[2019] UKUT 90 (TCC)

Appeal number: UT/2017/0173
UT/2018/0001
UT/2018/0002
UT/2018/0003

INCOME TAX – whether vehicles are "goods vehicles" – decision of FTT upheld

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

(1) NOEL PAYNE
(2) CHRISTOPHER GARBETT
(3) COCA-COLA EUROPEAN PARTNERS
GREAT BRITAIN LIMITED

Respondents

Tribunal: Judge Greg Sinfield
Judge Jonathan Richards

Sitting in public at the Royal Courts of Justice, Strand, London on 19-20 February 2019

Hugh Flanagan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

John Gardiner QC and Ed Hellier, counsel, instructed by Reynolds Porter Chamberlain LLP, for the Respondents

DECISION

Introduction

1. Chapter 6 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") imposes income tax charges where vehicles are made available to an employee. Section 10(1) of the Social Security and Benefits Act 1992 imposes a corresponding charge to national insurance contributions ("NICs"). The income tax and NIC charges vary depending on whether the vehicle is a "car" or a "van", both of which have statutory definitions that themselves depend on whether the vehicle is a "goods vehicle" as defined.

2. At relevant times, Coca-Cola European Partners Great Britain Limited ("Coca-Cola") employed Mr Payne and Mr Garbett as technicians. In connection with that employment, in the tax year 2016-17, Coca-Cola provided them with the use of a second generation VW Transporter T5 Kombi van (a "Kombi 2"). In addition, in the tax year 2011-12, Coca-Cola provided other employees with the use of first generation VW Kombi Transporter T5 vans (each a "Kombi 1") and Vauxhall Vivaro vans (each a "Vivaro") [1].

3. HMRC concluded that, for the purposes of the income tax and NIC charges, none of the Kombi 1, the Kombi 2 or the Vivaro were "goods vehicles". They therefore issued Mr Payne and Mr Garbett with PAYE coding notices for 2016-17 on this basis. On the same basis, HMRC made a decision that Coca-Cola was liable for Class 1A NICs in the tax year 2011-2012. Mr Payne, Mr Garbett and Coca-Cola all appealed against HMRC's decisions and their appeals were heard together by the First-tier Tribunal (Tax Chamber) (the "FTT"). The parties asked the FTT simply to determine, as a point of principle, whether or not the Kombi 1, the Kombi 2 and the Vivaro were "goods vehicles" and leave the numerical consequences of that decision to the parties[2].

4. On 30 August 2017, the FTT (Judge Guy Brannan) released a decision (the "Decision") deciding that the Vivaro was a "goods vehicle" but that the Kombi 1 and Kombi 2 were not. Coca-Cola appeals against that decision in relation to the Kombi 1. Mr Payne and Mr Garbett appeal against that decision in relation to the Kombi 2 and HMRC appeal against the decision in relation to the Vivaro. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

Relevant statutory provisions

5. The definitions that are relevant for the purposes of these appeals are set out in s115 of ITEPA which, so far as relevant, provides as follows:

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[1] In describing the Kombi 1, the Kombi 2 and the Vivaro as "vans" we are simply using their common description and are not determining whether they are "vans" for income tax and NIC purposes.

[2] Before the FTT, the parties evidently proceeded on the basis that, if the vehicles were not "goods vehicles", they were necessarily "cars". Mr Gardiner explained that this assumption is not strictly accurate. However, the taxpayers do not seek to re-open this point on appeal.

115 Meaning of "car" and "van"

(1) In this Chapter—

"car" means a mechanically propelled road vehicle which is not—

(a) a goods vehicle,

(b) a motor cycle,

(c) an invalid carriage, or

(d) a vehicle of a type not commonly used as a private vehicle and unsuitable to be so used;

"van" means a mechanically propelled road vehicle which—

(a) is a goods vehicle, and

(b) has a design weight not exceeding 3,500 kilograms,

and which is not a motor cycle.

(2) For the purposes of subsection (1)—

"design weight" means the weight which a vehicle is designed or adapted not to exceed when in normal use and travelling on a road laden;

"goods vehicle" means a vehicle of a construction primarily suited for the conveyance of goods or burden of any description;

The FTT's decision

6. The FTT heard evidence from Mr Thomas Sayer, who was the car and van fleet manager for Coca-Cola. It also had expert evidence from Mr Michael Roberts, an independent engineer with particular expertise in the fields of motor-vehicle design and construction. Mr Michael Phillips, an automotive executive with over 30 years of experience in the automotive industry, gave expert evidence for HMRC.

Findings of fact

7. At [12] to [47], the FTT made findings as to the characteristics of the Kombi 1, the Kombi 2 and the Vivaro. None of those findings of primary fact is challenged though the parties have very different perspectives on the conclusions that should be drawn from those primary facts. We will not attempt to summarise all these detailed findings but would simply highlight the following general points emerging from those findings as they help to put in context some of the discussion below:

(1) The Kombi 1, the Kombi 2 and the Vivaro as used by Coca-Cola's employees at the relevant times were all based on commercially available panel vans. Coca-Cola paid a third-party specialist contractor to modify those vehicles to make them suitable for their employees' use.

(2) The commercially available version of the Vivaro was effectively divided into just two sections: a driver and passenger seat at the front, with a relatively large storage area behind. The modifications made to the Vivaro included, but were not limited to, the addition of a second row of seats (that

could accommodate two passengers). A window was added next to those seats and a steel bulkhead added behind those seats so that goods being transported could not enter the passenger compartment in the event of sudden braking (see [16(2)] and [16(7)]).

(3) Thus, Coca-Cola's modifications to the Vivaro resulted in the creation of a "mid-section" (of volume around 2.5 m^3) including the additional two passenger seats that was separated from the rear cargo area by the steel bulkhead. The seats in the mid-section could be removed, but only with the use of tools. Even with the second row of seats in place, there would be around 1.5 m^3 of space in the mid-section that could be used to carry goods (see [19] and [21]) and therefore the FTT concluded at [150] that the mid-section of the Vivaro was adapted for the carrying of a significant amount of cargo. A number of other modifications were made to the Vivaro.

(4) The commercially available version of the Kombi 1 already included, as standard, a bench of seats that could seat up to three passengers behind the driver and single passenger seat at the front of the vehicle. This second row of seats was fixed to tracking on the floor of the Kombi 1 but could be removed without any tools. The commercially available Kombi 1 had windows on either side of this second row of seats.

(5) Coca-Cola's modifications to the Kombi 1 included adding a central partition behind this second row of seats to separate passengers from the rear load area and to prevent loose items entering the passenger compartment if the vehicle braked suddenly (see [26(2)]). Therefore, like the Vivaro, the Kombi 1 had a "mid-section" that included seating for passengers, although unlike in the Vivaro, this seating could be removed without tools. Coca-Cola added storage and racking to the rear section of the Kombi 1.

