presented" to be used for pushing, moving animals, transporting plants, boxes, water and equipment or carrying munitions. This appears to have been a key feature, having regard to the minutes of the Customs Code Committee.
31. The appellant submitted that, given those differences, the X900 is not identical to the vehicle described in the Regulation and it is not directly applicable.
32. That then raises the issue whether the Regulation is applicable by analogy. In this, the findings of the CJEU in *Kubota* must be applied.
33. The appellant argued that if Tribunal finds as fact that the X900 is sturdy enough to use on construction sites, and is so intended, then the Tribunal must find that the Regulation does not apply; and that the X900 must fall into 8704 10.
34. The appellant submitted that, in relation to the dumper qualification tests set out in the decision of the CJEU in *Kubota*, all are met in relation to the X900:
- (1) it has a tipping hopper with a collapsible tailgate, which is specifically designed to dump loads.
  - (2) it is designed to transport sand, gravel, earth, stones, namely loose materials.
  - (3) it is used on construction and building sites.
35. Hence, the appellant argued, the Regulation cannot be applied to the X900 by analogy.
36. The appellant pointed out that the BTI being appealed itself describes the X900 as "sturdily built." The covering letter from HMRC dated 27 July 2018 distinguished between "sturdily built" in context of transporting material over rough terrain, as against "sturdy" in the context of a dumper specially designed to transport sand, gravel etc for use in quarries, mines or building sites.

#### **HMRC'S ARGUMENTS**

37. HMRC's essential points were:
- (1) the objective characteristics of X900 are so similar to the Regulation vehicle that the Regulation must be applied by analogy to the X900;

(2) the Regulation was held, in the second FTT decision, to apply to a range of utility vehicles which are very similar to the X900. The reasoning in that decision can largely be applied to the X900; and

(3) the reasoning of the CJEU in *Kubota* is as applicable to the X900 as it was to the Regulation vehicle.

38. Mr Fell submitted that interpreting the Regulation as not applying to the X900 would frustrate the underlying purpose of the Regulation, apparent from its recitals and the minutes of the Customs Code Committee, of resolving the difficulty of divergence over the classification of utility vehicles with cargo beds so as to ensure the uniform application of the CN and the equal treatment of traders.

#### DISCUSSION

39. The primary question here is whether the X900 is sufficiently similar to the Regulation vehicle such that, applying the Regulation by analogy, the X900 must be classified under 8704 21. The analogy, if there is one, could be expressed like this: just as 8704 21 is the correct classification for the Regulation vehicle, so too, due to the similarity between the Regulation vehicle and the X900, it is the correct classification for the X900. As Advocate General Mischo explained in *Hewlett Packard BV*, the exercise is one of identifying the guidance on the interpretation of 8704 21 inherent in the Regulation, and applying it to a similar case. In the language of *Anagram*, our task is to identify the differences between the Regulation vehicle and the X900, and then decide if those differences affect the “principal characteristics” (which we understand as the principal characteristics of the Regulation vehicle which were relied upon in the Regulation in reaching its conclusion that 8704 21 applied).

40. In undertaking this exercise, we are assisted and guided by the CJEU’s decision in *Kubota*, which essentially confirmed – and explained – the correctness of the Regulation’s application of 8704 21. We note that this was not something the second FTT had before it when deciding whether the vehicles it was considering were sufficiently similar to the Regulation vehicle to be “covered” by the Regulation. For this reason – and because the X900 was not itself under consideration in the second FTT’s decision – we do not place great store on the “persuasive” authority of that decision.

41. The task of identifying “principal characteristics” is assisted in this case 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. We see these passages as providing guidance as to whether differences between the Regulation vehicle and another vehicle affect the vehicle’s principal characteristics. If, despite such differences, these passages nevertheless hold true of the other vehicle, that indicates that the principal characteristics are not affected. This approach accords with CJEU authority to the effect that the reasons in a classification regulation affect its scope. With this in mind, we now look at those two passages from the “reasons” column in more detail.

