



**TC06082**

Appeal number: TC/2016/03029  
TC/2016/03032  
TC/2016/03044

*INCOME TAX – ITEPA 2003 Part 3 Chapter 6 - provision of cars, vans and fuel to employees - whether three vehicles were “goods vehicles” – whether “a vehicle of a construction primarily suited to the conveyance of goods or burden” within s 115(2) ITEPA 2003-modifications to vehicles - correct test to be applied*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**(1) NOEL PAYNE**

**Appellants**

**- and -**

**(2) CHRISTOPHER GARBETT**

**-and-**

**(3) COCA-COLA EUROPEAN PARTNERS  
GREAT BRITAIN LIMITED**

-

**THE COMMISSIONERS FOR HER MAJESTY’S      Respondents  
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE GUY BRANNAN**

**Sitting in public at the Royal Courts of Justice, Strand, London on 4 and 5 July 2017**

**David Ewart QC instructed by Reynolds Porter Chamberlain LLP for the Appellant**

**Oliver Conolly, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

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## DECISION

### Introduction

- 5 1. These three joined appeals all raise the same issue. In a nutshell the question is whether each of three different types of vehicle supplied by the Third Appellant (“Coca-Cola”) to its employees is a “goods vehicle” for the purposes of section 115(2) Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”). Section 115(2) defines a “goods vehicle” as “a vehicle of a construction primarily suited for the conveyance of goods or burden of any description...” The Appellants contend that  
10 each of the three vehicles is a “goods vehicle” and the Respondents (“HMRC”) contend that they are not.
2. These appeals concern income tax in relation to the First and Second Appellants and National Insurance Contributions (“NICs”) in relation to the Third Appellant.
- 15 3. A different (lower) rate of income tax applies if a vehicle is a “goods vehicle”. I am asked to determine that issue as a point of principle, leaving it to the parties to agree the numerical consequences of that decision.

### The appeals

- 20 4. The three joined appeals before me have been arranged so that the “goods vehicle” issue can be determined in relation to 3 different types of vehicle. The three appeals are as follows:
- (1) an appeal by the First Appellant against a PAYE Coding Notice for the tax year 2016/17 in relation to the use of a VW Transporter T5 Kombi van (second generation) (“**Kombi 2**”);
  - 25 (2) an appeal by the Second Appellant against a PAYE Coding Notice for the tax year 2016/17 also in relation to a VW Kombi 2;
  - (3) an appeal by the Third Appellant against an HMRC decision, issued on 10 March 2016, that it is liable to Class 1 A NIC in respect of vans and fuel made available to employees in the period 6 April 2011 to 5 April 2012. The vans  
30 were the VW Kombi Transporter T5 (first generation) (“**Kombi 1**”) and the Vauxhall Vivaro (“**the Vivaro**”).

### The evidence

5. As well as the usual bundles of documents and exhibits, three witnesses gave witness statements and were cross-examined. First, Mr Thomas Sayer gave evidence  
35 on behalf of the Appellants. Mr Sayer is the manager of the car and van fleet for the Third Appellant (and its predecessor within the Coca-Cola group). Secondly, Mr Michael Roberts, an independent engineer with particular expertise in the fields of motor-vehicle design and construction, gave expert evidence for the Appellants.

6. Thirdly, Mr Michael Phillips, an automotive executive with over 30 years of experience in the automotive industry, gave expert evidence for HMRC.

7. Finally, the witnesses and I were able to examine the Kombi 2, which was helpfully produced for inspection during the hearing by the Appellants.

## 5 **The statutory provisions**

8. Section 115 ITEPA, so far as material, provides as follows:

(1) In this Chapter—

“car” means a mechanically propelled road vehicle which is not—

- 10 (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—

- 15 (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)—

20 “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....”

9. The provisions which relate to fuel are found in sections 120-153 ITEPA.

25 10. There is a corresponding charge to Class 1A NICs in section 10(1) Social Security Contributions and Benefits Act 1992.

## **The facts**

11. Have been considered the evidence of Mr Sayer, Mr Roberts and Mr Phillips, together with the related documentary evidence, I find the facts to be as set out below.

30 12. Until 1997, Coca-Cola’s technicians had used estate cars. In 1997 Coca-Cola decided to equip their technicians with vans because its technicians were required to carry significantly more, and heavier, equipment than before. It had become apparent that the vans originally used by Coca-Cola, with 1.9 litre diesel engines, were underpowered and therefore Coca-Cola had started using the Vivaro and the Kombi 1  
35 and 2 which had more powerful engines.

13. Mr Sayer confirmed, in relation to all three vehicles, that Coca-Cola offered its employees the choice between a panel van (i.e. with no seats in the mid-section of the vehicle) and a vehicle as modified by a third party specialist contractor. It was suggested to Mr Sayer, in cross-examination, that the employees would opt for the van as modified by the third party in order to use the rear seats for their own private purposes and Mr Sayer confirmed that this was correct. There was no evidence to suggest that the employees undertook their own modifications.

#### *The Vivaro*

14. The Vivaro (apparently it was the second generation of this vehicle) was in use by Coca-Cola between 2007 and 2010-11. The Vivaro was produced by Vauxhall as result of a joint venture between General Motors and Renault.

15. The Vivaro was designed originally as a panel van and had a load space volume of 5 m<sup>3</sup> and a payload of 1000 kg. The Vivaro had the following characteristics:

(1) Its engine and transmission mounted transversely, driving the front wheels to provide compact mechanical packaging to maximise the load area and load volume.

(2) The driver's position was set high in order also to maximise the load area and load volume.

