In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 31

BETWEEN:-

THE COLLECTOR OF CUSTOMS

Appellant

-v-

RAYCLAN LIMITED

Respondent

JUDGMENT

(In Court)

Date of hearing: 10th and 11th December 2015
Date of judgment: 4th February 2016

Mr Norman MacDonald, Attorney General's Chambers, for the Appellant
Mr John Cooper, Williams Barristers & Attorneys, for the Respondent

Introduction

1. This is a case about the correct classification for the purposes of import duty of six Daihatsu Hi-Jet Cargo motor vehicles ("the Vehicles") which the

Respondent ("Rayclan"), an automobile business, imported into Bermuda for sale to its customers.

2. By an email dated 3rd April 2014, Customs Officer 187 Cle-Ann Lathan advised Rayclan that the Vehicles (of which only two had at that time been imported) fell to be classified under Heading 87.03 of the Bermuda Nomenclature and Import Duties ("the Bermuda Nomenclature") as motor cars or other motor vehicles principally designed for the transport of persons, and that they therefore attracted duty of 75%. The Bermuda Nomenclature is the First Schedule to the Customs Tariff Act 1970 ("the 1970 Act").

3. By a decision contained in a letter to Rayclan's attorneys dated 5th May 2014 the Appellant ("the Collector") confirmed that this classification was correct. By a notice dated 16th May 2014 Rayclan gave notice to the Collector pursuant to section 122(2)(b) of the Revenue Act 1898 ("the 1898 Act") requiring her to review her decision. By a decision on review dated 30th May 2014 ("the Review Decision"), the Collector, through the agency of Customs Officer 213 Jordan Knight, confirmed her previous decision.

4. By a notice of appeal dated 24th July 2014, Rayclan appealed the Review Decision to the Tax Appeal Tribunal ("the Tribunal"). The appeal was brought under section 122B of the 1898 Act. Rayclan submitted that the Vehicles should be classified under Heading 87.04 of the Bermuda Nomenclature as motor vehicles for the transport of goods, and that they should therefore attract duty of 35.5%.

5. The Tribunal found in Rayclan's favour. After a careful and detailed summary of the relevant evidence, statutory provisions and Explanatory Notes, the Chairman, giving the Tribunal's written decision, concluded at para 32:

> "*As stated in paragraph 4 above, there was, at the end of the day, a simple decision to be made by the Tribunal, namely whether the Vehicle falls within classification 87-03 or 87-04. Having reviewed the submissions made by counsel for the Appellant and the Respondent, hearing the testimony of the various witnesses called, reviewed the Vehicle*

and hearing the various legal arguments and submissions by both parties, the Tribunal has determined that the Appellant has proved, on the balance of probabilities, that the Vehicles are more in the Nature of Motor Vehicles for the Transport of Good[s] than Motor Cars and Other Motor Vehicles Principally Designed for the Transport of Persons and that the decision of the Respondent was incorrect and accordingly find for the Appellant such that the Vehicle should have been classified under 87.04 of the Bermuda Customs Tariff and not 87.03."

6. By a Notice of Originating Motion dated 27th January 2015 the Collector has appealed the Tribunal's decision. The appeal is brought pursuant to section 29 of the Taxes Management Act 1976 ("the 1976 Act").

Framework of appeal

7. Section 29 of the 1976 Act provides:

"*(1) A party to proceedings before the Tribunal who is aggrieved by the decision of the Tribunal may appeal to the Supreme Court on a point of law within twenty-one days or such longer period as the Supreme Court may allow after the Tribunal delivers its decision by lodging notice of appeal with the Registrar.*

(2) On any appeal under this Part, the Supreme Court may make such order, including an order for costs, as it thinks just.

(3) Section 62 of the Supreme Court Act 1905 [title 8 item 1] shall be deemed to extend to the making of rules under that section to regulate the practice and procedure on an appeal under this section."