(6) The commercially available Kombi 2 had fundamentally the same design as the Kombi 1 although its front section included two seats for passengers other than the driver rather than one. Coca-Cola's modifications to Kombi 2 were similar to those of Kombi 1 and included the addition of removable racking in the mid-section that was suitable for the transport of goods (see [34(4)]). In relation to the Kombi 2, it was a contractual requirement imposed by Coca-Cola that the employee/driver of the vehicle had the racking in the mid-section in place during working hours. In other words, during working hours the second row of seats was required to be removed (see [39]).

8. At [48] to [82], the FTT summarised aspects of the expert evidence provided by Mr Roberts and Mr Phillips and, at [84] to [126], the FTT summarised the parties' respective submissions.

The FTT's formulation of the statutory test

9. At [127] to [144], under a heading "The principles", the FTT explained how it interpreted the statutory test. All parties had expressed themselves to be broadly content

with the approach that Judge John Brooks in the FTT had followed in the case of *Timothy Jones v HMRC* [2012] UKFTT 265 ("*Jones*"). In that case, the FTT was considering the definition of "goods vehicle" in s115(2) of ITEPA in the context of a vehicle that had been modified. The FTT said, at [16] and [17] of the decision in *Jones*:

> 16. A "goods vehicle" is defined by s 115(2) ITEPA as a "vehicle of a **construction** primarily suited for the conveyance of goods or burden of any description" (emphasis added).
>
> 17. Although the Land Rover Discovery supplied to Mr Jones may have become primarily suited for the conveyance of goods or burden this is as a result of modifications, which have been made to the vehicle so as not to fundamentally alter its structure, and not because it was "of a construction" for such a purpose.

In the Decision, however, Judge Brannan disagreed with this approach. He said, at [132]:

> I do not think that "construction" as used in section 115(2) carries any necessary reference to the "structure" of an object in the sense of its core framework or its chassis or body.

10. Judge Brannan's approach to the interpretation of the word "construction" in s115(2) is set out at [133] to [135] as follows:

> 133. A motor vehicle is usually an assembly of parts added to the body and chassis of the vehicle. Most of these parts can be removed and replaced either for maintenance or replacement. Thus, for example, the windscreen wipers, light bulbs, battery, wheels/tyres, carpets and even (as Mr Conolly accepted) the doors can be removed and replaced, albeit in some instances only by a skilled mechanic. But these are surely all part of a vehicle's construction. It seems to me that, in context, the "construction" of a motor vehicle comprehends the whole of its parts employed to perform its functions, even if those parts are removable. Plainly, those parts must in some way form part of the vehicle. By contrast, for example, badges stuck to the windscreen would not, in my view, form part of the vehicle's construction.
>
> 134. Moreover, again with respect, I do not think that there is any statutory justification for the requirement that the alteration or modification must be "fundamental" in order to form part of a vehicle's "construction". In my view, all that is necessary is that a modification or alteration forms part of the vehicle's assemblage of parts i.e. that it forms part of the vehicle's "construction" in the sense that I have explained above.
>
> 135. Mr Conolly accepted, rightly in my view, that "construction" was a wider concept than merely looking at the state of the vehicle when it rolled off the manufacturer's assembly line. In other words, the vehicle's "construction" could change as the vehicle is modified or adapted.

11. At [142], Judge Brannan rejected the idea that, for an adaptation or modification to a vehicle to be relevant in the context of s115(2), that adaptation had to be "permanent".

12. At [143], Judge Brannan observed that s115(2) asks whether the construction of a vehicle is "primarily suited" to the conveyance of goods or burden. He concluded that, in cases where a "multi-purpose" vehicle has more than one potential "suitability", it is necessary to identify whether any suitability is predominant. Moreover, at [162], he concluded that, if a vehicle is suitable both for the carriage of goods and the transport of passengers, with neither suitability predominating, then the vehicle will not be a "goods vehicle" as defined since it has no "primary suitability" at all, still less a "primary suitability" of conveying goods.

13. Judge Brannan also recorded, at [144], the parties' agreement that, to ascertain whether a vehicle is a "goods vehicle", it is necessary to take into account relevant characteristics of the vehicle, viewed objectively. The use to which a particular employee actually puts the vehicle is not relevant.

The FTT's conclusions and reasoning

14. At [147] to [148], the FTT concluded that the commercially available version of the Vivaro (i.e. prior to Coca-Cola's modifications) had the characteristics of a goods vehicle. The FTT referred to features of the (unmodified) Vivaro referred to at [15] and concluded that, while those features were not exclusive to goods vehicles, they were more typical of goods vehicles than of vehicles primarily designed to carry passengers. The FTT noted the following particular features of the (unmodified) Vivaro that it considered to be "more characteristic of a vehicle the construction of which was designed to carry goods":

> (1) The Vivaro's engine and transmission are mounted transversely and the driver's position set high to maximise the load area and load volume.
>
> (2) The mechanical components on the Vivaro were packaged to allow a large flat load space and its height was designed to maximise the load area and load volume.
>
> (3) The design and dimension of the sliding door facilitated loading.
>
> (4) The suspension and braking system were designed to deal with heavy loads and a trailer.

15. At [149], the FTT noted that it was necessary to take into account adaptations to the Vivaro because it was necessary to consider "all the characteristics of the vehicle as it was provided to the employee". At [150], it considered those adaptations, noting that they involved the addition of seating that could only be removed with tools. However, it concluded that, even with the addition of the seating, there remained a material amount of cargo-carrying space and that Coca-Cola's adaptations to the mid-section of the Vivaro included adaptations for the carrying of cargo. At [151], it considered whether the addition of a window to the mid-section of the Vivaro made any difference, but concluded that it did not.

16. The FTT's overall conclusion at [152] in relation to the Vivaro was:

> 152. It is clear that the Vivaro had a dual capability of carrying passengers and carrying cargo. However, for the reasons I have given and taking account of all the characteristics of the vehicle, it seemed to me that, on a narrow balance, the construction of the Vivaro was primarily suited to the conveyance of goods.

17. Turning to the Kombi 1 and Kombi 2, the FTT concluded at [154] that they were based on panel van designs and had the features, referred to in [148] and summarised at paragraph 14 above to which it had attached significance. However, at [156], the FTT noted that the basic design characteristics of the Kombi 1 and Kombi 2 were also found in other Volkswagen vans such as the Shuttle and the Multivan which were "essentially minibuses designed to carry passengers".