(3) The mechanical components (fuel tank, exhaust, rear suspension) were packaged to allow a flat load space floor of 2415 mm length by 1663 mm width (ignoring the addition of the second row of seats and the bulkhead – see below).

(4) The Vivaro's body was designed to allow 1387 mm of height to maximise the load area and load volume.

(5) The side sliding door had a large aperture of 1000 mm wide ×1285 mm high to facilitate the loading of pallets using a forklift truck.

(6) The rear door aperture was 1390 mm wide and 1320 mm height to facilitate loading.

(7) The suspension springs and components were constructed to carry a maximum load of up to 3000 kg gross vehicle weight ("GVW").

(8) The brake system components were developed and constructed to operate effectively and safely with the vehicle both unladen and laden (up to a maximum of 3000 kg GVW) and whilst towing a braked trailer of up to 2000 kg.

(9) There was a fixed window in the nearside sliding side access door.

16. The Vivaro was modified by a third party specialist contractor. The modifications included the addition of:

(1) a second row of seats for two persons incorporating seat belts and headrests. These seats were fitted on recessed aluminium tracking which was

bolted to the vehicle frame. These seats covered an area just over half the width of the vehicle;

(2) a window in the offside next to the second row of seats;

5 (3) a fabric trim to the bulkhead, roof and lower side panels (including the mid-section);

(4) plywood panels to the offside and roof of the passenger section (which included the mid-section);

(5) a 12 mm resin impregnated nonslip plywood floor to provide a hard-wearing durable surface covering the steel floor;

10 (6) a 5 mm wipe-clean polycarbonate side-lining to prevent loads damaging the vehicle body internally and to allow easy cleaning of the load area;

(7) a steel bulkhead behind the mid-section to prevent loose items from entering the passenger compartment in the event of sudden braking;

15 (8) storage units to the nearside rear compartment (i.e. behind the bulkhead) and shelving was added to the offside in the same area;

(9) security film to the side windows;

(10) ratchet straps to retain loose items (it was not clear where in the vehicle these were fitted but I assume that they were fitted in the rear cargo section and infer from the photographic evidence that they were also fitted in the mid-section beside the second row of seats);

(11) 4×200 mm long recessed cargo tracks to the rear cargo compartment floor (and according to the photographic evidence tracks were also fitted in the mid-section beside the second row of seats);

25 (12) PVC floor matting, incorporating cut-outs for the cargo tracks (again it was not clear where this matting was laid);

(13) sheet metal rear door internal upper panels to prevent internal damage to the steel exterior door panels;

(14) cargo nets to the rear doors;

(15) high-level cargo nets to the roof above the rear shelving units; and

30 (16) fluorescent interior lights in the rear cargo area (and possibly the mid-section, although Mr Sayer was unable to remember exactly where the lights were fitted).

35 17. All the above adaptations (with the exception of the window in the offside door) could be removed, but (with the exception of the security window film) would have required permanent fixing holes or fittings in the vehicle structure.

18. Mr Sayer described the fabric trim, which he said was fitted to the rear and mid-sections of the Vivaro, as “comfortable but not luxurious.”

19. The vehicle (as delivered to the employee) was, therefore, broadly divided into three sections: first, there was the driver and front passenger area. The second section

(the “mid-section”) (which was approximately 2.5 m<sup>3</sup>) was occupied by the second row of seats and storage areas. The mid-section was separated from the rear cargo area of the vehicle by a bulkhead. Between the second row of seats and the bulkhead was a metal storage area which was used to stow items of equipment such as fluorescent strip lighting. On the offside of the vehicle this storage area extended in height to the top of the headrests of the second row of seats but for most of the width of the vehicle the height of this storage area was approximately level with the seat pads of the second row of seats. This storage area could be used even if the second row of seats was in place. There were also fixing points on the floor which allowed straps to be put in so that items could be carried in the area between the seats and the sliding door in a secure fashion. I infer that these were fitted by the third party specialist contractor. In addition, there were fixing points on the forward facing side of the bulkhead to enable a ladder to be attached to the bulkhead. The third section was the cargo area in which racking was inserted for the driver to store parts and equipment. The second row of seats could be removed but could only be done with the use of tooling.

20. I should add that Mr Roberts referred to the second row of seats in the Vivaro as a two-seater bench seat. However, the specifications from the third party responsible for refitting the vehicle, clearly indicates that the second row of seats were to individual seats fitted side-by-side. That was also consistent with the photographs provided of the interior of the Vivaro.

21. With the second row of seating in place, there would be approximately 1.5 m<sup>3</sup> of usable load space for the purpose of carrying goods with no passengers (assuming no goods were carried on the seats). If the seats were removed the full volume of 2.5 m<sup>3</sup> would then be available for the purpose of carrying goods.

22. Mr Sayer confirmed that the second row of seats in the Vivaro were removed “sometimes” but was unable to provide any detail with regard to the extent to which the mid-section was used for storage.

23. The vehicles were leased by Coca-Cola and were returned at the end of the lease period. At the end of the lease period there was a certain amount of “making good” by Coca-Cola in respect of alterations to the vehicle. For example, holes that had been drilled inside the vehicle would be filled or plugged.

#### *The VW Kombi 1*

24. The Kombi 1 was used by Coca-Cola, approximately, from 2010 – 2015. It also originally based on a panel van (the VW Transporter T5) with approximately a 1000 kg payload and 5 m<sup>3</sup> in volume.

25. The Kombi 1 had the following characteristics:

(1) Its engine and transmission mounted transversely, driving the front wheels to provide compact mechanical packaging to maximise the load area and load volume.