8. The relevant rules are to be found in Order 55 of the Rules of the Supreme Court 1985 ("RSC"), which deals with appeals to the Supreme Court from courts, tribunals or persons. Order 55, rule 1 provides in material part that the subsequent rules of the Order shall, in relation to an appeal to which the Order applies, have effect subject to any provision made in relation to that appeal by or under any enactment. Thus Order 55, rule 3(1), which provides that an appeal to which the Order applies shall be by way of rehearing, does not have effect in relation to an appeal from a decision of the Tribunal as the rule is inconsistent with section 29 of the 1976 Act, which provides that an

appeal against such decision lies only on a point of law. See Green v Minister of Housing and Local Government [1967] 2 QB 606 QB *per* Widgery J at 615 F, applied by Ground CJ in Bermuda Telephone Co Ltd v Minister of Telecommunications [2008] Bda LR 58 SC at para 4.

9. The standard of review on a question of law is correctness. See Housen v Nikolaisen [2002] 2 SCR 235, Supreme Court of Canada, *per* McLachlin CJ and L'Heureux-Dube, Iacobucci, Major and Arbour JJ at para 8. As Kawaley J (as he then was) stated in The Tax Commissioner v Oleander Cycles Ltd [2005] Bda LR 41 at para 39:

> "*... the restrictive requirement that appeals to this Court should only be on points of law suggests to me that Parliament intended this Court to serve in a general supervisory role over the Tribunal, both in terms of clarifying pure questions of law and reversing decisions the validity of which are undermined by errors of law. The factual merits of a decision will not ... be subject to review even though ... misapplying a statute or making factual findings which are not supported by the evidence may be said to constitute an error of law: Edwards v Bairstow [1956] AC 14 at 35 (Lord Radcliffe).*"

10. RSC Order 55, rule 7(5) provides in material part that the Court may give any decision or make any order which ought to have been given or made by the Tribunal and make such further or other order as the case may require, or may remit the matter with the opinion of the Court for rehearing and determination by the Tribunal.

11. RSC Order 55, rule 7(7) provides that the Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.

Grounds of appeal

12. The Collector appeals on the following grounds:

    (1) The Tribunal erred in law in that it misdirected itself and applied the wrong legal test as to the standard of proof that Rayclan has to meet

when it held that Rayclan was not required to prove that the Collector was unreasonable.

(2) The Tribunal erred in law in that it failed to have regard to the admissions of Rayclan contained in part A of Rayclan's written submissions to the Tribunal that:

(a) the issue to be decided by the Tribunal was whether it was reasonable for the Collector to classify the Vehicles under Heading 87.03 of the Bermuda Nomenclature; and

(b) Rayclan has the burden of proving that the decision of the Collector was unreasonable.

(3) The Tribunal erred in law and exceeded its jurisdiction by purporting to determine that the decision of the Collector was not an "*ancillary matter*" subject to the standard of proof of reasonableness, when that issue was never raised by Rayclan in its grounds of appeal and the Tribunal had already upheld the Collector's objection to Rayclan raising further grounds of appeal.

(4) The Tribunal erred in law by breaching the rules of natural justice and procedural fairness when it held that the "*reasonableness*" standard of proof put forward by the Collector was incorrect, after the Chairman had advised the parties during the hearing that "*reasonableness*" was the standard of proof that applied in this case.

(5) The Tribunal erred in law in that it failed to apply or it misapplied the Explanatory Notes to Headings 87.03 and 87.04 of the Bermuda Nomenclature in coming to its decision.

(6) The Tribunal erred in law in that it failed to apply or misapplied the Rules of Interpretation of the 1970 Act in coming to its decision.

(7) The Tribunal erred in law in that it misconstrued the evidence of Amy Greenslade and ignored the exhibits proffered during her evidence in

concluding that the Vehicles could not be licensed by the Transport Control Department as private passenger vehicles.

(8) The Tribunal erred in law in that it wrongly permitted the viewing of and had regard to a Daihatsu Hijet vehicle which was not one of the vehicles at issue in the appeal before it, was not one of the vehicles at issue as viewed by the Customs authorities at the Port of Entry, and contained prejudicial commercial advertising on the exterior. The Tribunal further erred by failing to have regard to the observation of the Chairman of the Tribunal, that the vehicle so viewed had a child safety feature, namely windows in the rear seat that only roll down half way.