18. The FTT then considered, at [157] to [159], whether the adaptations to the Kombi 1 and Kombi 2 compelled the conclusion that its construction, as modified, made it more suitable for the carriage of goods but concluded that it did not. For example, the addition of the bulkhead served a dual purpose: it enabled goods to be carried in the rear cargo section but it also ensured the protection of passengers in the mid-section. Overall, the FTT concluded that the Kombi 1 and Kombi 2 were both "multi-purpose vehicles" that were originally designed to enable workers to be taken to work and goods to be carried. The comfort of passengers in the mid-section might be lower than in a vehicle designed specifically for the carriage of passengers, but that did not detract from the conclusion that it was suitable for the carriage of passengers. Even the addition of racking in the mid-section of the Kombi 2 did not make it "primarily suitable" for the conveyance of goods. Looking at the entirety of the Kombi 1 and Kombi 2, the FTT concluded that they were "equally suitable for carrying goods and passengers" and that therefore they did not constitute "goods vehicles".

The correct approach to the statutory definition of "goods vehicle"

19. The parties were not agreed on the correct approach to applying the statutory definition. It is, therefore, convenient to set out what we consider to be the correct approach on a few key issues which will be relevant to our examination of all parties' appeals before dealing with the detail of each party's submissions on the characterisation of the Vivaro, the Kombi 1 and the Kombi 2.

The relevance or otherwise of the terms "car" and "van" as commonly understood

20. Mr Gardiner QC, who appeared with Mr Hellier, submitted that the "ordinary meaning" of the words "car" and "van" should inform the approach to the statutory definitions in dispute in this appeal. He noted that, in s115 of ITEPA, the defined term "goods vehicle" is used in order to determine whether a vehicle meets the definition of "car" or "van". If a vehicle is a "goods vehicle", it cannot be a "car" as defined. If a vehicle is not a "goods vehicle", it cannot be a "van" as defined. Moreover, even if a vehicle is not a "goods vehicle", it will not be a car unless it is a "vehicle of a kind commonly used as a private vehicle" or is suitable to be used in that way (see limb (d) of the definition of "car" in s115). That, he argued, meant that Parliament necessarily had in mind concepts of "car" and "van" as used in the real world when enacting the statutory scheme.

21. In addition, Mr Gardiner referred us to authorities in which similar definitions had been considered. For example, in *Flower Freight Co Ltd v Hammond* [1963] 1 QB 275, it was necessary to consider whether the presence of a roof rack on a passenger-carrying vehicle meant that the vehicle was "constructed or adapted for use for the carriage of goods". Of this test, Lord Parker CJ said:

> … The question is not what does this particular vehicle usually carry nor what is this vehicle capable of carrying, but what is the use for which the vehicle was constructed or adapted. It seems to us that this question falls to be resolved by looking at the vehicle and considering whether vehicles of this kind are ordinarily used for the carriage of passengers and their effects or for the carriage of goods.

In his oral submissions, Mr Gardiner relied heavily on this approach and submitted that it was "blindingly obvious" from a simple observation of the vehicles that, since they were all based on a panel van design, they were necessarily "vans" and "goods vehicles".

22. We agree, however, with Mr Flanagan that the statutory scheme does not rest only on the commonly understood meanings of "car" and "van". If Parliament had wished to rely only on these commonly understood meanings, it could simply have left the terms undefined. Instead, Parliament has enacted prescriptive definitions of "car" and "van", both of which depend on whether a vehicle meets the prescriptive definition of "goods vehicle". A striking example of the extent to which the statutory definitions of "car" and "van" can differ from what might be considered to be the ordinary meaning of those words can be found in *Morris and County Pharmacy Ltd v Revenue and Customs Commissioners* [2006] STC 1593 in which Park J determined that a motorhome was a "car" for the purposes of the predecessor provision to s115 of ITEPA.

23. Therefore, a consideration of what vehicles might commonly be understood to be "cars" or "vans" is not directly relevant in this appeal. Of course, in saying this, we are not deciding that a court or tribunal should apply the statutory definitions in a vacuum without regard to reality. It will be necessary to pay close attention to the construction of the vehicle and decide the particular use (if any) for which it is primarily suited. That exercise will often involve a consideration of the uses for which vehicles of a similar nature are suitable. However, we reject the submission that, simply because a vehicle answers to the description of a "van" as that term might be commonly understood, it necessarily follows that it is a "van", or a "goods vehicle", for the purposes of s 115 of ITEPA.

The approach to identifying "primary suitability"

24. Mr Flanagan made two points in relation to the test of whether a vehicle is of a construction "primarily suited" to the carriage of goods.

> (1) Before this question can be answered, it is necessary first to determine whether a vehicle has any "primary suitability" at all. If a vehicle has a number of "suitabilities", none of which predominate, it is not of a construction "primarily suited" to the conveyance of goods or a burden.

(2) It would be wrong to conclude that a vehicle is of a construction "primarily suited" for the conveyance of goods simply because it is marginally more suitable for this purpose. The scheme of the legislation is to tax the benefit to an employee of being provided with a car. Therefore, even if a vehicle is of a construction marginally more suitable for the conveyance of goods, it should not be regarded as "primarily suited" for this purpose when it is still substantially providing the benefit of a car. Rather, the concept of "primarily suited" is to be interpreted as satisfied only where any further suitability is of an ancillary or limited nature.

25. Mr Gardiner disagreed with both of Mr Flanagan's arguments for the following reasons:

(1) He acknowledged the theoretical possibility that a vehicle's "suitabilities" might be equally predominant. However, given his submission that the task is to identify whether a vehicle is like a "car" or a "van", having due regard to the general meaning of those words, he doubted whether there would be many vehicles whose primary suitability could not be ascertained and submitted that the Vivaro, the Kombi 1 and the Kombi 2 were not such vehicles.

(2) He argued that Mr Flanagan's submission recorded at paragraph 24(2) amounted to a reworking of the definition that Parliament has enacted.

26. We accept Mr Flanagan's submission set out in paragraph 24(1). We have already explained why we do not consider that the statutory definition is asking whether the vehicle is a "car" or a "van" as generally understood. The statutory provisions clearly envisage that a vehicle that has no primary suitability is not a "goods vehicle" as defined.

27. We do not, however, accept Mr Flanagan's submission set out in paragraph 24(2) and we agree with Mr Gardiner that it involved a reworking of the statutory test. Parliament has enacted a test based on "primary" suitability. As a matter of ordinary English, if a vehicle is of a construction marginally more suitable for the conveyance of goods than it is for any other use, its "primary suitability" is that of conveying goods. Moreover, the scheme of the legislation is that the provision of a "car" or a "van" to an employee will attract a tax charge, although the amount of the charge applicable to the provision of a "van" may often be lower than the charge on the provision of a car. Since the provision of both cars and vans is taxed, we see no indication in the statutory provisions that Parliament intended that suitability as a passenger vehicle should carry any greater weight than suitability for the conveyance of goods.

