JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 10 of 1973

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.(Presiding).
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A.(Ag.).

B E T W E E N THE COLLECTOR-GENERAL - Respondent-Appellant

A N D THE CARIBBEAN CEMENT CO. LTD. - Appellant-Respondent

Mr. E.A. Harris, Assistant Attorney-General
instructed by the Crown Solicitor for
the Respondent-Appellant.

Dr. Lloyd Barnett, instructed by Messrs. Milholland,
Ashenheim & Stone for the Appellant-Respondent.

February 11 and March 17, 1976

SWABY, J.A.:

This is an appeal and cross-appeal by the respondent-appellant and the appellant-respondent, (hereinafter referred to as the Collector General and the Company, respectively) from a judgment delivered by Marsh, J., judge of the Revenue Court on March 2, 1973, reclassifying as an 'industrial truck' under Item 716.02 of Division 71 of the First Schedule of the Customs Tariff (Revision) Resolution, 1954 certain machinery, known as a Tennant 92 Industrial Power Sweeper, imported into the Island by the Company, which had previously been classified by the Collector General as a 'road motor vehicle' under Division 73, Item 732.02 of the Tariff, but which the Company all along claimed to be correctly classifiable under Division 71, Item 716-13.9 of the said Customs Tariff, as 'industrial machinery'. The Collector General also appealed from an order to pay the Company's costs, to be taxed or agreed, of and incident to the appeal in the Revenue Court. After hearing arguments from counsel for the parties on February 11, 1976 this Court (i) dismissed the appeal of the Collector General, (ii) allowed the appeal of the Company and classified the goods under item 716-13.9 of Division 71 of the Tariff, (iii) awarded costs, to be agreed or taxed, of and incident to the appeals both in the Revenue Court and in this Court to the Company and (iv) stated that we would later put our reasons in writing. This we now do.

In 1973 the Company imported for use in its factory at Rockfort two crates of power sweeping machinery and parts known as a Tennant 92 Power Sweeper of a value of $9,014:71 which were entered by the Company's Brokers on Import Entry No. 14759 on March 30, 1972. The duty was assessed thereon under Division 71 - 'Machinery other than electric', Head, "Mining, Construction and other Industrial Machinery", item 716-13.9, "Other", at the rate of 5% ad valorem, namely $495:80, under the general tariff, the country of origin being the United States of America. The Collector General refused this classification and demanded entry under Division 73 - 'Transport Equipment', Head - "Road Motor Vehicles", item 732.03, "Buses, truck lorries and road vehicles complete n.e.s." (i.e. not elsewhere specified or included) the rate of the general duty being 40% ad valorem. Additional duty amounting to $3,470:66 was, on April 7, 1972 paid under protest by provisional entry No. 146. On June 30, 1972 notice of objection pursuant to s.16(2) of the Customs Law, Chap. 89 was given by the Company's attorneys-at-law to the Collector General and application made for a review and revision of the assessment of the duty. The grounds stated in the objection were:-

1. That the goods were not designed or intended to be used on a road but were specifically designed for use in industrial warehouses, plants, mills, factories etc. Attention was drawn to the fact that the capacity of the vehicle was given in square feet per hour and not feet per hour. This being so, the goods, it was submitted, could not be classified as a "Road Motor Vehicle" and therefore could not be caught under tariff item No.732.03.9.
2. That the goods were either an industrial sweeper or, by virtue of a dust collector operated by a powerful vacuum fan, a vacuum cleaner, both of which would be "Mining, Construction and other Industrial Machinery" falling under tariff item No.716.13.9 "Other".

The Collector General replied on July 26, 1972 to the Company's attorneys-at-law that he had been informed on investigation that the equipment possessed all the necessary factors for a vehicle and although said to be for indoors was capable of being used on the road, and reference to a catalogue and/or inspection of the vehicle was requested so that a decision could be taken by him. This request was granted by forwarding a photo copy of the manufacturers' brochure or catalogue and

specifications on August 14, 1972 to the Collector General who was at the same time informed that inspection of the vehicle could be arranged by request on any week day at the Company's factory. On September 7, 1973 the Collector General replied that he had studied the brochure sent to him in the light of the Company's objection to the duty assessed and he could find no reason to review or reverse the duty assessed. Certain arguments in rebuttal of the Company's contention that the machinery was an industrial sweeper or vacuum cleaner requiring classification under item 716-13.9 of the Customs Tariff were also set out, chief of which were that:-

(i) all vehicles were removed from Divisions 71 and 72 of the Tariff by reason of the General Notes governing these sections;

(ii) there was no definition of 'road vehicles; and bearing in mind the General Notes to Divisions 71 and 72 the only inference was that the term "road" used in the Tariff was in contradistinction to "rail";

(iii) the fact that a vehicle was adapted by the makers for use indoors did not affect its classification as a road vehicle since in the classification of 'road', vehicles other than motor vehicles, wheel barrows and wheel chairs were included;

(iv) in so far as the Tennant 92 Sweeper was concerned it was observed that its use is both for indoors and outdoors; furthermore it collected 1800 lbs of stuff which presumedly it must dump somewhere.