42. The first sentence of the second paragraph under “reasons” is the easier of the two passages to interpret. It seems to us clearly consistent with the facts stated in the “description” column. It is therefore somewhat academic whether this sentence is purely a conclusion derived from that description, or, like the situation in *Hewlett Packard BV*, it is informing us of an additional fact not necessarily spelled out in the “description” column: on either reading, there is harmony between the two columns.

43. Turning to the third paragraph under “reasons”: the first sentence simply tracks the words of 8704 10 (albeit in the negative). The second sentence tracks the words of the HS Explanatory Note cited in brackets at the end – again in the negative voice. However, there are difficulties in interpreting this second sentence:

- (1) The sentence says that the Regulation vehicle is “not” –
  - (a) sturdily built
  - (b) with a tipping or bottom opening body,
  - (c) designed for the transport of excavated or other materials
- (2) The first difficulty is that the “description” column says that the Regulation vehicle is fitted with a cargo bed with a flat-bed tipping body i.e. statement (b) immediately above cannot be correct (as a negative statement).
- (3) We can resolve this difficulty by interpreting the sentence as saying, not that *all of* (a), (b) and (c) above are “not” the case – rather – one or more of them is.
- (4) The next difficulty is the description column says that the Regulation vehicle is fitted with a cargo bed constructed of a *strong* steel frame with a *sturdy* flat-bed tipping body (emphasis added). How can this be reconciled with the statement that the Regulation vehicle is “not sturdily built”? We see two possible resolutions:
  - (a) The first is that “not sturdily built” simply means “not strong” - and so this part of the “reasons” must (somewhat like the situation in *Hewlett Packard BV*) be furnishing an additional fact about the Regulation vehicle that is not evident from the “description” column – namely, that there is an aspect of the Regulation vehicle that is not strong (i.e. weak), and this aspect, although not specified in any detail, offsets the “strong” steel frame and “sturdy” tipper, such that, overall, the Regulation vehicle is “not sturdily built”;
  - (b) The second is that “not sturdily built” here, read in context, does not mean simply “not strong”, but rather reflects the Regulation vehicle’s modest physical bearing (as is evident from its dimensions, cargo capacity and presentation for use in smaller-scale, non-industrial settings - all as set out in the “description” column).
- (5) The judgment of the CJEU in *Kubota* assists in this question of interpretation. “Sturdiness” is first mentioned at [35] in the context of discussion of whether the Regulation vehicle is specially designed to transport loose materials and intended for use in quarries, mines or on building sites, at roadworks, airports and ports. The CJEU there links non-sturdiness with three aspects found in the “description” column of the Regulation: (i) limited cargo capacity; (ii) open cabin with no protection for the driver against loose materials; and (iii) presentation for use for a range of transportation functions for various items such as plants or animals, materials, boxes or munitions. These indicate that “sturdiness” in this context relates to size and suitability for use in heavier industrial settings – rather than simply “strength”. This is further illustrated at [36] where the CJEU links sturdiness with use on construction sites and refers to *B.A.S. Trucks* at [35], where the CJEU stated that in the light of their inherent characteristics, dumpers seem intended primarily for the transport of materials in quarries mines or on building sites.
- (6) Also of assistance in this question of interpretation is the context of the HS Explanatory Note quoted here in the Regulation: the note is describing “dumpers” immediately after (and in distinction to) the category of vehicles which includes “multipurpose vehicles”.

44. 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; 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.