The features that are part of the "construction" of a vehicle

28. The arguments of Mr Gardiner under this heading are most easily understood in the context of the removable seating in the Kombis. Since that seating could be removed without tools, he argued that it was not part of the "structure" of the Kombis and so could not be an aspect of the "construction" of the Kombis that was relevant to

determining whether they were of a "construction primarily suited for the conveyance of goods or burden".

29. The arguments were not, however, limited to the significance or otherwise of the removable seating in the Kombis but rather, set out an approach to ascertaining a vehicle's "construction". Mr Gardiner accepted that the "construction" of the vehicles was not fixed once and for all when they come off the manufacturer's production line. However, he submitted that, since the Kombis and the Vivaro were all originally constructed as panel vans (which are archetypal goods vehicles), they could only cease to be goods vehicles if they were somehow "reconstructed". That, it was submitted, would require a fundamental change to their "structure". Mr Gardiner criticised the FTT's reasoning, set out at [132], that relied on Latin roots of the word "construction" and, in his submission, failed to acknowledge that the words "construction" and "structure" were derived from the same root and that there was, therefore, a necessary relationship between the construction of a vehicle and its structure.

30. We do not accept Mr Gardiner's criticisms of [132]. In that paragraph, the FTT was addressing the contention (upheld by the FTT in *Jones*) that the "construction" of a vehicle could only be altered by modifications which amount to a fundamental alteration to its structure. We consider that the FTT was correct to reject this contention for the simple reason that the statute makes no mention of the concept of "fundamental" alterations to "structure".

31. We will not seek to circumscribe what parts of a vehicle are, or are not, part of a vehicle's construction that are relevant to the statutory definition of "goods vehicle". That can only be ascertained on a case by case basis by reference to a particular vehicle under consideration. We will say, however, that we agree with Mr Gardiner that, as a linguistic matter, there is a clear link between "construction" and "structure": for example, the "construction" of a vehicle will be manifest in the vehicle's "structure". However, we do not consider that this compels the conclusion that any parts of a vehicle that are removable are not part of its structure and so are not relevant to an examination of whether the vehicle is of a construction primarily suited for the conveyance of goods. As Mr Flanagan (and the FTT at [133]) observed, many parts of a vehicle are removable including items that on any view are part of its construction and relevant to its suitability for use, such as its wheels.

32. More specifically, we consider that the FTT was both entitled, and correct, to conclude that the Kombis' removable seats were part of their construction and relevant to the question of whether the Kombis were of a construction primarily suited for the conveyance of goods or burden. The FTT had before it evidence that indicated that the Kombis were manufactured and sold with the removable seating in place and that the manufacturer's brochure described the Kombis as "flexible, versatile and extremely adaptable … offering seating for up to five passengers". It would have been quite wrong for the FTT simply to ignore the removable seats.

The significance or otherwise of the seats for passenger and driver at the front of the vehicles

33. This issue is best understood in the context of the appeal relating to the Kombis, although it raises the more general question of how to ascertain the "primary suitability" of a vehicle that can carry both goods and passengers.

34. At [161], the FTT said:

> In the case of the Kombi 1, therefore, the front row was primarily suitable for carrying passengers (including the driver) …

35. Later in this decision, we will consider the detailed criticisms that Mr Gardiner and Mr Hellier made of paragraph [161]. However, in this section, we will focus on their general point, by reference to authorities not relied upon before the FTT, such as *Cook v Hobbs* [1911] 1 KB 14, that the FTT was wrong to conclude that seating for passengers and driver at the front of the vehicle pointed in favour of a suitability for passenger transport.

36. In *Cook v Hobbs*, Mr Cook owned a cart that he used to take goods to market. When travelling to market, he would take his wife and son with him to help in serving customers. The Customs and Inland Revenue Act 1888 provided that no carriage licence was required for a "cart … which is constructed or adapted for use, and is used, solely for the conveyance of any goods or burden in the course of trade or husbandry" and the question was whether Mr Cook's cart fell within the scope of this exemption.

37. Clearly, the presence of the word "solely" in the statutory exemption created some difficulty and all members of the court said that they found the case difficult. However, the court concluded that, despite the presence of seating for passengers, Mr Cook's cart fell within the exemption. Lord Alverstone CJ gave the following reasons:

> I am not altogether clear what the draftsman of the Act meant by the word "burden" and I am not going to attempt to define it. But I think that at all events it includes persons who are taken to a market along with goods for the purposes of assisting in selling them there, and who have to bring them back if they are not sold. I think that, provided the cart is constructed, and in other respects, used only for the carriage of goods in the course of trade, the presence of such persons in the cart will not make it taxable any more than did the presence of the farm labourers who rode to their work in *Latchford v Kelsey*.

38. In *Coleborn (T.) & Sons Limited v Blond* [1951] 1 KB 43, the question was whether an ex-army vehicle which could transport wireless equipment and had seats for an officer and a driver in the cab and two seats in the rear for soldiers working the equipment was a vehicle "constructed or adapted solely or mainly for the carriage of passengers". Bucknill LJ said:

> In my opinion, the mere fact that a vehicle, in the course of the work for which it was designed, habitually carried a man or men does not ipso facto make it a vehicle constructed solely or mainly for the carriage of passengers. Every vehicle, unless controlled by wireless, must have a

> driver and is, in a sense, constructed for the carriage of a passenger. But [the relevant statutory provision] speaks of road vehicles "constructed or adapted solely or mainly 'for the carriage of passengers' and therefore, if the accommodation for carrying passengers is only incidental to the use of the vehicle for other purposes, it would be exempt. Thus the crew of an armoured car or the driver and attendants in an ambulance are all, in one sense, passengers; but the main purpose which causes their presence in the vehicle is that they may use it for the special purposes for which it was constructed.

39. Mr Gardiner sought to extract from these authorities a principle that the seating for passengers and driver at the front of the vehicles could not, on their own, be indicative of a suitability for passenger transport. Rather, all other relevant aspects of the vehicles should first be identified and, if those characteristics indicated a primary suitability for the conveyance of goods or burden, then the seating at the front should be regarded as ancillary to that primary suitability and so "take its colour" from those other features of the vehicle. Mr Flanagan submitted that the authorities did not set out a principle of such broad application to this appeal. First, they related to different statutory provisions. Secondly, at most, they indicated that accommodation for driver and passengers in what was otherwise a vehicle primarily suited for the carriage of goods would not prevent such a vehicle being a "goods vehicle"; they did not provide that accommodation for driver and passengers was irrelevant to the question of whether the vehicle was otherwise primarily suitable for the conveyance of goods or burden.