- (2) The driver's position was set high in order also to maximise the load area and load volume.
- (3) The mechanical components (fuel tank, exhaust, rear suspension) were packaged to allow a flat load space floor of 2570 mm length by 1692 mm width (disregarding the second row of seats and the bulkhead).
- (4) The Kombi 1's body was designed to allow 1410 mm of height to maximise the load area and load volume.
- (5) The side sliding nearside door had a large aperture of 1020 mm wide ×1284 mm high to facilitate the loading of pallets using a forklift truck.
- (6) The rear door aperture was 1486 mm wide and 1305 mm high to facilitate loading.
- (7) The suspension springs and components were constructed to carry a maximum load of up to 3200 kg gross vehicle weight ("GVW").
- (8) The brake system components were developed and constructed to operate effectively and safely with the vehicle both unladen and laden (up to a maximum of 3200 kg GVW) and whilst towing a braked trailer of up to 2000 kg.
- (9) The rear tailgate had no window in order to provide better security for the rear load area.
- (10) There was a three-seater bench seat with seat belts and headrests. The seat fitted into mounting locations in the floor and could be removed without tools. Therefore, the Kombi 1 could seat up to five passengers including the driver. Mr Sayer's evidence was that Coca-Cola chose Seat Pack option B for the front row which contained a single passenger seat together with the driver's seat.
- (11) There were windows on each side of the second row of seats. These windows had an opening panel.
- (12) There were no specific storage or racking facilities in the mid-section.
26. The Kombi 1 was modified by a third-party specialist contractor. The modifications included:
- (1) a 12 mm resin impregnated plywood floor (rear section) to provide a hard-wearing durable covering over the steel floor;
- (2) a central partition behind the second row of seats to separate the driver and passengers from the load area, preventing loose items from entering the passenger compartment if the vehicle braked suddenly;
- (3) storage modules;
- (4) various containers and load restraint straps;
- (5) elastic netting storage pockets fitted to side-lining; and
- (6) security film fitted to driver's cab side windows.



27. All of the above adaptations could be removed, but all (with the exception of the security window film) would have required permanent fixing holes or fittings in the vehicle structure.

5 28. Thus, the Kombi 1 was supplied by the manufacturer with a removable second row of seats and with windows on both sides of that row. The second row of seats could be removed without tools. Following adaptations by the third party contractor, it had racking in the rear cargo area only.

10 29. The rear cargo section of the Kombi 1 was approximately 3 m<sup>3</sup> in which the racking and storage units were fitted – this area could only be used for the purpose of carrying goods.

15 30. As already mentioned, no alterations were made to the passenger compartment area (i.e. the mid-section) between the rear bulkhead and the front row of seats (i.e. the driver's cab area). This area was approximately 2.5 m<sup>3</sup>. With the three-person bench seat in place there would be relatively little remaining area for the conveyance of goods or at least this area was significantly reduced for this purpose. Without the second row of seats in place, however, the full area of the mid-section would be available to carry cargo.

#### *The VW Kombi 2*

20 31. The Kombi 2 was fundamentally the same design as the Kombi 1 with certain minor updates to the specification and features.

32. The Kombi 2 had the following characteristics:

- 25 (1) its engine and transmission mounted transversely, driving the front wheels to provide compact mechanical packaging to maximise the load area and load volume;
- (2) the driver's position was set high in order also to maximise the load area and load volume;
- (3) the mechanical components (fuel tank, exhaust, rear suspension) were packaged to allow a flat load space floor of 2570 mm length by 1692 mm width;
- 30 (4) the Kombi 2's body was designed to allow 1410 mm of height to maximise the load area and load volume;
- (5) the side sliding nearside door had a large aperture of 1020 mm wide × 1284 mm high to facilitate the loading of pallets using a forklift truck;
- (6) the rear door aperture was 1486 mm wide and 1305 mm high to facilitate loading;
- 35 (7) the suspension springs and components were constructed to carry a maximum load of up to 3200 kg gross vehicle weight ("GVW");
- (8) the brake system components were developed and constructed to operate effectively and safely with the vehicle both unladen and laden (up to a

maximum of 3200 kg GVW) and whilst towing a braked trailer of up to 2000 kg;

(9) the rear tailgate had no window, in order to provide better security for the rear load area;

5 (10) there were three passenger seats in the second row, comprising a single seat to the left and a double seat to the right with seat belts and headrests. The seats fitted into mounting locations in the floor and could be removed without tools;

(11) there were windows and doors on each side of the mid-section;

10 (12) the front row of seats comprised a driver's seat and two passenger seats. There was storage under the front passenger seats. The Kombi 2 could, therefore, carry five passengers plus the driver;

33. The seats in the second row were heavy and required two people to move them.

15 34. The Kombi 2 was modified by a third-party specialist contractor. The modifications included:

(1) a 12 mm plywood floor with a non-slip covering to provide a hard-wearing durable covering over the steel floor;

20 (2) a fixed partition behind the second row of seats (incorporating racking) to separate the driver and passengers from the load area preventing loose items from entering the passenger compartment if the vehicle braked suddenly;

(3) Fixed storage units in the rear cargo compartment with an overall size of approximately 1350 mm (height) × 1630 mm (width) × 1220 mm (depth);

25 (4) removable storage units in the second section of the vehicle on the offside and nearside. These units were bulky and required two people to install and remove them. When the offside unit was fitted in place, the second row double seat had to be removed. The unit was secured to the vehicle floor and rear partition by means of direct hand bolts. The nearside unit was fitted in place of the second row single seat and was secured to the vehicle floor and rear partition by means of direct hand bolts. The single seat also required to people  
30 to remove it or insert it into the vehicle.