45. It will be evident from our conclusions above that we do not understand [36] of the CJEU’s *Kubota* judgement to be establishing a “principal characteristic” of the Regulation vehicle that it was not used on construction sites - such that any vehicle, such as the X900, which is used on construction sites, is, for that reason, not sufficiently similar to the Regulation vehicle). We come to this view because:

(1) the CJEU’s statement about use on construction sites was expressly based on the Regulation vehicle’s objective technical characteristics and properties: it is therefore not an additional fact about the Regulation vehicle but a conclusion drawn from the facts in the “description” column; and

(2) the CJEU expressly linked that statement to [35] in *B.A.S. Trucks*, where the subject matter was the “primary” purpose of the vehicle: hence the key point being made about the Regulation vehicle at [36] of *Kubota* was that it was not, based on its objective characteristics, a vehicle with a primary purpose of being used on construction sites - rather, it was a multi-purpose vehicle. This “principal characteristic” of the Regulation vehicle is of course spelled out in the first sentence of the second paragraph of the “reasons” column.

46. We now turn to comparing the X900 with the description of the Regulation vehicle – and summarise the differences in the table below (note that this draws on our findings of fact about the X900 set out above):

<i>Aspect</i>	<i>Differences: Regulation vehicle vs X900</i>
<b>Four wheel drive</b>	None
<b>Utility vehicle</b>	None
<b>Cylinder capacity</b>	X900 larger by 178 cc (898 vs 720 cc)
<b>Net weight</b>	X900 heavier by 330 kg (960kg vs 630kg)
<b>Unbraked towing capacity</b>	X900 has 300 kg less towing capacity (450 kg vs 750 kg)
<b>Dimensions</b>	Immaterial
<b>Cabin</b>	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
<b>Number of seats</b>	None
<b>Roll-over protection frame</b>	None
<b>Cargo bed of strong steel frame with sturdy flat-bed tipping body</b>	None (as evidenced by finding at [11] above, the X900 also has a sturdy tipper)

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

47. These differences, viewed in aggregate, do not, in our view, affect the principal characteristic expressed in the first sentence of the second paragraph of the “reasons” column. That the X900 does not present for use in pushing, moving live animals (unless in cages or similar) or transporting water (unless in containers) – three of a list of nine examples of a range of functions – does not, in context, affect the correctness of the general statement that the X900 is designed as a multipurpose vehicle that can be used for a range of functions (see our finding of fact at [7] above); and having 450 kg of towing capacity rather than 750 kg does not detract from X900’s presentation for use for hauling trailers (see our finding of fact at [9(2)] above).

48. Several of the differences arguably affect the principal characteristics expressed in the second sentence of the third paragraph of the “reasons” column (as interpreted by us at [44] above) – it is arguable that, by being 330kg heavier, and having a semi-open (rather than fully open) cabin and a hydraulic (rather than manual) tipper, the X900 does 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. We take these two characteristics in turn.

*“Not sturdily built”*

49. Although increased weight and driver-protection, and a having a hydraulic tipper, do make the X900 more “sturdy” than the Regulation vehicle in the sense described at [44] above, the facts remain that the X900 is virtually identical to the Regulation vehicle in terms of overall dimensions and cargo capacity.

50. We acknowledge the appellant’s arguments as to the ratio of tare weight to payload. We note that for the Regulation vehicle, this ratio was 630:400, or 1:0.63. The ratio for the X900 was 960:400, or 1:0.42. Both these ratios are well under the ratio of 1:1.16 which is cited in the HS Explanatory Notes for Subheading 9704.10, in a list of the characteristics that distinguish dumpers from other vehicles for the transport of goods (in particular, tipping lorries (trucks)): it says there that “because of their sturdy construction the tare weight/payload ratio does not exceed 1:1.16”. We find this statement from the HS Explanatory Notes sheds little light on the matter in hand because:

- (1) the focus of the list in which it appears is the distinction between dumpers and tipping lorries – here, the X900 is clearly not a tipping lorry;
- (2) both the Regulation vehicle and the X900 clearly fall comfortably on the same side of this ratio i.e. this ratio does not highlight any difference between them; and
- (3) it appears that what makes this ratio inapposite as a meaningful measure for “utility vehicles” (like the Regulation vehicle and the X900) is that they have limited payload capacity (this is, indeed, one of the signs of lack of “sturdiness” cited in the CJEU’s *Kubota* judgement at [35]) – this means that the vehicle does not have to be very heavy, in absolute terms, to reach a low weight to payload ratio. For this reason the ratio does not shed meaningful light on “sturdiness” (as we have understood it at [44] above).