40. We have derived relatively little assistance from *Coleborn v Blond* or *Cook v Hobbs*. As Mr Flanagan rightly submitted, those authorities deal with different statutory provisions that set out somewhat different tests. For example, the statutory provision under consideration in *Cook v Hobbs* expressly invited an examination of the actual use to which a vehicle is put whereas both parties were agreed that actual use is not relevant in the context of s115 of ITEPA. The extract from Lord Alverstone CJ's decision out in paragraph 37 above is based at least partly on the use to which the seats on the cart were put. Neither *Coleborn v Blond* nor *Cook v Hobbs* offer much by way of guidance on whether a vehicle that is suitable for carrying both goods and passengers has any "primary suitability" or, if it does, how it should be identified.

41. We reject the submission of Mr Gardiner summarised in paragraph 39, at least as regards the passenger seating at the front. If correct, his submission would mean that the presence of passenger seating at the front of any vehicle would be incapable of influencing the outcome when s115 of ITEPA is applied since, on that approach, that passenger seating would "take its colour" from the rest of the vehicle. We see no warrant for such an approach in the context of a statutory provision that is clearly focused on identifying the "primary suitability" of a vehicle (if one exists) by reference to all relevant aspects of its construction. Nor do we consider that this was the approach followed in *Cook v Hobbs*. Lord Alverstone CJ decided that if Mr Cook's cart was constructed and, in other respects, used only for the carriage of goods, the passenger seating would not disqualify it from the exemption. He did not determine that the presence of any passenger seating was irrelevant in determining whether the cart was so constructed or used. We do, however, agree with Mr Gardiner that the presence of a seat at the front for the driver can shed no light on whether a vehicle is a "goods vehicle"

as defined since, at least as matters currently stand, all "mechanically propelled road vehicles" with which s115 of ITEPA is concerned need a driver.

42. However, we do consider that *Cook v Hobbs* offers some guidance as to the meaning of the word "burden" in s115 of ITEPA. Therefore, if an examination of all relevant characteristics of a vehicle's construction (including any passenger seating at the front) indicates that a vehicle is primarily suitable for the conveyance of goods with the passenger seating having a connection with the conveyance of those goods similar to that identified in *Cook v Hobbs*, then the passengers transported on those seats could count as "burden" so as not to displace the vehicle's primary suitability for the conveyance of "goods or burden". Such a conclusion, would have to be grounded in evidence as to the suitability of the vehicle and of the passenger seating within it.

HMRC's appeal against the FTT's decision in relation to the Vivaro

43. HMRC appeal against the FTT's decision in relation to Vivaro on four broad grounds:

> (1) The FTT followed a flawed approach to deciding whether the Vivaro was "primarily suited" to the conveyance of goods or burden.
>
> (2) The FTT failed to have regard to and/or to give due weight to factors that made the Vivaro's mid-section equally suitable for the conveyance of passengers and goods.
>
> (3) The FTT wrongly applied a test of "typicality" by considering whether features of the Vivaro were more "typical" of cars or vans.
>
> (4) The FTT's conclusion that the Vivaro was a "goods vehicle" was one that no reasonable Tribunal, properly applying the law could reach.

Ground 1

44. Ground 1 can be disposed of briefly as it relied on Mr Flanagan's submissions as to how "primary suitability" should be identified which we have considered, and rejected, in paragraphs 24 to 27 above. There was no error of law in the FTT's conclusion at [152] that "on a narrow balance", the construction of the Vivaro was primarily suited to the conveyance of goods. The FTT found that the Vivaro had two "suitabilities": carrying goods and carrying passengers. Once the FTT concluded that the construction of the Vivaro made it more suitable for carrying goods than passengers, if only by a fine margin, it followed that it was of a construction primarily suited to the conveyance of goods.

Grounds 2 and 4

45. HMRC's Grounds 2 and 4 involved challenges to the FTT's factual conclusion on the principles outlined in *Edwards v Bairstow*. In large part, these challenges related to the following findings that the FTT made in connection with the mid-section of the Vivaro at [150]:

> In addition to the features listed in [148], the mid-section of the Vivaro was adapted to carry a significant amount of cargo, both behind the twin seats and to their left-hand side. This seemed to me to be an important feature in the overall assessment of the characteristics of the Vivaro. Clearly the majority of the mid-section was taken up by seating (which I recognise could only be removed with tools), but there was a material amount of cargo-carrying space (1.5 m^3 in Mr Roberts' estimation) which, in my view, could not be ignored and I reject Mr Conolly's submission to the effect that it was *de minimis*. This mid-section cargo-carrying capability which existed even when the mid-section seats were in the vehicle), when taken together with the rear cargo area, suggested to me that the primary suitability of the Vivaro was for the conveyance of goods.

46. Mr Flanagan submitted that the evidence before the FTT demonstrated that, while the presence of a seat for the driver in the front of the Vivaro was a neutral feature, as a whole, the front section of the Vivaro was primarily suited to the carrying of passengers. He accepted that the rear section of the Vivaro was primarily suited to the conveyance of goods. Therefore, he argued that the mid-section of the Vivaro was of central importance and the FTT's conclusions on that section had tipped the scales in the taxpayers' favour. It followed in his submission that the FTT's conclusion was particularly sensitive to any error in the evaluation of the mid-section.

47. Mr Flanagan's first point was that, at [158], as part of its conclusion that the Kombis were primarily suited for the conveyance of passengers, the FTT attached significance to the fact that, judged in terms of space, the mid-section of the Kombis was equally suitable for the conveyance of goods and passengers: when the removable seats were in place, almost all the space was taken up by those seats; when they were removed, almost the entire space was available for conveying goods. Therefore, he submitted that parity of reasoning should have led the FTT to the conclusion that the construction of the Vivaro was at least equally suitable for the conveyance of goods and passengers. Indeed, he argued that the situation with the Vivaro was even clearer since the seating in its mid-section was fixed and could only be removed with tools indicating a greater passenger carrying suitability than the Kombis. On a similar note, Mr Flanagan argued that the FTT should have given less weight to the goods-carrying suitability of the mid-section because that suitability was more limited than that in the rear section.

