

Mauritius Assessment Review Committee considers "intended use" to determine HS code classification

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Executive summary

The Mauritian Assessment Review Committee (the ARC) recently determined that a second-hand catamaran imported by a Mauritian company (the Applicant) was correctly reclassified from Harmonized System (HS) Code 8901.1000 (Cruise, ships, excursion boats, cargo ships, barges and similar vessels) to HS Code 8903.9100 (Yachts and other vessels) by the Post Clearance (PCA) Unit of the Customs Department, of the Mauritius Revenue Authority (the Respondent). While none of the goods under the HS Codes in question are subject to customs duty, goods that are within the scope of HS Code 8903.9100 are not exempt from Value Added Tax (VAT).

The basis of the decision was that, as interpreted by the relevant Explanatory Notes (EN) of the Harmonized Commodity Description and Coding System (the Harmonized System), its General Rules for Interpretation (GIRs) and the application of the GIRs in *Lising & Co Ltd (2012) SCJ 478*, the characteristics, properties and intended use inherent to the catamaran was "a yacht or vessel for pleasure and sports" and consequently, it should be classified under HS Code 8903.9100.

The decision of the ARC in the present case hinges on the classification for Customs duty purposes, though it is the *Value Added Tax Act* (VATA) that is the appropriate law. For instance, VATA exempts journals and periodicals of

heading No. 49.02: the said heading includes newspapers. Newspapers are treated as taxable supplies on the basis that the law exempts only journals and periodicals.

In the present case, the fact that the ARC based its decision on the classification for Customs duty purposes does not change the VAT treatment for a catamaran. It would therefore be interesting to understand the impact of this determination on any exempt and zero-rated goods that depends on the Customs classification. This may also have an impact on supplies made by registered persons, though VATA should prevail.

Detailed discussion

The current case is in respect of VAT on the import of goods so that any VAT is payable at the time the goods are removed from Customs.

The Applicant acquired a catamaran which was declared and cleared for delivery under HS Code 8901.1000. Following a compliance review by the PCA Unit of the Respondent, the catamaran was reclassified under HS Code 8903.9100: resulting in a VAT claim from the Respondent.

Mauritius is a member to the International Convention on the Harmonized System (the Convention). Pursuant to the *Customs Act*, the *Customs Tariff Act* (CTA) and the Customs Tariff (Classification of Goods) Regulations 1988, the classification of any goods for the purpose of the CTA is determined in accordance with the Convention and any related publications by the World Customs Organisation (WCO). The GIRs of the Harmonized System are used for the classification of products within the relevant tariff headings of the Convention.

There are six GIRs. The rules provide a hierarchical set of principles, and if the correct classification can be ascertained as at a given stage it is unnecessary to proceed further (*HM Revenue & Customs v Flir Systems AB*).

GIRs

- ▶ Rule 1 requires an objective consideration of the characteristics and properties of the goods in terms of the relevant chapters and EN to the Harmonized System.
- ▶ Rule 2(a) deals with incomplete or unfinished and unassembled or disassembled goods. Rule 2(b) deals with goods which are composed of a mixture of materials and substances and which are not classifiable through the use of Rules 1 and 2(a).

- ▶ Rule 3 is a tie breaker provision for the purpose of rule 2(b) when goods are, *prima facie*, classifiable under two or more headings.
- ▶ Rule 4 comes into operation when Rules 1, 2 and 3 cannot determine the tariff classification of products: the products will be classified under the heading appropriate to the goods to which they are most akin.
- ▶ Rule 5 specifies how to classify containers.
- ▶ Rule 6 deals with the classification of goods to the subheadings of a heading.

The ARC ruling

The basis of the ARC ruling revolves on the classification of the catamaran for the purposes of customs duty.

The ARC explained that the “objective characteristics and properties as defined in the wording of the relevant heading” is the decisive criterion. The intended use of the good may constitute an objective criterion for classification if it is inherent to the good and the inherent character must be capable of being assessed on the basis of the good’s objective characteristics and properties (*Case C-486/06 BVBA Van Landeghem*). The Mauritian Supreme Court in the case of *Lising & Co Ltd (2012) SCJ 478* applied these principles.

The competing HS Code headings are as follows:

8901.1000: Cruise ships, excursion boats, ferry boats, cargo ships, barges and similar vessels **for the transportation of persons and goods**

8903.9100: Yachts and other vessels **for pleasure or sports**

The EN makes a clear distinction between heading 8901 and 8903, whereby heading 8901 covers “all vessels for transport of persons and goods,” and the latter heading covers “all vessels for pleasure and sport.” In addition, a vessel under Heading 8903 cannot be classified under Heading 8901 as the latter specifically excludes vessels of heading 8903.

The catamaran was equipped with the required facilities for a passenger to stay and enjoy the luxury and facilities offered by the vessel. A passenger can book the vessel for eight days with lodging and meals on board, akin to a hotel. It is a not vessel merely for the transportation of persons: taking passengers from one point to another.

The ARC therefore maintained the Respondent’s classification.

Implications

There is no public information currently as to whether the Applicant has appealed the decision of the ARC.

Under the First Schedule to the VATA, ships for the transport of persons or both persons and goods falling under heading No. 89.01 are exempt from VAT. Heading 89.01 of the First Schedule to the CTA refers to "Cruise, ships, excursion boats, ferry-boats, cargo ships, barges and similar vessels for the transportation of persons or goods." It is believed that the VAT exemption is restricted to ships only so that any excursion boats and ferry boats are outside its scope. In other words, the scope of exempt goods for the purposes of VATA is a subset of Heading 89.01, so that not all the goods that are within the said Heading are exempt from VAT. Furthermore, interpreting the scope of the exempt supply for VAT purposes should have been the foundation for this case, though the ultimate VAT outcome is the same.

Goods are classified in the Harmonized System in the state as they are presented to Customs. The commercial purposes of a good does not change its technical characteristics.

Intended use should be considered where this is clearly a relevant criterion as indicated by the headings under consideration. Intended use must not be confused with the subjective or actual use to be made of the good. The GIRs, as evidenced by a number of international cases, involve a degree of subjectivity. Also, as per section 15(2)(e) and

section 20(1) of the *Customs Act 1988*, the burden of proof remains on the taxpayer. Due care should therefore be exercised by taxpayers in classifying a good under a specific heading: specially, where in addition to considering the objective criteria, the intended use is also being considered. Failure to adequately understand the wording of a specific heading could result in a wrong heading classification with potential reclassification by the MRA and unintended administrative burden and financial consequences.

It has been established by the Courts, including the *Privy Council in Bike World Limited (2002) PRV 46* that the Customs & Excise department is able to seek the views of the WCO when they are in doubt of any specific heading classification: such classification received must be given due consideration.

The ARC did not consider the point raised by the Applicant in its written submissions on the possibility to recover the input tax on the basis that this point was not raised in the reasons for representations and the proceedings. It is important to emphasize the fact that a business motive is not sufficient for a person to recover the VAT a person may incur: the principal consideration is the use of the catamaran for the purposes of the taxable supplies of the Applicant. It is not clear if the ARC would have adopted an approach consistent with the neutrality principle, so that VAT in question would have been treated as allowable though not supported by an appropriate Customs import declaration.

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