(9) The Tribunal erred in law by failing to provide any or sufficient reason for its decision.

First through Fourth Grounds

13. The First through Fourth Grounds can be taken together. They require the Court to construe section 122B of the 1898 Act in conjunction with section 122 and the Fourth Schedule of that Act:

14. Section 122B is headed "*Appeals to the Tax Appeal Tribunal*". It provides in material part:

"*(3) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal is satisfied that the Collector of Customs or other person making that decision could not reasonably have arrived at it, to do one or more of the following—*

(a) direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) require the Collector of Customs to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Collector of Customs as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when similar circumstances arise in future.

(4) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(5) On an appeal under this section the burden of proof shall lie upon the appellant to show that the grounds on which any such appeal is brought have been established.

(6) References in this section to a decision as to an ancillary matter are references to any decision of a description specified in the Fourth Schedule to this Act which is not comprised in a decision falling within section 122(1)(a) and (b)."

15. Section 122 is headed "*Requirement for review of a decision*". It provides in material part:

"*(1) ... this section applies to—*

(a) any decision by the Collector of Customs, in relation to any relevant duty, as to—

. . . . .

(ii) the rate at which any such duty is charged in any case, or the amount charged;

. . . . .

(b) ... or

(c) any decision by the Collector of Customs or any proper officer which is of a description specified in the Fourth Schedule to this Act."

16. The Fourth Schedule, which is headed "*Reviewable Decisions Subject to Supervisory Jurisdiction on Appeal*", provides in material part:

"*(1) Decisions under paragraphs (a) to (e), made for the purposes of the Revenue Act 1898—*

(a) any decision as to whether anything is liable to forfeiture or as to whether anything forfeited or seized under the Revenue Act 1898 is to be restored

to any person or as to the conditions subject to which any such thing is so restored;

. . . . .

(c) any decision to refuse delivery of any goods (section 19(2); ..."

17. Section 19, to which the Fourth Schedule refers, is headed "*Importer's entry to be made within three days; power to refuse delivery*". It provides:

"*(1) The importer of any goods shall, except as otherwise provided, within three days after their importation, make due entry inwards of such goods; and in default of such entry the proper officer may convey such goods to a Queen's Warehouse, and if the duties thereon, together with all charges of removal and warehouse rent are not paid within 30 days after such three days have expired, the goods shall be treated as abandoned to the government and may be disposed of as the Collector of Customs sees fit.*

(2) The Collector of Customs may refuse delivery of any goods (even though they may have been entered) of any importer who has failed, within thirty days of the delivery to him of goods previously imported by him, to enter and pay any duty or other charges on all such previously imported goods; and any goods so refused delivery may be held in a Queen's Warehouse at the importer's expense until he enters and pays all duty and other charges on all such previously imported goods."

18. The first question arising is whether Rayclan's appeal to the Tribunal was in relation to a decision on the review of an ancillary decision, in which case it was brought under section 122B(3), or whether it was in relation to another decision, in which case it was brought under section 122B(4). The reason why the answer to that question is potentially significant will become apparent later in this judgment.

19. Mr Cooper, who appeared for Rayclan submitted that the appeal to the Tribunal was brought under section 122B(4) as it concerned a decision by the Collector relating to the rate at which import duty was charged in relation to the Vehicles, which was a decision falling under section 122(1)(a) not the Fourth Schedule. I agree.

20. Section 2(2) of the 1970 Act provides in material part:

"*Except as otherwise provided in this Act or any other enactment, on goods—*

(a) imported into Bermuda;

. . . . .

there shall be imposed duty at the rate specified in the First Schedule with respect to goods of that class or description …"

21. The First Schedule, ie the Bermuda Nomenclature, assigns a Tariff Code to goods according to their class or description and a Rate of Duty to that Code. In the decision appealed to the Tribunal, the Collector had assigned the Vehicles to Tariff Code 8703.327, "*Other vehicles valued at $12,000 or less*" under Heading 87.03, which, as stated earlier in this judgment, attracted a Rate of Duty of 75%. Thus the purpose of classifying the Vehicles under a specific Heading and Tariff Code was to determine the rate of import duty. That is why the classification related to the rate at which duty was charged.