On October 6, 1972 the Company gave Notice to the Collector General of its intention to move the Revenue Court as soon as Counsel on its behalf could be heard on appeal from the whole of his order or decision made on September 7, 1972 whereby it was ordered that the assessment of Customs duty on the Tennant 92 Power Sweeper of $3,470:66 should be made under item 732.03 of the First Schedule to the Customs Tariff (Revision) Resolution, 1954, and for an order that the said Sweeper fell within item No. 716-13.9 'Other' or item 713-01 "Tractors other than Steam" of the said Customs Tariff; or, in the alternative, did not fall within the said Customs Tariff or at all and was therefore not dutiable.

The Collector General in his Statement of Case on appeal in reply made certain admissions relating to the Company's case, and further gave notice of his intention to contend at the hearing of the appeal in the

Revenue Court that his decision had been validly made and should be confirmed by the learned judge of that Court for the reason that the Tennant Sweeper was a motor vehicle and therefore liable to duty under item 732.03, because the definition of "motor vehicle" contained in the Road Traffic Law, Cap. 346 was not an exhaustive definition for all purposes. He listed certain authorities on which he said he would rely in support of his contention, viz. -

(i) R. v. Thornton (1949) 96 Can. Crim. Cases 323;
(ii) Falkiner v. Whitton (1917) A.C. 106,
(iii) the definition of 'motor vehicle' in the United Kingdom Civic Amenities Act 1967; and
(iv) the copy brochure or specifications of the Sweeper by its Manufacturers

to show that the Tennant Sweeper was a 'motor vehicle'. He further stated that he would argue that even if the Tennant Sweeper was not liable to duty under item No. 732.03 as a "Road Motor Vehicle", by virtue of s.19(2) of the Customs Law it was liable to duty in the alternative under item 732.06, and would also contend that the fact that the Tennant Sweeper was adapted for use indoors or on private premises did not alter its basic features which made it akin to 'road motor vehicles'.

The appeal in the Revenue Court and indeed in this Court proceeded on the bases set out above and the authorities mentioned above were cited before that Court by counsel for the Collector General as well as in this Court.

In his written judgment the learned judge of the Revenue Court said, inter alia, that the Collector General, in classifying the Sweeper under item No. 732.03 of Division 73 "Transport Equipment" of the Tariff, thereby implied that the Sweeper was a "Road Motor Vehicle" which classification he did not accept as coming within the ordinary meaning of that expression, although on the evidence given before him the Sweeper was capable of being used on the roads in an emergency or for some limited special purpose. He referred to the evidence of Mr. Donald Lloyd Mattis, Motor Vehicle Examiner employed to the Minister of Works, a witness called by the Company, which was to the effect that he had been a motor vehicle examiner for 8 years during which time he had examined vehicles, carried out road tests, and issued certificates of fitness for vehicles; he had

examined the Sweeper for which a Special Permit would have to be issued by the Minister before it could be licensed for use on the roads - it had no road springs or speedometer - and so he classified it for tax purposes as a 'tractor'. Mr. Mattis regarded a 'tractor' as a vehicle that could not carry a 'pay load' but could only carry its loose tools. The fact that it sucked up dust would not be regarded by him as a 'pay load'. Under cross-examination Mr. Mattis said that the Sweeper was a 'motor vehicle' and could be used on the roads if specially adapted and if a special permit could be obtained from the Minister. He admitted that he had not examined the Sweeper for purposes of Customs Duty. It was part of the Company's case that it did not ever intend to fit certain mechanical accessories to the Sweeper in order to be able to obtain a certificate of fitness so that the Sweeper could be licensed for use on the roads, or to apply to the Minister for the grant of a Special Permit to use it on the roads, as such was not its intention.