48. In assessing arguments such as this, we have concluded that we should be slow to interfere with findings of fact made by the FTT as part of an application of the correct legal test that takes into account relevant considerations, and ignores irrelevant considerations. In *Biogen v Medeva* [1996] UKHL 18, [1997] RPC 1 at p. 45 Lord Hoffmann said when discussing the issue whether an invention was "obvious" in patent proceedings:

> The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis,

> relative weight, minor qualification and nuance (as Renan said, la vérité est dans la nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.

We consider those remarks to be as applicable to the multi-factorial assessment that the FTT was performing of the "suitabilities" of a vehicle as they are to the question of "obviousness" in patent proceedings.

49. Applying that approach, we reject Mr Flanagan's submissions set out in paragraphs 46 and 47 above. At their highest, those arguments suggest that the FTT could have reached a different conclusion which is unsurprising since, as the FTT had acknowledged, the issue was finely balanced. Photos of the Vivaro that we were shown clearly demonstrated that some of the Vivaro's mid-section was suitable for carrying goods and it was a matter for the FTT to evaluate the relative significance of its goods and passenger-carrying suitabilities. Nor do we consider that the fact the FTT reached a particular conclusion in relation to the Kombis compelled the same conclusion in relation to the Vivaro. The Vivaro and the Kombis were different vehicles made by different manufacturers.

50. Mr Flanagan also took us to the evidence before the FTT. He showed us photographs that demonstrated that the Vivaro had large windows in its mid-section and argued that the bulkhead between the mid-section and the rear section was suitable as much for protecting passengers from goods sliding forward as it was for protecting the goods themselves. He invited us to conclude that the seats in the front and the rear were comfortable and suitable for transporting passengers over reasonable distances. But the FTT clearly had these points in mind when it made its decision, not least because it made detailed findings on the layout and nature of the Vivaro. While this evidence suggests that another conclusion might have been possible, it does not demonstrate that the FTT made any error of law in reaching the factual conclusion that it did.

51. Mr Flanagan submitted that, in at least two respects, the FTT had failed to take into account relevant aspects of the evidence in evaluating the suitability of the Vivaro's midsection. For example, he submitted that the cross-examination of Mr Roberts demonstrated that goods could not be transported in the mid-section while passengers were using the seats and that the absence of a bulkhead between the mid-section and the driver's compartment meant that piling goods in the mid-section would create a health and safety hazard. However, we see no force in this submission. First, the fact that the FTT did not specifically recite the evidence in question in the Decision does not mean that the evidence was "ignored". Second, the passages of Mr Roberts's cross-examination cannot support the weight that Mr Flanagan sought to put on them. Mr Roberts accepted that the goods-carrying potential of the Vivaro's mid-section would be reduced if passengers were using the seats. He did not say that no goods could be transported while passengers were using the seats. Even if he had, that would not compel the conclusion that the Vivaro was more suitable for the transport of passengers. Moreover, the absence of a bulkhead behind the driver was a feature of the unmodified Vivaro which HMRC accepted was primarily suitable for the transport of goods and so

cannot have supported a conclusion that the Vivaro was more suitable for the transport of passengers.

52. In addition, Mr Flanagan criticised the FTT for not giving more weight to the evidence, recorded in paragraph 13 above, that suggested employees of Coca-Cola chose vehicles with seats in the mid-section so that they could use the vehicles for private use: that, he submitted, was strong evidence of "suitability" that the FTT simply ignored. However, there is nothing in that argument: the FTT cannot have "ignored" this evidence since it appeared in the Decision.

53. Moving away from the Vivaro's mid-section, Mr Flanagan criticised the FTT's reliance, at [148], on a set of factors as being "more characteristic" of vehicles primarily suited to the conveyance of goods when those were also found in passenger vehicles. But the FTT had already acknowledged, at [147], that these features were not exclusive to goods-carrying commercial vehicles. Therefore, the features that the FTT listed were simply an element in its overall evaluation and the FTT made no error of law in taking them into account.

54. Grounds 2 and 4 disclose no error of law in the Decision and we dismiss HMRC's appeal on those grounds.

Ground 3

55. Under Ground 3, HMRC challenge the approach that the FTT adopted at [147] and [148]. In those sections of the Decision, they submit that the FTT made findings, based on Mr Roberts's expert evidence, as to features that were more "characteristic" of goods vehicles than cars. However, Mr Roberts was giving evidence as to the characteristics of vehicles commonly described as cars and not of vehicles that meet the statutory definition set out in s115 of ITEPA (and which would include multi-purpose vehicles). With that background, HMRC's Ground 3 can be broken down into the following three arguments:

> (1) Ground 3(a): Mr Roberts's evidence in this regard was irrelevant, because it was not directed at the definition of "car" as employed in the statute. Alternatively, some of the "goods-carrying commercial vehicles" about which Mr Roberts was giving evidence would have been "cars" for the purposes of s115 of ITEPA. Therefore, the FTT should have regarded Mr Roberts's evidence as consistent with a conclusion that the Vivaro was a multi-purpose vehicle that was a "car" for the purposes of s115.
>
> (2) Ground 3(b): The FTT's analysis of vehicles that are "characteristic" of "goods-carrying commercial vehicles" was flawed because it involved a "statistical happenstance". Most "cars", for the purposes of s115 ITEPA will be ordinary family cars rather than multi-purpose vehicles and most "vans" for the purposes of s115 will be ordinary panel vans. Therefore, by focusing on features of the vehicles which were shared with panel vans but not with ordinary family cars, the FTT was adopting a skewed test which would, by weight of numbers, necessarily incline it to a conclusion that the Vivaros were "vans" for the purposes of s115.

(3) As Ground 3(c), HMRC challenge the FTT's factual conclusion that the characteristics relied on are more "typical" of goods-carrying vehicles. We have already dealt with this challenge in paragraph 53 above.

56. We reject Ground 3(a) as it involves an over-literal reading of part only of the Decision. At [148], the FTT was seeking to compare features of the Vivaro with features of other vehicles as part of the exercise of determining whether the construction of the Vivaro was "primarily suited" to the conveyance of goods. It had well in mind the fact that vehicles primarily suited to the conveyance of goods would share features with vehicles primarily suited to the conveyance of passengers (as it said so expressly at [147]). For that reason, the results of the FTT's comparison at [148] produced the relatively modest conclusion that certain features of the Vivaro are "more characteristic" of vehicles whose construction was primarily suitable for the conveyance of goods. The FTT recognised, at [149], that this modest conclusion could be displaced by the presence of other factors. We do not, therefore, accept that Ground 3(a) discloses any error of law since the passages of the Decision complained of are part of a balanced, and nuanced, evaluation of the evidence of precisely the kind with which we should be slow to interfere (for the reasons set out in *Biogen v Medeva).*

57. For similar reasons, we reject Ground 3(b) which proceeds on the footing that, in [147] and [148], the FTT was engaged in an exercise in statistical sampling. The FTT was not performing any such exercise: it was conducting a measured and balanced analysis of relevant factors duly acknowledging the presence of other potentially relevant factors.