22. Mr MacDonald, who appeared for the Collector, submitted that Rayclan's appeal to the Tribunal was in relation to a decision on the review of an ancillary decision, namely whether the Vehicles, which he submitted had been seized under the 1898 Act, were to be restored to Rayclan once the correct amount of import duty had been paid. But the Vehicles had not been seized: the Collector had refused delivery of them. Moreover, as this was because the applicable duty had not been paid in relation to them, and not because the applicable duty had not been paid in relation to vehicles previously imported by Rayclan, section 19(2) of the 1898 Act was not engaged.

23. Mr Cooper submitted that it was important to establish that the decision which had been appealed to the Tribunal was not a decision on the review of a decision relating to an "*ancillary matter*" because a different standard of proof applied to "*other decisions*". Specifically, he submitted that on an appeal relating to an ancillary decision the appellant had to satisfy the Tribunal that the decision was Wednesbury unreasonable whereas on an appeal against any other decision the appellant merely had to satisfy the

Tribunal on a balance of probabilities that the decision was wrong. That was the approach which the Tribunal had adopted. Mr MacDonald submitted that the Tribunal's approach was wrong and that an unreasonableness test applied to any appeal to the Tribunal irrespective of whether it related to an ancillary matter.

24. Where there is a statutory right of appeal to a tribunal, the standard of proof borne by the appellant will depend upon the terms of the statute. I am not persuaded by Mr MacDonald's submission that absent an express statutory provision to the contrary, the standard will necessarily be whether the decision was Wednesbury unreasonable. As to the two authorities on which he relied in support of this proposition, Minister for the Environment v Bermuda National Trust [2003] Bda LR 41 concerned an appeal to the Supreme Court from a decision of the Minister pursuant to section 61 of the Development and Planning Act 1974, which allowed an appeal on a point of law; and Bermuda Telephone Co Ltd v Minister of Telecommunications [2008] Bda LR 58 concerned an appeal to the Supreme Court from a decision of the Minister pursuant to section 60 of the Telecommunications Act 1986, which allowed an appeal on a point of law or mixed fact and law.

25. It is more fruitful to turn to the language of section 122B of the 1898 Act. Apart from section 122B(3), there is no reference in the 1898 Act to the standard of proof to be applied on an appeal to the Tribunal. I therefore reject Mr Cooper's submission that section 122B(3) was intended to carve out a category of decisions to which an unreasonableness standard of proof applies as distinct from all other decisions to which a different, unstated standard of proof applies: something which would make little legislative sense. If the legislature had intended that a different standard of proof should apply to section 122B(4) then the 1898 Act would have provided for this in express terms.

26. Section 122B(3) provides that in relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the Tribunal shall have certain specified powers. Section 122B(4) provides that in relation to other decisions, the Tribunal shall have those powers and, in addition, the

further powers specified in that subsection. Hence the wording "*the powers of an appeal tribunal on an appeal under this section shall <u>also</u> include …*" (emphasis added). In order to exercise one of the powers conferred by section 122B(3) in relation to one of the other decisions mentioned in section 122B(4) the Tribunal would have to be satisfied to the same standard as it would have to be satisfied when exercising that power under section 122B(3).

27. Considered in context, the phrase in section 122B(3) "*where the tribunal is satisfied that the Collector of Customs or other person making that decision could not reasonably have arrived at it*" is merely another way of saying "*where the tribunal is satisfied that the appellant has shown that the grounds on which the appeal is brought have been established*". The legislative intent was not to indicate that the appellant is required to satisfy a different standard of proof in relation to a decision under that subsection.

28. I therefore allow the First Ground of appeal and find that the Tribunal erred in law in that it misdirected itself and applied the wrong legal test as to the standard of proof which Rayclan had to meet when it held that Rayclan was not required to prove that the Collector was unreasonable.