35. All of the above adaptations could be removed, but all would have required permanent fixing holes or fittings in the vehicle structure.

36. Thus, the Kombi 2 was constructed by the manufacturer with a second removable second row of seats (in a 2+1 combination), and windows on both sides of  
35 that row. Following adaptations by a third party contractor, it had optional racking in the mid-section and fixed racking in the cargo area. When the racking was inserted in the mid-section, the second row of seats had to be removed (and vice-versa). It was, however, possible for the double seat, in the mid-section, to be removed and racking inserted on the right-hand side of the vehicle whilst retaining the single seat on the  
40 left-hand side of the vehicle.

37. With both of the storage units fitted in the mid-section, this area (of approximately 2.5 m<sup>3</sup>) could only be used for the conveyance of goods. The combined volume of the storage units in this area was approximately 0.8 m<sup>3</sup>. With neither the seats nor the storage units fitted to this area, the full volume of the area would be 2.5 m<sup>3</sup> and could be used for the purpose of carrying goods.

38. The rear section of the vehicle (i.e. behind the bulkhead) was approximately 3 m<sup>3</sup> and contained the racking and storage units. This area could only be used for the conveyance of goods.

39. 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 removed.

#### *General*

40. Mr Sayer exhibited to his witness statement an appendix which showed technical information in respect of approximately 100 vehicles. The appendix calculated the maximum payload capacity of each vehicle, the maximum passenger weight related the maximum passenger weight as a percentage of the maximum payload capacity of the vehicle.

41. Of the cars (i.e. vehicles primarily designed to carry passengers) shown in that appendix, none had a payload capacity exceeding one ton and the occupant weight (using 75 kg as the standard weight per passenger, including the driver) demonstrated, in Mr Sayer's view, that those vehicles were designed to carry people, not goods or burden.

42. In relation to the Vivaro (based on six passengers) the percentage was 45% and in relation to the Kombi (based on six passengers) the percentage was 36%. By way of comparison, the corresponding figure for a VW Golf estate was 70%, for a Volvo XC 90 estate 71% and for a Skoda Octavia hatchback 60%. The closest "car" to the Vivaro was the Mercedes GLD AMG estate which was 50%.

43. It was put to Mr Sayer in cross-examination that the "car" comparators did not shed any real light on the Vivaro and Kombis, which were multi-purpose vehicles. Mr Sayer did not accept this and said that it would have been possible to produce a shorter list but the outcome would still be the same.

44. I note that an MPV (designed primarily as a passenger-carrying vehicle) was listed on Mr Sayer's schedule, viz a Ford Galaxy estate where the relevant percentage was 59%.

45. The weight of the permanent racking installed into the three vehicles was approximately 200 kg, leaving capacity (depending on the type of vehicle) for approximately 588-649 kg of equipment, movable racking, spare parts and tools.

46. Mr Sayer commented on the permanence of the alterations made to the vehicles. He recognised that the tracking would have been put into the vehicles in the course of the modification process. Although it could have been removed, it would have been intended to be part of the vehicle whilst it was in Coca-Cola's use.

5 47. In relation to the Kombis, Mr Sayer accepted that the second row of seats was standard on all Kombis.

*The expert evidence*

*(a) Mr Roberts (the Appellants' expert witness)*

10 48. As regards the Vivaro, Mr Roberts considered that the characteristics described in [15 (1)-(8)] above were primarily for the purpose of carrying goods and, in his experience, would not typically be found in what he described as "cars", by which he meant vehicles primarily suited to the transport of passengers. Only the window described in [15 (9)] could be said to be a design and construction feature of the vehicle as originally supplied by the manufacturer which was intended for the purpose of carrying passengers (other than in the driver's cab area).

15 49. In relation to the adaptations made to the Vivaro, Mr Roberts considered that those described in [16 (4)-(15)] were made to the vehicle for the purpose of carrying goods and, in his experience, would not typically be found in "cars". He was also of the opinion that only the adaptations described in [16 (1)-(3)] above were made to the vehicle for the purpose of carrying passengers.

20 50. As regards the Kombi 1, Mr Roberts' opinion was that the characteristics described in [25 (1)-(9)] were design and construction features of the vehicle which were for the purpose of carrying goods and, in his experience, would not typically be found in "cars" (see above). Only the features described in [25 (10)-(11)], in respect of the vehicle as originally supplied, were for the purpose of carrying passengers (other than in the driver's cab area).

25 51. In relation to the adaptations made to the Kombi 1, Mr Roberts considered that the adaptations made by the third-party specialist contractor were made for the purpose of carrying goods and, in his experience, would not typically be found in "cars". Mr Roberts was also of the opinion that no adaptations had been made to the vehicle, as supplied by the manufacturer, for the purpose of carrying passengers.

30 52. Finally, as regards the Kombi 2, Mr Roberts considered that the characteristics described in [32 (1)-(9)] above were primarily for the purpose of carrying goods and, in his experience, would not typically be found in what he described as "cars". Only the features described in [32 (10)-(11)], in respect of the vehicle as originally supplied, were for the purpose of carrying passengers (other than in the driver's cab area).

53. In relation to the adaptations to the Kombi 2, Mr Roberts' opinion was that the characteristics described in [34 (1)-(4)] were design and construction features of the vehicle which were for the purpose of carrying goods and, in his experience, would not typically be found in "cars" (see above). In his opinion, no adaptations had been  
5 made to the vehicle's specifications as supplied for the purpose of carrying passengers.