Conclusion on HMRC's appeal in relation to the Vivaro

58. HMRC's appeal is dismissed.

The taxpayers' appeal in relation to the Kombi 1 and Kombi 2

59. Mr Gardiner pursued two main themes in his criticism of the Decision arguing that the FTT made errors of principle in its approach and also reached factual conclusions that were flawed in the *Edwards v Bairstow* sense in part because they arose from faulty reasoning.

60. It was submitted that the FTT made the following errors of principle in its approach to the Kombi 1 and Kombi 2:

(1) It failed to step back and consider that the essence of the statutory test was whether the Kombis were "vans". In several paragraphs of the Decision, the FTT acknowledged that the Kombis were based on panel van designs (see for example [24] and [31] and the description of the vehicles in paragraph [4]) yet nevertheless reached the "extraordinary" conclusion that the Kombis were "cars". Had it stepped back, it would have realised that there was no relevant distinction between the Kombis and the Vivaro.

(2) It failed to look at the "structure" of the Kombis. In particular, by focusing on removable seats, the FTT was looking at the way the Kombis were used, not at their suitability.

(3) It made comparisons between the Kombis on the one hand and "multipurpose" or "dual purpose" vehicles on the other. Yet the concept of a "multipurpose" or "dual purpose" vehicle does not appear in the statute and, where it is defined, in other contexts it applies only to vehicles with rear windows (which the Kombis do not have).

61. Mr Gardiner made the following criticisms of the specific reasoning that led the FTT to its conclusions:

(1) He described one criticism, of paragraph [161], as "decisive". In that paragraph, he submitted that the FTT had analysed the Kombis as having three sections. The rear section, he submitted, was suitable solely for the carriage of goods (and the FTT's conclusion that it was "primarily" suitable for such goods was plainly flawed since no passengers or effects could be carried in the rear section). The FTT had concluded that the middle section was equally suitable for the conveyance of goods and passengers. However, crucially, it had concluded that the front section was primarily suitable for the conveyance of passengers. That conclusion could not follow in the light of authorities such as *Cook v Hobbs* and *Coleborn & Sons Limited v Blond*. On those authorities, the front section should have taken its colour from the remainder of the vehicle and be regarded as primarily suitable for the carriage of goods or, at the very least, have had a mixed suitability. If the FTT had not reached its flawed conclusion on the front section, its perception of the balance of the vehicle would have changed and it would have concluded that it was of a construction primarily suitable for the conveyance of goods or burden.

(2) More generally, Mr Gardiner subjected paragraphs [154] to [162] to detailed scrutiny, suggesting that they contained several instances of flawed reasoning or an application of the wrong test.

(3) Mr Gardiner also submitted that the FTT had ignored evidence that Mr Sayer gave as to payloads of goods vehicles as compared with passenger vehicles.

Failure to "step back"

62. We reject the criticism set out in paragraph 60(1). We have already explained why the concepts of "car" and "van" as used in ordinary parlance were of little relevance to the statutory definitions that the FTT was applying. Therefore, the fact that the Kombis were described as "vans" or based on designs for a "panel van" could not be determinative. Rather, the FTT had to perform a multi-factorial evaluation of whether the Kombis were of a construction primarily suited for the conveyance of goods or burden. As we note further below, we have some reservations about the way that the FTT analysed the front section. However, overall, we consider that the FTT did

appropriately "step back" and consider its conclusions in the light of the overall characteristics of the vehicle as demonstrated by the concluding sentence of [161]:

> Looking at the entirety of the vehicle and taking all of its characteristics into account, it seemed to me equally suitable for carrying goods and passengers and cannot, therefore, be regarded as a "goods vehicle".

63. Finally, we can understand why, as a matter of pure impression, all parties have expressed surprise that the FTT concluded that the Vivaro was a "goods vehicle" whereas the Kombis were not. However, as we have noted, the Vivaro and the Kombis were different vehicles made by different manufacturers and had somewhat different features. The FTT itself noted that its evaluation of both vehicles was finely balanced and therefore it could reasonably come to different conclusions on the two different makes of vehicle.

Focus on "use", not "suitability" of the "structure"

64. We have already explained what we consider to be the correct approach to ascertaining the "structure" of a vehicle for the purposes of s115 of ITEPA. It follows from an application of that approach that the FTT made no error of law in taking into account the presence of the Kombis' removable seating when evaluating whether they had a primary suitability and, if so, what that suitability was.

65. Nor do we consider that the FTT focused on "use". The FTT correctly directed itself at [144] that the actual use to which any vehicle was put was not relevant to the definition of "goods vehicle" in s115(2) of ITEPA. Moreover, contrary to the submissions of Mr Gardiner, the effect of the FTT's decision is not that the Kombis were "goods vehicles" when the seating was removed and "cars" when the seating was present. The Kombis' status did not fluctuate: rather the FTT's conclusion was that the presence of seating that could be removed was an aspect of its evaluation that pointed towards an equal suitability for the transport of passengers and the conveyance of goods or burden. We therefore reject the taxpayers' criticisms of the Decision under this heading.

Comparison with "multipurpose" or "dual purpose" vehicles

66. Mr Gardiner criticised what he submitted was a comparison with multipurpose vehicles (such as the Volkswagen Shuttle and Minivan) at [156] and [159]. However, there was no arguable error of law in that approach. At [156], the FTT was simply noting that the Shuttle and Minivan, which it considered to be minibuses (and thus not "goods vehicles") had the same "basic design characteristics" as the Kombis. It was plainly open to the FTT, when considering whether the Kombis had a "primary suitability" and, if so, what that suitability was, to consider the suitabilities of other vehicles that it regarded as similar.

67. Nor do we consider that there is any error in the FTT's use of the term "multi-purpose" vehicle. As we have noted, in order to be a "goods vehicle", a vehicle must have a primary suitability: if it has a number of suitabilities, none of which is predominant, it will not satisfy that definition. The term "multi-purpose vehicle" does

not appear in s115 of ITEPA but, read in context, the FTT is clearly using it to encapsulate the concept of a vehicle that has no "primary suitability": see, for example, [162] in which the FTT uses the expression "a genuinely multi-purpose vehicle with no primary suitability".

68. Finally, Mr Gardiner's reference to different contexts in which Parliament has defined the concept of a "multi-purpose vehicle" sheds no light on whether the Kombis answer to the different statutory definition of "goods vehicle" in s115. We therefore reject the criticisms of the Decision under this heading.