29. I can deal with the Second through Fourth Grounds of appeal quite briefly. The Tribunal acted correctly in forming its own (albeit mistaken) view of the correct test. It would have been wrong in principle for the Tribunal to apply what it believed to be an incorrect test simply because that is what the parties had agreed. In order to apply that test, the Tribunal had to consider whether the Collector's decision was a decision on the review of a decision on an ancillary matter. It had to do so irrespective of whether the "*ancillary matter*" point had been pleaded.

30. Sometimes (and I speak from experience) a material point or issue does not occur to a court or tribunal until after the conclusion of the substantive hearing. So it was in the present case. When that happens, the court or tribunal should give the parties an opportunity to comment on that point of issue before deciding it. When, having risen, the Tribunal became

concerned that the correct test was whether the decision of the Collector was incorrect rather than unreasonable, it should therefore have informed the parties of its concerns and invited their submissions, whether at a further hearing or in writing. The Tribunal's omission to do so was a breach of natural justice. Albeit the breach has been corrected on appeal by giving the parties the opportunity to address the Court on the correct test. In the circumstances the Second and Third Grounds of appeal are dismissed and the Fourth Ground is allowed.

Fifth and Sixth Grounds; determination of matter before the Tribunal

31. In view of my finding allowing the First Ground of appeal, the Fifth and Sixth grounds are redundant. However the submissions which I have heard on those grounds have equipped me to determine the matter which was before the Tribunal, namely whether the Review Decision was one at which she could not reasonably have arrived. The burden of proof is on Rayclan, as the company was the appellant before the Tribunal. This is a more cost effective approach than remitting the matter to the Tribunal for rehearing.

32. As the unreasonableness test in section 122B(3) of the 1898 Act is derived from judicial review, I take it to be shorthand for the bundle of grounds which may give rise to a successful application for judicial review. As Lord Templeman stated in R v IRC, ex parte Preston [1985] AC 835 HL at 862 C:

> "*Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.*"

It is in light of these considerations that I must determine whether the decision of the Collector is one at which she could not reasonably have arrived.

33. The Bermuda Nomenclature is based upon the Harmonized Commodity Description and Coding System ("HS") developed by the World Customs Organization ("WCO"). As the WCO explains on its website, the system is

used by more than 200 countries as a basis for their customs tariffs. The official interpretation of the HS is given in the Explanatory Notes published by the WCO. They are now in their Fifth Edition, published in 2012.

34. The Explanatory Notes in relation to Heading 87.03 read:

"*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*

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 for 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 'multipurpose' vehicles (e.g. van-type vehicles, sports utility vehicles, certain pick-up type vehicles). The following features are indicative of the design characteristics generally applicable to the vehicles which fall in this heading:

(a) Presence of permanent seats with safety equipment (e.g. safety seat belts or anchor points and fittings for installing safety seat belts) for each person or the presence of permanent anchor points and fittings for installing seats and safety equipment in the rear area for the driver and front passengers; such seats may be fixed, fold-away removable from anchor points or collapsible;

(b) Presence of rear windows along the two side panels;

(c) Presence of sliding, swing-out or lift-up door or doors, with windows, on the side panels 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)."

35. The Explanatory Notes in relation to Heading 87.04 read:

"*MOTOR VEHICLES FOR THE TRANSPORT OF GOODS*

The classification of certain motor vehicles in this heading is determined by certain features which indicate that the vehicles are designed for the transport of goods rather than for the transport of persons (heading 87.03). These features are especially helpful in determining the classification of motor vehicles, generally vehicles having a gross vehicle rating of less than 5 tonnes, which have either a separate closed rear area or an open rear platform normally used for the transport of goods, but may have rear bench-type seats that are without safety seatbelts, anchor points of passenger amenities and that fold flat against the sides to permit full use of the rear platform for the transport of goods. Included in this category of motor vehicles are those commonly known as 'multipurpose' vehicles (e.g. van-type vehicles, pick-up type vehicles and certain sports utility vehicles). The following features are indicative of the design characteristics generally applicable to the vehicles which fall in this heading:

(a) Presence of bench-type seats without safety equipment (e.g. safety seat belts of anchor points and fittings for installing safety seat belts) or passenger amenities in the rear area behind the area for the driver and front passengers. Such seats are normally fold-away or collapsible to allow full use of the rear floor (van-type vehicles) or a separate platform (pick-up vehicles) for the transport of goods;

(b) ...