54. Mr Roberts' opinion was that all three vehicles were designed primarily as panel vans, to have an internal volume of at least 5 m<sup>3</sup> and a payload capacity of 1000 kg. The construction of the three vehicles and their mechanical components had been  
10 developed to meet these design criteria and, in his view, were constructed primarily for the conveyance of goods rather than passengers.

55. Mr Roberts considered that the addition of the second row of seats in the Vivaro would only have "marginally" restricted the goods volume of vehicle when in place, but that this capacity would be restored if the seats were removed (with tools). Mr  
15 Roberts was pressed on this point in cross-examination. It was put to him that out of a total cubic load-carrying capacity of 5.5 m<sup>3</sup>, removing 2.5 m<sup>3</sup> from the total (i.e. the volume of the area behind the driver's cab and the rear bulkhead) was more than "marginal". Mr Roberts accepted this but pointed out that if no passengers were carried, it would be possible to use a floor area around the seats as well as the racking  
20 areas behind the seats to carry goods.

56. The addition of windows to the Vivaro, in Mr Roberts' opinion, would not have compromised the goods carrying ability of the vehicle in any way.

57. In relation to the Kombi 1, Mr Roberts noted that, with the seats removed, the goods carrying capacity of the vehicle was not compromised in any way.

25 58. Mr Roberts observed that the Vivaro and the Kombis 1 and 2 would have contained no engineering features to reduce levels of noise vibration and harshness to enable the passenger environment to be quieter and more comfortable. The mid-section was essentially a load area to which seats had been fitted with no additional acoustic or vibrational engineering material added. That contrasted with a passenger-  
30 carrying car where the fundamental engineering philosophy was the comfort of the passenger so that acoustic material would be built-in. Furthermore, the structure of the vehicle body itself, in the case of a car designed to carry passengers, would be developed to minimise "booming" i.e. road-induced noise, harshness and vibration being transmitted through to the passenger compartment. Those were fundamental  
35 design requirements in passenger cars which were not applied to the mid-sections of the three vehicles involved in these appeals.

59. In Mr Roberts' opinion the payload of most cars was around 500 kg, which would effectively be the weight of four or five passengers plus provision for up to 100-150 kg of luggage. In other words, the payload of a passenger vehicle was much  
40 smaller than the payload which the three vehicles involved in these appeals were designed to carry.

60. Mr Roberts accepted that the main use for the Kombis was to provide additional seating to transport workmen to their place of work.

61. In summary, Mr Roberts' opinion was that the three vehicles in question were designed and constructed primarily for the conveyance of goods rather than passengers. Secondly, Mr Roberts considered that the adaptations and manufacturer supplied options (namely the fitment of seats and windows in the second row), although allowing passengers to be carried, did not compromise the original design functions of the three vehicles which were primarily constructed for the conveyance of goods.

62. In response to points raised by Mr Phillips, Mr Roberts commented that the Kombi 1 and 2 were not "car-derived vehicles": they were based on the VW T5 Transporter panel van which was fundamentally designed to carry goods. Of the variants mentioned by Mr Phillips, the California was a campervan and the Shuttle and Multivan were minibus variants. The Kombi 1 and 2 was the basic VW Transporter van with a middle row of seats added. Although the Kombi had a flexible role it shared many of the features of the VW Transporter van family but its features were not, he considered, car-derived in any way. Any passenger-carrying or recreational-type features added to the basic VW Transporter van in the Shuttle or Multivan would not make the Kombi more of a car than a commercial vehicle.

63. Mr Roberts accepted, however, that the payload of the Shuttle was very similar to that of the Kombis, as were the dimensions of the sliding door and rear door. Mr Roberts accepted that the Shuttle was very similar in terms of its design, overall shape, transverse engine mounting, flat floor etc. to the Kombis. Mr Roberts also accepted that the dimensions of the rear and side doors of the Kombis were practically identical to those of the Shuttle.

64. Mr Roberts also accepted that the new bulkhead in the Vivaro was inserted in order to create a new passenger area which was separated from the load area. I infer that the same logic would apply to the Kombis.

65. Mr Roberts also disagreed with Mr Phillips' assessment that the load area was covered with hard-wearing durable covers very similar to car boot or estate car loading areas. Mr Roberts noted that the vehicles were adapted by third parties who fitted 12 mm thick resin impregnated plywood floors to the load areas of these vehicles. That was not a floor covering that would be found in any car boot or estate car. I agree with Mr Roberts' assessment on this point.

66. Mr Roberts also disagreed with Mr Phillips' comments in relation to Mr Roberts' witness statement where Mr Roberts had stated that the engine and transmission were mounted transversely to maximise load area and volume. Mr Roberts said that when looking at the proportions of the three vehicles it was possible to see, in terms of length, that the engine compartment was made as short as possible; the driving position was moved as far forward as possible so that it was, in effect, partly over the engine and transmission. The remainder of the vehicle was, then, clearly defined as a load carrying area with a predominantly flat floor. In this

connection, I asked Mr Roberts how this was different from passenger-designed MPVs, such as a Renault Espace. Mr Roberts accepted that there were similarities. An MPV would fall somewhere between a normal car and a passenger-carrying vehicle based on a panel van structure. It was a “car” with a maximised interior area. But even  
5 a Renault Espace had much smaller internal height and volume than the three vehicles in question.