The "three-section" analysis of the Kombis and the treatment of the front section

69. At [161], the FTT said:

> 161. In the case of the Kombi 1, therefore, the front row was primarily suitable for carrying passengers (including the driver), the mid-section was equally suitable for carrying passengers or (with the seats removed) goods. The rear cargo section was plainly primarily suitable for the conveyance of goods. In my view, therefore, it was not possible when looking at the vehicle as a whole to conclude that it was primarily suitable for the conveyance of goods. Looking at the entirety of the vehicle and taking all of its characteristics into account, it seemed to me equally suitable for carrying goods and passengers and cannot, therefore, be regarded as a "goods vehicle".

At [162], the FTT made it clear that these conclusions applied to the Kombi 2 as well.

70. In the first three sentences of this paragraph, there is perhaps a suggestion that the FTT was dividing the Kombi 1 into three constituencies each of which could return a candidate who represented the conveyance of goods, the conveyance of passengers or neither and that the classification of the Kombi 1 would depend on the number of candidates of each hue returned. That is certainly the basis on which Mr Gardiner approached his submissions set out in paragraph 61(1) above. However, it is clear from the final sentence of [161], that this is not the basis on which the FTT approached its task. It properly and relevantly had regard to aspects of the three sections of the Kombi 1 as, between them, those three sections accounted for the whole of the vehicle. However, in the final sentence, the FTT stood back and considered the suitabilities of the vehicle as a whole.

71. We agree with Mr Gardiner that the FTT made an error of law in its evaluation of the front section of the Kombis as the presence of a seat for the driver could not point in favour of the Kombis having a suitability for passenger transport since every road vehicle needs a driver. However, for the reasons set out below, we do not accept the submission that the presence of seating for passengers in the front section either pointed towards a suitability for the carriage of goods or was a neutral indication.

72. First, as noted in paragraph 41 above, we do not accept the submission that, as a matter of law, the presence of seating for passengers at the front should "take its colour" from features of the vehicle behind it and so be incapable of influencing the result of the classification exercise.

73. Therefore, it was a matter for the FTT to evaluate what conclusions it drew from the presence of passenger seating at the front. In principle, the FTT could have been shown evidence that demonstrated that the seating at the front was connected with the Kombis' suitability for the conveyance of goods. For example, conceptually, evidence could have been given that the transport of loads of the kind that the Kombis are suitable to carry would require, in addition to a driver, the presence of one or more passengers to help with loading and unloading. If such evidence had been presented, the FTT could have considered it in the light of the fact that the Kombis also had removable seating in the midsection. If compelling evidence had been given on this issue, and the FTT had ignored it, there would have been force in the submission that the FTT erred in not concluding that front section of the vehicle was suitable for the conveyance of goods or burden (since, by analogy with the judgment in *Cook v Hobbs*, the passengers who were to help with loading and unloading might count as "burden"). However, Mr Gardiner did not point us to any such compelling evidence and did not contradict Mr Flanagan's submission that no evidence had been given to the FTT on this issue.

74. Mr Gardiner was also critical of the FTT's conclusion in [161] that the rear section of the Kombis was "primarily" suitable for the conveyance of goods. The FTT should, he submitted, have concluded that the rear section was solely suitable for that purpose. However, we do not think that the FTT's conclusion was to any extent influenced by a perception that the rear section of the Kombis was of a construction suitable to carry passengers or their effects. At [29], the FTT had found as a fact that the rear section of the Kombi could only be used for the purpose of carrying goods. Therefore, the conclusion in [161] that the rear section was "primarily" suitable for the carriage of goods is a typographical or drafting error rather than indicating an error in reasoning.

75. In conclusion, even though the FTT was wrong to draw the conclusion it did from the presence of a seat for the driver, overall it was entitled to reach the conclusion that the accommodation of seating for passengers in the front section pointed against the construction of the Kombis being primarily suitable for the carriage of goods or burden. Furthermore we consider that, after it had weighed the significance of its conclusion on the seating at the front against other competing considerations, it was open to the FTT to conclude that the Kombis had no overall "primary suitability" with the result that they were not goods vehicles. We therefore reject the criticisms of the Decision under this heading.

Other criticisms of the FTT's process of reasoning

76. Mr Gardiner made some minor criticisms of the FTT's reasoning set out at [154] to [162]. For example, he pointed out instances of the FTT referring to the "intended" use of the Kombis without making clear whose "intentions" were relevant or how the question of "intention" was relevant to the Kombis' "suitability". He pointed out that, at [155], the FTT referred to the "characteristics" of the vehicle whereas the statutory test requires "suitability" to be ascertained from the vehicle's "construction". There is no force in these textual criticisms. Reading the Decision as a whole, we are satisfied that the FTT had the correct test in mind throughout.

77. More fundamentally, Mr Gardiner criticised the chain of reasoning at [154] to [156]. He argued that, in [154], the FTT had reached a preliminary conclusion that the Kombis were goods vehicles (because they had the same type of original design features as were present in the Vivaro). Therefore, in [157], instead of asking whether modifications to the Kombis "compel the conclusion" that they are more suitable for the conveyance of goods, the FTT should have asked itself whether the modifications displaced its preliminary conclusions that the Kombis were goods vehicles.

78. We agree with Mr Flanagan that this involves a mis-reading of the Decision. At [154], the FTT reaches no preliminary conclusion. Indeed, it is clearly stated that while the Kombis share some features with the Vivaro that is not, of itself, determinative if other features of the Kombis indicate that they are not suitable primarily for the conveyance of goods. Mr Gardiner, in his oral submissions, criticised the FTT for referring to the "suitability of the vehicles" at [154] without referring to their "construction" and suggested that this indicated that the FTT had considerations of "use" in mind, but we regard that as a minor textual criticism similar to those set out at [77] above. At [156], the FTT indicates some features (foreshadowed in [154]) that point against the Kombis being goods vehicles, namely that the same "basic design characteristics" seen in both the Kombis and the Vivaro are also found in minibuses. We dismiss the submission that there is a logical flaw in the FTT's reasoning that amounts to an error of law.

Ignoring Mr Sayer's table of comparative weights

79. Mr Sayer's evidence as to payload was recorded at [42]. It was not, therefore, "ignored". It was not incumbent on the FTT to refer to that evidence again when setting out its reasoning.

Conclusion on the taxpayers' appeals in relation to the Kombis

80. The taxpayers' appeals are dismissed.

Disposition

81. The taxpayers' appeals, and that of HMRC, are dismissed.

JUDGE GREG SINFIELD **JUDGE JONATHAN RICHARDS**

RELEASE DATE: 22 March 2019