51. Although the canopy and steel barrier and meshing at the back of the seating area do make the X900 “sturdier” than the Regulation vehicle, they provide only patchy protection, particularly in relation to ingress of loose materials, which would not be stopped by the meshing. These differences do not, in our view, affect the accuracy of the statement that the X900 is “not sturdily built” in the way we have understood that phrase at [44] above.

*“Not designed for the transport of excavated or other materials”*

52. As regards whether these differences affect the characteristic of not being designed for the transport of excavated or other materials – in our view this characteristic goes to the non-specialist nature of the Regulation vehicle, in contrast to the 8704 10 classification, which describes special purpose vehicles – those “specially designed” (in the CJEU’s words in *Kubota*) for transporting loose materials. The differences do not, in our view, affect the non-specialist character of the vehicle: based on the facts found (see [7] above), the X900 is as much designed for multi-purpose use as the Regulation vehicle, and this is not compromised by its heavier weight, limited driver-protection, and hydraulic tipper.

53. We thus conclude that the differences between the Regulation vehicle and the X900 do not affect the principal characteristics of the vehicle; and therefore, by analogy, the Regulation applies to the X900.

**CONCLUSION**

54. The appeal is dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

55. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ZACHARY CITRON  
TRIBUNAL JUDGE**

**RELEASE DATE: 05 JUNE 2020**

## APPENDIX

### COMMISSION IMPLEMENTING REGULATION (EU) 2015/221 of 10 February 2015 concerning the classification of certain goods in the Combined Nomenclature

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to [Council Regulation \(EEC\) No 2658/87](#) of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, and in particular Article 9(1)(a) thereof,

Whereas:

(1) In order to ensure uniform application of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation.

(2) [Regulation \(EEC\) No 2658/87](#) has laid down the general rules for the interpretation of the Combined Nomenclature. Those rules apply also to any other nomenclature which is wholly or partly based on it or which adds any additional subdivision to it and which is established by specific provisions of the Union, with a view to the application of tariff and other measures relating to trade in goods.

(3) Pursuant to those general rules, the goods described in column (1) of the table set out in the Annex should be classified under the CN code indicated in column (2), by virtue of the reasons set out in column (3) of that table.

(4) It is appropriate to provide that binding tariff information issued in respect of the goods concerned by this Regulation which does not conform to this Regulation may, for a certain period, continue to be invoked by the holder in accordance with [Article 12\(6\)](#) of Council Regulation (EEC) No 2913/92. That period should be set at 3 months.

(5) The measures provided for in this Regulation are in accordance with the opinion of the Customs Code Committee,

HAS ADOPTED THIS REGULATION:

#### Article 1



The goods described in column (1) of the table set out in the Annex shall be classified within the Combined Nomenclature under the CN code indicated in column (2) of that table.

## **Article 2**

Binding tariff information which does not conform to this Regulation may continue to be invoked in accordance with [Article 12\(6\)](#) of Regulation (EEC) No 2913/92 for a period of 3 months from the date of entry into force of this Regulation.

## **Article 3**

*This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 February 2015.

For the Commission,

On behalf of the President,

Heinz ZOUREK

Director-General for Taxation and Customs Union

ANNEX

Description of the goods (1)	Classification (CN code) (2)	Reasons (3)
<p>A new, four-wheel drive utility vehicle with a compression-ignition internal combustion piston engine (diesel) of a cylinder capacity of 720 cm<sup>3</sup>, with a net weight (including fluids) of approximately 630 kg, an unbraked towing capacity of 750 kg and with dimensions of approximately 300 160 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 m<sup>3</sup> 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 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.</p>	<p>8704 21 91</p>	<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>