The learned judge cited with approval Lord Atkinson's observations in Falkiner v. Whitton (1917) AC 106, a case cited by counsel for both parties. At p. 110 of his judgment Lord Atkinson said in connexion with the Australian Customs Tariff -

> "It also appears clear from an examination of these enactments that the words 'motor cars, waggons, and lorries' are not treated as terms of art, and are not used in them in any technical sense or with any special meaning. They must therefore be interpreted according to their common and ordinary meaning, namely, that which they bear in ordinary colloquial speech."

Marsh, J., said that he accepted this statement as indicating the approach which he ought to take in deciding questions under the Jamaican Tariff Resolution subject to any special qualifications or rules of interpretation that are set out therein. Having considered the evidence tendered, particularly the coloured brochure of the manufacturers of the machine along with its description and use, power operational mobility etc., he said that he formed the opinion that anyone describing the machine in colloquial speech would refer to it as a small "industrial truck" and he set out a full description of it, part of which he described as follows:- "It is also fitted with detachable power operated brushes at the front

and the side, and a vacuum mechanism which sucks up dirt and debris into a large hopper tank fitted to its underside, where the same is stored for disposal elsewhere. Apart from the brushes none of these special features is visible to the naked eye.

In answer to a question put to the Company's counsel by the learned judge counsel for the Company submitted that the machine could not properly be classified under item 716.02 of the Tariff, as an "Industrial truck (sometimes known as industrial tractor for use in factories, railroad stations, docks etc for internal transport)" because it was not used for internal transport which was an essential condition for classification under that item. The learned judge was not in agreement with this reply and said that, in his view, although it operated in a special way and by way of special equipment (some of which was detachable) its predominant purpose was to keep the factory and its environs clean, by collecting dirt and debris wherever the same might be found, and moving them to some convenient spot elsewhere within the compound for dumping. There was, in his view, no essential difference between that exercise and the use of a small open bodied truck, on which dirt and debris that had been previously swept up could be loaded manually, for removal elsewhere. The only difference was that in the case of the Tennant Sweeper it was fitted with a number of attachments which eliminated the use of manual labour in the sweeping and collecting part of the process. While, therefore, it may not be used exclusively for transport, it was used in that capacity and the transportation of the rubbish which it collected was an integral part of its function. He saw it therefore as a piece of machinery designed to sweep up and collect rubbish and transport the same to some central point for dumping. In short, he said, it is an 'industrial truck' used internally within the factory for collecting and transporting garbage and other debris and the fact that it was transporting rubbish rather than goods or personnel was, in his view, irrelevant. The learned judge, continuing further, said that while he accepted that in the ordinary meaning of the term the machine was not a 'Road Motor Vehicle', and that the classification contended for by the Company was more accurate than that of the Collector General, he was equally satisfied that none of the competing classifications provided the most specific description of the

goods available under the Tariff. In his judgment a more specific description of the equipment was to be found under Item 716.02 of the Tariff which reads:

> "Industrial trucks (sometimes known as industrial tractors for use in factories, railroad stations, docks etc for internal transport)"

He eventually found that although the machine was described by its manufacturers as an industrial Sweeper it was, in his estimation, a more comprehensive machine than a mere sweeper since it also collected and transported the debris which it swept up or gathered. He said that acting under the provisions of rule 30 of the Revenue Court Rules, published in the Jamaica Gazette Supplement of September 22, 1972 he could substitute his own classification of the goods under the Tariff and he accordingly classified the Sweeper under item 716.02 of the Customs Tariff (Revision) Resolution, 1954. The learned judge added that he had been encouraged in the view he had taken generally in the matter, by the provisions of s. 19 (1) of the Customs Law, Cap. 89 which provides in effect that where goods were classifiable under two or more items of the Tariff, they should be classified under the item which attracts the highest rate of duty. This provision, he said, is a very important statutory departure from the rule of construction normally applied to the charging provisions of a taxing statute, namely, that ambiguities therein should be resolved in favour of the subject or taxpayer. Therefore, even if he had taken the view that the Company's classification provided equally specific description of the goods as that selected by the Court it was clear that s.19(1) would nevertheless have required the goods to be classified under item 716.02, the rate of duty which, though lower than that of the Collector General's classification, was nonetheless higher than that of the Company's.

The learned judge decided, therefore, that the decision of the Collector General made on September 7, 1972 should be quashed and the goods reclassified under Item No. 716.02 of the Customs Tariff (Revision) Resolution, 1954 in accordance with his judgment. He also ordered that the Company should have the costs (taxed or agreed) of and incident to its appeal to the Revenue Court.