(c) Absence of rear windows along the two side panels; presence of sliding, swing-out or lift-up doors, windows, on the side panels or in the rear for loading and unloading goods (van-type vehicles);

(d) Presence of a permanent panel or barrier between the area for the driver and front passengers and the rear area;

(e) Absence of comfort features and interior finish and fittings in the cargo bed area which are associated with the passenger area of vehicles (e.g. floor carpeting, ventilation, interior lighting, ashtrays)."

36. I was referred to a couple of cases in which the Explanatory Notes were the subject of comment by a court or tribunal. In Attorney General of Canada v Suzuki Canada Inc 2004 FCA 131 the Federal Court of Appeal was concerned with whether certain all-terrain vehicles should be classified

under Heading 87.03 or alternatively as "*motorcycles*" under Heading 87.11. Malone JA, giving the judgment of the Court, stated at para 13:

"*To satisfy their interpretive purpose, and to ensure harmony within the international community, the Explanatory Notes should be respected unless there is a sound reason to do otherwise.*"

37. Don Scott Commercials (2005) Customs Duties Cases/C00196 concerned an appeal to a tribunal sitting in London against the classification for purposes of import duty of various vehicles under Heading 87.04 rather than Heading 87.03 – in England, unlike Bermuda, Heading 87.04 carried the higher rate of duty. The Tribunal stated at para 21 of its decision that it found the Explanatory Notes for those Headings "*difficult to understand*" and "*muddling*". The Tribunal stated at para 22:

"*... we think that the vehicles that fall on the 87.03 side of the dividing line are multi-purpose vehicles that are suitable for both the carriage of passengers and goods, but nevertheless they consist of one single body (without fixed division), the comfortable and safety-equipped seats for passengers in the rear section are removable, so that goods can be carried, but nevertheless when the seats are in place they have windows and the comfort features associated with the carriage of persons. The sort of vehicle that falls on the 87.04 side of the dividing line appears to have a fixed division between the passenger section and the goods section.*"

38. Assistance in classifying the Vehicles may also be found in the "*General rules of interpretation*" ("*GRI*") in the Bermuda Nomenclature. They do not mention the Explanatory Notes, but provide in material part:

"*Classification of goods in the Bermuda Nomenclature 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. When ... goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. …

. . . . .

(c) When goods cannot be classified by reference to 3 (a) … they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

39. When approaching the question of classification the Collector rightly looked first to the Explanatory Notes. As these are guidance issued by the WCO she would have had to have good reason for departing from them. It was only if with the assistance of the Explanatory Notes she was unable to reach a judgment as to the Heading under which the Vehicles should be classified, ie if upon analysis both Headings appeared equally applicable, that the GRI would have come into play as a tie-breaker.

40. The principal test which the Collector applied was whether on the one hand the Vehicles were solely capable of carrying goods, in which case they fell under Heading 87.04, or alternatively whether they were multipurpose and could carry both goods and passengers, in which case in her judgment they fell under Heading 87.03. This is illustrated by the following extracts from the Review Decision:

"*8. The predominant, most obvious, and most relevant feature of the Hi-Jet when considering whether it is solely capable of carrying goods or if it is multipurpose and can carry passengers, is the bench seat which allows passengers to ride in the rear of the vehicle.*

. . . . .

