

IS IT A BIRD, IS IT A PLANE...OR IS IT A VAN?

In the case of TC06082: Noel Payne, Christopher Garbett and Coca-Cola European Partners Great Britain Ltd First-tier Tribunal August 2017, the three joined appeals raised the same issue, namely whether each of three different types of vehicle supplied by Coca-Cola to its employees was a 'goods vehicle' for the purposes of s115(2) ITEPA 2003, which defines such a vehicle as '..a vehicle of a construction primarily suited for the conveyance of goods or burden of any description...'

The three different types of vehicle were a VW Transporter T5 Kombi van (second generation) (Kombi 2), a VW Kombi Transporter T5 (first generation) (Kombi 1) and the Vauxhall Vivaro.

Until 1997, Coca-Cola's technicians had used estate cars. In 1997 Coca-Cola decided to equip their technicians with vans because they were required to carry significantly more, and heavier, equipment. It had become apparent that the vans originally used by Coca-Cola, with 1.9 litre diesel engines, were underpowered and therefore Coca-Cola had started using the Vivaro and the Kombi 1.

Coca-Cola offered its employees the choice between a panel van (i.e. with no seats in the mid-section of the vehicle) and a vehicle as modified by a third party specialist contractor. It was suggested by HMRC that the employees would opt for the van as modified by the third party in order to use the rear seats for their own private purposes and the taxpayers confirmed that this was correct.

HMRC argued that the three vehicles were primarily designed, with subsequent adaptations, to provide transport for up to five people including the driver. The second row of seats was not designed to be removed on a regular basis and required two people to remove or insert seats with specialist knowledge and training.

After detailed evidence regarding the specifications of the three van models, the Tribunal stated:

'...I do not think that it precludes an interpretation of the word "construction" in section 115(2) that includes modifications and adaptations to the original construction of the vehicle.

Also, I consider that the purpose of the legislation argues against such a limited meaning of the word "construction" and, instead, suggests that modifications and adaptations made to a vehicle from time to time should be capable of forming part of its "construction". The charge to income tax in respect of a vehicle provided to an employee arises when the vehicle is made available to the employee (section 114(1) and 116 ITEPA). The charge arises on an annual basis. It would be strange that the charge to tax on the provision of a vehicle to an employee in a particular income tax year should depend on the historic (original) construction of a vehicle rather than its state at the time when it is made available. In my view, Parliament intended the test of whether a vehicle was a "goods vehicle" to be applied throughout the period of time that the vehicle was made available to the employee in each tax year. If subsequent modifications and adaptations were to be disregarded, it would be possible, as Mr Conolly fairly observed, for an employer to acquire a vehicle falling within the definition of a "goods vehicle", add windows and additional rows of seats (taking up all the cargo space), make the modified vehicle available to the employee and claim that it nonetheless remained a "goods vehicle". Such an incongruous conclusion suggests, of itself, that it cannot be correct.

On that basis, it was found that the Vivaro was a goods vehicle but that both versions of the Kombi were not constructed primarily to be suitable for the conveyance of goods or burden.

Upper Tribunal

In the Upper Tribunal ([2019] UKUT 0090 (TCC) HMRC Commrs v Noel Payne, Christopher Garbett and Coca-Cola European Partners Great Britain Ltd Upper Tribunal March 2019, Coca-

Cola appealed against the decision in relation to the Kombi 1. Mr Payne and Mr Garbett appealed against that decision in relation to the Kombi 2 and HMRC appealed against the decision in relation to the Vivaro.



A number of criticisms were levelled at the First-tier Tribunal for their approach. However, the Upper Tribunal felt that it should be slow to overturn what were primarily findings of fact and ultimately all of the appeals were dismissed.

Court of Appeal

In the Court of Appeal [2020] EWCA Civ 889: Noel Payne, Christopher Garbett and Coca-Cola European Partners Great Britain Ltd v HMRC Commrs July 2020, the taxpayers appealed again for a variety of reasons. However, one of the important points was whether the definition of a van considered the vehicle as it came off the production line or included subsequent alterations of that vehicle. The Court stated:

'It follows, therefore, that in my judgment, one should consider the Kombis and the Vivaro for that matter, in their modified

form, and should not start from the premise that they were based on panel vans for the conveyance of goods and look for sufficient alterations to justify moving away from that original function. The term "construction" cannot be taken to mean the construction of the vehicle as it rolled off the factory production line. Such an approach would be contrary to the purpose of Chapter 6, ITEPA 2003 which is to ascertain the taxable benefit that is in the hands of the employee in the tax year in question.

It also follows from the conclusion that "construction" of a vehicle is not confined to fundamental changes to its structure, that depending on the facts, fixings for removable seating and the seating itself may be part of the "construction" of a vehicle and that one is not looking for changes to an original structure.'

The taxpayers' appeals against the Kombi decision were dismissed but HMRC won their appeal regarding the Vivaro:

'...in deciding that the Vivaro was primarily suited for the conveyance of goods, it seems to me that the FTT was swayed by its view of the mid-section of the Vivaro which it described and evaluated at [150] of the FTT Decision which is set out at [15] above. The so-called difference in layout from that of the Kombi is the space for goods/tools in the Vivaro mid-section. In this regard, the FTT seems to have lost sight of the fact that it had found at [34(4)] that the mid-section of the Kombi 2 also had removable storage units. Even on the FTT's view that a narrow balance is enough to be "primarily suited", it seems to me that the difference is insufficient upon which to differentiate the Vivaro from the Kombi and to decide that the Vivaro is primarily suited for the conveyance of goods. This is all the more so when one considers whether the Vivaro was suited first and foremost for that purpose. It seems to me that the only reasonable conclusion on the facts, having weighed all the features of a Vivaro and considered the vehicle as a whole (including its appearance) is that it, like the Kombis, is multi-purpose and is not primarily suited to the conveyance of goods.'

It is not clear as yet whether the taxpayer will appeal to the Supreme Court but the case contains important matters of principle in judging whether a vehicle is a 'car' or 'van' and hence has significant tax consequences. Will this provide HMRC with ammunition to move on to have a look at dual-cab pick-up trucks? Only time will tell.

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