*(b) Mr Phillips (HMRC’s expert witness)*

67. Mr Phillips was not a qualified engineer but had a general knowledge of the motor industry over many years.

10 68. Mr Phillips observed that the Kombi 1 and 2 vehicles had a multi-purpose and flexible role. In his view, they shared many features of similar “car derived” vehicles, e.g. the VW California (campervan), Shuttle and Multivan (all derived from the VW T5 Transporter van). The Shuttle and Multivan were both essentially minibuses designed to carry passengers. Mr Phillips considered that the Kombi vehicles as  
15 supplied from the manufacturer could be modified to meet various individual needs and requirements.

69. Mr Phillips also considered that the interior trim of the Kombi vehicles shared styling and design features similar to “cars” (by which he meant vehicles primarily suited for the transport of passengers). He had in mind, in particular, air-  
20 conditioning/climate controls, satnav, multimedia (radio CD players, MP3 connections) power points/cigarette lighters, ash/litter trays, soft trim interiors, reclining driver’s and passenger seats. Mr Phillips stated that the Kombi vehicles included “passenger side windows and comfort controls [as mentioned above] positioned in the drivers and the rear passenger sections which remained even if the  
25 seats were removed. This demonstrated, in his opinion, that the primary design purpose of the vehicle was passenger transport. However, after examining the Kombi 2, Mr Phillips conceded that the comfort controls to which he referred were not, in fact, located in the second row of seats area, as he asserted, but were in fact only to be found in the driver’s cab area.

30 70. Mr Phillips also noted that the “load areas” (his evidence was unspecific but I took him to mean both the mid-section behind the driver’s cab as well as the rear load area) were provided with a flat floor with a hard-wearing durable cover which was very similar to the car boot areas or estate car load areas. Again, his evidence was unspecific but I took him to be referring to the Kombi vehicles.

35 71. Mr Phillips also considered that the fact that there were permanent seatbelt fixing points in the mid-section (I assumed he was referring to the Kombi 1 and 2) indicated that the vehicle had been designed to carry passengers. It seemed to me that this was an unconvincing point. There was a legal requirement that, if passengers were to be carried, seat belts had to be fitted. At most it seemed to me to indicate that  
40 the manufacturer envisaged that passengers *may* be carried in the mid-section.

72. Mr Phillips also took issue with Mr Roberts' view in relation to the transverse mounting of engines and transmission. This was not unique to commercial vehicles and was used in many "car derived vehicles" e.g. people movers and MPVs. Whilst this may be true, I understood Mr Roberts' point not to be that transverse mounting was a unique feature of load-carrying vehicles but rather it was more typical of such vehicles than it was of vehicles designed primarily for the transport of passengers. Secondly, Mr Phillips noted, referring to Mr Roberts' views in respect of the high set driving position in respect of the three vehicles, that this was common to off-road 4x4 vehicles and "people movers" – both types of vehicle which were designed primarily to carry passengers.

73. In cross-examination, Mr Phillips accepted that the base vehicle from which the Vivaro and the VW Kombi 1 and 2 were derived was a panel van.

74. Mr Phillips considered that the trim level of the midsection was similar to that of the driver's area. It was a basic plastic-type construction. It would have some sort of acoustic barrier behind the plastic trim but it may not be of a particularly significant level. It would probably be very similar to that of a very basic car. Mr Phillips considered that the trim level was fairly standard for a minibus or other form of passenger transport vehicle.

75. Mr Phillips observed that, in relation to the Kombi vehicles, although the seats were removable the seat belt anchorage points were fixtures. Moreover removing the seats was a two-person operation and required knowledge on the removal procedure.

76. Mr Phillips then proceeded to consider the rear "load space" i.e. the area behind the inserted bulkhead. Once again, Mr Phillips' evidence was vague but I took him to be referring to the Kombi 2. In relation to this area of the vehicle, Mr Phillips suggested that its primary purpose was to transport tools and the tools may not be "goods". Mr Conolly, correctly in my view, confirmed that HMRC placed no reliance on this point.

77. Also in relation to the Kombi 2, Mr Phillips confirmed his view that the bulkhead was removable, although it was obviously only removable with tools.

78. In relation to the Vivaro, Mr Phillips considered that it was designed to be flexible and to suit a range of applications and variations. He did not accept Mr Roberts' contention that it was designed from the outset to be a panel van.

79. In response, Mr Roberts disagreed with Mr Phillips' statement. The Vivaro was originally designed as a panel van. Therefore, the initial design would have been a panel van with a payload of 1000 kg and an internal area of approximately 5 m<sup>3</sup>. From this basic design of vehicle many variants were then offered, using the original structure and these variants included a minibus. The original design, however, would have been a panel van.

80. Mr Phillips devoted a large portion of his witness statement to considering the type of driving licence required for different types of vehicles, an issue which I thought was of very limited relevance. Regardless of whether the vehicles were



primarily suited to the transport of goods or passengers, they could be driven on a full ordinary driving licence.

5 81. Mr Phillips also referred to Directive 2007/46/EC in relation to vehicle definitions. He noted that the three vehicles involved in this appeal could be classified as M class (cars) or generally N class (commercial vehicles), subject to final adaptation and intended use. Again, I found this reference to this Directive of very limited relevance, because the statutory test is different.

10 82. In summary, Mr Phillips' opinion was that the three vehicles were primarily designed, with subsequent adaptations, to provide transport for up to 5 persons including the driver. The second row of seats was not designed to be removed on a regular basis and required two people to remove or insert seats with specialist knowledge and training. Finally, the factors which Mr Roberts considered to be found primarily in goods-carrying vehicles were, in Mr Philips' opinion, common across many vehicles which were not necessarily primarily suited to the conveyance of goods.