14. The specifications that the Collector was referring to in the letter dated 5th May 2014, mentioned that there was a rear seat, and that the vehicle is capable of not only carrying goods, but also passengers. …"

41. But that was not the correct test. The Collector should have considered whether the Vehicles were principally designed for the transport of persons, in which case they fell under Heading 87.03, or alternatively whether they were principally designed for the transport of goods, in which case they fell under Heading 87.04. Vehicles in each category may be capable of carrying out the principal function of vehicles falling within the other category: hence

both categories include "multi-purpose" vehicles. The Collector may have been applying this test, as well as the test mentioned above, in the following extract from the decision under review:

"*'15. The Importer submits that the primary feature that is indicative of the primary purpose of the vehicle is to stand back as it were and consider the design and characteristics of the vehicle as a whole.'*

16. I agree with the excerpt from the Statement of Case in paragraph 15 above, however, when considering the 'stand back' test the fact that the Hi-Jet is a vehicle which can carry goods and can ***also*** *carry passengers is unassailable.*"

42. The question for the Court is whether Rayclan has satisfied me that, had the Collector consistently applied the correct test, her decision on classification is one at which she could not reasonably have arrived.

43. In order to answer this question it is necessary to consider the characteristics of the Vehicles. They had some features which point towards classification under Heading 87.03 as vehicles for the transport of persons: eg seatbelts for the rear seat; rear side windows which only went half way down, which may reasonably be regarded as a "child safety feature"; and no permanent panel or barrier between the area for drivers and the front passengers. They had other features which point towards classification under Heading 87.04 as vehicles for the transport of goods: eg a fold-away bench seat in the back which, when folded, disappeared into a cavity below the cargo bed. Some features, such as the sliding back doors, strike me as equally compatible with both Headings. In my judgment the Collector could in these circumstances reasonably have concluded that, standing back, the Vehicles were principally designed for the transport of persons and should therefore be classified under Heading 87.03.

44. It was therefore unnecessary for the Collector to resort to the GRI, and she did not do so. If it had been necessary, she would have been unlikely to find that either Heading provided a more detailed description than the other. As to numerical order, Heading 87.04 occurs after Heading 87.03, and thus that

test would have favoured classification under the latter heading. But on the facts of this case the "*numerical order*" test was not engaged.

Seventh through Ninth Grounds

45. I need only consider these grounds briefly. Suffice it to say there is nothing in them. I am not satisfied that the Tribunal misconstrued the evidence of Amy Greenslade. It was a matter for the Tribunal's discretion whether to permit the viewing of a Daihatsu Hijet vehicle other than one of the six Vehicles imported by Rayclan, as was the weight to be attached to the "child safety" feature of the rear window. Considered in the context of the narrative which preceded them, the Tribunal's reasons were perfectly satisfactory.

Summary and conclusion

46. The First Ground of appeal is allowed. The Tribunal erred in law when it held that Rayclan's burden was to prove that the decision of the Collector was incorrect. What Rayclan had to prove was whether the Collector's decision was one at which she could not reasonably have arrived.

47. The Fourth Ground of appeal is also allowed. The Tribunal erred in law by breaching the rules of natural justice when it held that the "*reasonableness*" standard of proof put forward by the Collector was incorrect without giving the parties an opportunity to address it on that issue.

48. The remaining grounds of appeal are dismissed.

49. Under section 29(2) of the 1976 Act I have jurisdiction to determine whether the Collector's decision was one at which she could not reasonably have arrived. I shall do so as this will be more cost effective than remitting the matter to the Tribunal for rehearing. I am satisfied that the Collector could reasonably have determined that the Vehicles fell under Heading 87.03

rather than 87.04. Rayclan's appeal against the Review Decision is therefore dismissed.

50. I am satisfied that for purposes of RSC Order 55, rule (7) the Tribunal's decision has occasioned the Collector substantial wrong in that by reason of that decision the Collector would only be entitled to collect (or, having collected, retain) 35.5% rather than 75% import duty on the Vehicles. If I am mistaken that the Tribunal's decision has occasioned the Collector substantial wrong, in the exercise of my discretion I should nonetheless have allowed the appeal.

51. The decision of the Tribunal is therefore quashed and the Collector's classification of the Vehicles under Heading 87.03 is reinstated.

52. I am grateful to both counsel for their helpful submissions.

53. I shall hear the parties as to costs.

Dated this 4th day of February 2016

Hellman J