It is from this judgment that the present appeals have come before this Court. Notice and grounds of appeal dated March 12, 1973 were duly filed and served on the Company on the Collector General's behalf; while Notice of Intention by the Company to contend that the decision of the Revenue Court should be varied and grounds of appeal dated April 6, 1973 were filed and served on the Collector General.

The crucial issue in these appeals before this Court was what was the proper item under the Customs Tariff (Revision) Resolution 1954 under which the goods in question should properly be classified for the assessment of Customs duty thereon. Learned counsel for the Collector General argued that the judgment of the learned Judge of the Revenue Court whereby it ordered that:-

(i) the decision of the Collector General made on September 7, 1972 classifying the goods under Item 732.03 be quashed; should be restored and confirmed,

(ii) the said goods should be reclassified under Item 716.02 should be set aside, and that

(iii) the Company should have the costs of and incident to the appeal should be set aside.

As regards (i) above it was contended that the sweeper was a 'road motor vehicle' and arguments and submissions were more or less the same as those advanced before the Revenue Court and the same authorities in support were cited before us. Nothing further was urged before us that would warrant our reversing the decision of the learned judge that the sweeper was not a 'road motor vehicle' within Division 73 of the Customs Tariff Resolution. With this decision we are in entire agreement. In our view, there was no merit in the alternative submission that the sweeper should be regarded as akin to a road motor vehicle applying principle 2 (e) of the General Provisions to the First Schedule to the Tariff. These provisions can only be called in aid when a suitable item cannot otherwise be found in the Tariff under which to classify the goods.

Regarding (ii) above counsel for the Collector General conceded that the reclassification under Item 716.02, was erroneous, since the vehicle was not designed to be used for transportation of either

passengers or goods. He agreed with the reply given by the Company's counsel to the question in this regard put to him by the judge. We, like the judge, had an opportunity of seeing the photographs in the brochure in evidence and of studying the specifications supplied therewith. The manufacturers have described this machinery as an industrial sweeper or vacuum cleaner built like a tank for rough large area sweeping jobs. In our view the words require no further interpretation according to their common and ordinary meanings which they bear in colloquial speech. We held that the principal or predominant purpose of this industrial machine was to sweep large factory areas at lower costs as the manufacturers claim for it and the storage and/or transportation of the dirt and other debris collected by the hopper to a dumping site within the Company's compound was subsidiary thereto. The Concise Oxford Dictionary defines the word "truck" as "strong usually four or six wheeled vehicle for heavy goods; open railway wagon; porter's two, three or four wheel barrow at railway station etc." There is no compartment or body for the carriage of goods or passengers in the sweeper and there is only one seat for the 'driver' who operates the vehicle. The hopper is at the bottom of the machine and the dirt is sucked into it by the vacuum system and dumped hydraulically from underneath the machine. It is not possible for the sweeper in its manufactured form to be used for the transportation of 'passengers' or goods and we do not regard dirt or debris as goods as understood in the ordinary use of that word. In the result we are not in agreement with the learned judge that so far as visual examination goes the equipment looks like an industrial truck, nor do we agree that the fact that it transports rubbish rather than goods or personnel is irrelevant.

Mr. Mattis, as already noticed, testified that in his view the sweeper could be classified as a 'tractor' and it was one of the contentions of the Company that, consistent with Mr. Mattis' evidence, a possible proper classification was Item 713-01, "Tractors other than steam" under Division 71 of the Tariff. In the ordinary dictionary definition of 'tractor' an essential functional constituent of such is 'haulage'. The primary function of this sweeper, however, is to sweep.

In short it is a mechanical 'broom' and its capacity to haul is purely secondary and subsidiary to its primary function of sweeping. Accordingly we dissent from the view that Item 713-01 is in any respect relevant.

In their brochure the manufacturers describe the sweeper as "built like a tank for rough (tough) large-area sweeping jobs. As a piece of machinery the sweeper's means of locomotion and operation are derived from an internal combustion engine. It is not electrically operated and it is of course not for household use. Item 716-13.9 which is subsidiary to Item 716-13-1, in our view, is more apt to cover the case of the sweeper. The sub-head and items are quoted hereunder:-

"Machinery and appliances (other than electrical), n.e.s.:

716-13.1 Chiefly for household use as determined by the Collector-General

716-13.9 Other"

The immediate description under which this sub-head and items fall is, the Head, "Mining, construction and other industrial machinery" under Division 71 - "Machinery other than electric", of the Tariff. We therefore held that the proper classification as contended for by the Company's counsel is Item 716-13.9. On the question of costs we saw no valid reason for disturbing the order made by the learned judge and accordingly we gave judgment in the terms already set out in this judgment.