### **Burden and standard of proof**

20 83. It was common ground that the burden of proof lay upon the respective Appellants to demonstrate that each of the three vehicles involved in these appeals was a "goods vehicle" within the meaning of section 115(2) ITEPA. The standard of proof is the ordinary civil standard of the balance of probabilities.

### **Submissions**

25 84. Mr Ewart, for the Appellants, submitted that the definition in section 115(2) ITEPA focused on the "construction" of the vehicle in question. Therefore it was necessary to examine the various features of the construction and ask whether that construction was primarily suited for the conveyance of goods or burden. The test recognised that the construction may be suited for more than one purpose. Mr Ewart accepted that the three vehicles in question could be used for more than one purpose because they had a middle row of seats for passengers. But that did not address the statutory question which was to examine the construction of the vehicle. The test was a purely objective one examining the characteristics of the vehicle's construction and the actual use or intended use of the vehicle was not relevant.

35 85. Mr Ewart characterised HMRC's argument as suggesting that if a vehicle contained a row of seats (apart from the driver's row of seats) the vehicle would be suited for carrying both passengers and goods and, therefore, could not be said to be primarily suited for either. Mr Ewart submitted that this was not the correct statutory test.

40 86. It was, he submitted, necessary, instead, to look at the construction of the vehicle. Mr Roberts' evidence considered the engine configuration, size, shape and materials used in the vehicle. His evidence also covered the design of the doors, the braking system and the engines. His conclusion was that these features would not

normally be found in vehicles whose primary purpose was to carry passengers. Mr Roberts was not, Mr Ewart submitted, saying that those features were never found in passenger vehicles but rather that they were not typically found in such vehicles. Mr Ewart also relied on Mr Roberts' evidence in respect of the absence of acoustic protection in the mid-section in respect of noise and vibration.

87. As regards comparisons with the VW Minivan and Shuttle, Mr Ewart contended that these were simply variants of the basic T5 Transporter panel van that VW produced. It was necessary to look at the construction features of each type of vehicle.

88. Looking at the features of the mid-section, it was relevant, Mr Ewart argued, that seat belts were a mandatory legal requirement. It was also relevant to consider the lack of passenger comfort features in the area behind the driver's cab.

89. Mr Roberts was not, as Mr Conolly suggested, making a comparison only with a car. Instead he was making a positive assertion about the purpose of the various features to be found in the three vehicles.

90. Mr Ewart submitted that the construction of the vehicle remained the same whether the seats were fitted or not: the construction of the vehicle was one where seats could be fitted or removed.

91. As already noted, Mr Ewart argued that actual use of the vehicle was not relevant as regards the statutory test. Similarly, the fact that Coca-Cola had offered its employees the choice between a panel van and one of the three vehicles in question was not relevant. The most it could be said was that the employees anticipated that they may have some use for the seats at some point in time.

92. It made no difference, Mr Ewart argued, whether one looked at the three vehicles before or after modification. In any event, Mr Ewart's primary submission was that the modifications to the three vehicles were not such as to fundamentally alter the structure of the vehicle. The fact that holes have been drilled into the vehicle in the process of modification was not such as to constitute a fundamental alteration in the structure of the vehicle. In that case, it was correct to look at the construction of vehicles prior to modification by the third party specialist contractors. That was, Mr Ewart argued, consistent with the statutory purpose of section 115(2) which was to classify vehicles in accordance with their construction.

93. If this was correct, then Mr Ewart submitted that his case in respect of the Vivaro must succeed because, if the second row of seats was ignored, HMRC themselves accepted that the vehicle was primarily suited for carrying goods. In relation to the Kombis, Mr Ewart accepted that the second row of seats was part of the original construction of the vehicles.

94. If the modifications were, however, part of the construction then Mr Ewart argued that features of the construction identified by Mr Roberts made the vehicle more suitable for the conveyance of goods than for passengers. Those features included the transverse engine mounting, the driver position, the volume of the

vehicle, the flat load area, the size of the side and rear doors, its braking system and its payload.

95. As regards the Vivaro, the photographic evidence exhibited to Mr Sayer's witness statement showed that there was a significant area for storage and carrying goods in the mid-section behind the seats as well as fixing points for securing loads beside the seats. Therefore, Mr Ewart argued that even in the mid-section only a relatively small part was taken up by seats.

96. Mr Ewart also took issue with HMRC's argument that, when comparing the size of the vehicle in relation to the seating area and the load area, account should be taken of the driver's front row of seats. It had to be accepted that the front part of every vehicle was going to be constructed for the driver and some passengers. The real issue related to the construction of the rear part of the vehicle i.e. behind the driver's row of seats.

97. The bulkheads were, in Mr Ewart's submission, neutral features. On the one hand they enabled a load to be carried safely behind the bulkhead, but equally they allowed passengers to be carried in safety in front of the bulkhead.

98. In relation to the two versions of the Kombi, Mr Ewart contended that, without the third party modifications, the features of the construction of the vehicles (i.e. the basic design features) described by Mr Roberts indicated that the vehicles were primarily suitable for carrying loads. In addition, there was a lack of the type of features that would be expected in a passenger vehicle.

99. If, however, it was necessary to look at the Kombi's with modifications (i.e. with the racking in place) then Mr Ewart submitted that it was even clearer that the vehicle was primarily constructed for carrying loads.

100. Mr Ewart also drew attention to the evidence of Mr Sayer in relation to the relative payloads of the vehicles where he calculated that in each of the three vehicles only approximately one third of the payload would consist of passengers.

101. Mr Ewart suggested that the VAT cases were largely irrelevant that I should not place reliance upon. The VAT cases were based on different statutory provisions and different factual circumstances. In any event, the cases turned on their own facts.

102. Mr Ewart submitted that if a person wanted a vehicle to transport passengers they were unlikely to choose a Kombi or a Vivaro. These vehicles were over-engineered for that purpose. Furthermore, the vehicles were the wrong shape i.e. they were not aerodynamically designed.

103. There was, said Mr Ewart, no two-stage process or "default position" as advocated by HMRC. The statutory test looked simply at the construction of the vehicle and whether that was primarily suited for carrying goods or burden. That test had to be applied, whether or not seats were fitted.

104. I asked Mr Ewart what, in context, the word “primarily” (as used in section 115 (2) ITEPA) meant. Did it mean that the test looked at the cubic capacity, the proportion of payload attributable to goods as opposed to passengers or some other test? Mr Ewart contended that one should not look at any one particular factor but, instead, look at the overall construction of the vehicle. The test was an objective test, weighing up all the different features of the vehicle’s construction.

105. In relation to modifications or adaptations to the vehicle, Mr Ewart referred to the First-tier Tribunal (“FTT”) decision in *Jones v HMRC* [2012] UKFTT 265 (TC) (Judge Brooks) (“*Jones*”). In that case the FTT held that modifications or adaptations could be taken into account for the purposes of the section 115(2) test only if they fundamentally altered the structure of the vehicle.

106. On that basis, therefore, the alterations made to the Vivaro could not be said to fundamentally alter the structure of the vehicle.

107. I asked Mr Ewart what his view would be if one of the three vehicles was modified by a third party (after its production by the manufacturer) so that it had three rows of seats and almost the entire space within the vehicle taken up by those seats. Would it then be correct to say that the addition of the seats did not fundamentally alter the construction so that the vehicle’s construction (if this was the case) was still primarily suited to the conveyance of goods or burden? Mr Ewart replied that it was important to look at all the other features of the vehicle. It may well be that even if a third row of seats was put in, but the rest of the features of the vehicle were the same as in the present case, he would still be arguing that the vehicle was constructed primarily as being suitable for the conveyance of goods. The actual use of the vehicle was not determinative – the test was what the vehicle’s construction was suited for.

108. Mr Conolly, for HMRC, accepted that the test in *Jones* was correct. Section 115(2) required the Tribunal to look at “construction” and not “construction *or adaptation*”. Therefore, it followed that any adaptation could only be considered if it was part of the construction of the vehicle as a matter of fact and impression. It had to be, said Mr Conolly, sufficiently permanent that it should be treated as part of the construction.

109. Mr Conolly submitted that the changes made to the Vivaro altered its construction and it was, therefore, necessary to consider the vehicle after the modifications were made. The holes that were drilled in the Vivaro to accommodate the racking and the second row of seats were permanent. Mr Roberts’s evidence was that once the holes were made they were permanent – they were drilled either into the floor or the side of the vehicle. Furthermore, from a visual inspection of the Kombi 2 the bulkhead necessitated bolts to be inserted into the structure of the vehicle. It was necessary to look at, so to speak, the “end product” e.g. the vehicle with the bulkhead fitted. It was not enough just to consider the holes by themselves. The scale of the changes in relation to the three vehicles in dispute was such that it would be artificial to ignore those changes.

110. In addition, Mr Conolly argued that his approach avoided the anomalous result, raised by the Appellants' argument, namely that it would be possible for a taxpayer to acquire a goods vehicle, insert several rows of seats, use it as a minibus and be taxed on the basis that the vehicle was a "goods vehicle".

5 111. Mr Conolly recognised that some of the changes could be undone. For example, the bulkhead was bolted to the vehicle and could have been removed by a mechanic. Realistically, however, the insertion of the bulkhead was a sufficiently permanent change to the actual structure of the vehicle. Mr Conolly noted that it was possible to remove a door but no one would deny that door was part of the vehicle's construction.

10 112. In this connection, Mr Conolly accepted that the racking slots placed in the mid-section constituted a permanent change the structure of the vehicle (e.g. the Kombi 2).

113. Mr Conolly accepted that the classification of the three vehicles for other regulatory purposes was irrelevant (*C & E Commissioners v Jeynes* [1984] STC 30 at 31j).

15 114. Next, Mr Conolly argued that the actual use of the vehicles was irrelevant. The test was confined to the question whether the construction of the three vehicles was primarily suited to the conveyance of goods (see *Jeynes*, above at 31j). This was common ground.

20 115. In cross-examination, Mr Roberts had accepted that one of the main uses of the Kombi was the transportation of crew members to a place of work. There were a range of uses to which Kombi-type vehicles could be put outside the facts of this particular case. Therefore, Mr Conolly maintained that it would be wrong to focus unduly on Coca-Cola's specific use of those vehicles.

25 116. Mr Conolly submitted that, as was common ground, only the physical characteristics of the vehicles were relevant (see *Jeynes*, above at 31j).

30 117. These vehicles, particularly the Kombis had different configurations – they were flexible and versatile. The VW brochure marketing these vehicles indicated that this was one of their central characteristics. Therefore, Mr Conolly suggested that the correct approach was a two-stage approach. First, it was necessary to ask whether either of the two configurations could be considered to be primary and the other secondary. If there was no default position as between the two, then the vehicle must be equally suited to both uses suggested by each configuration.

35 118. In this context, Mr Conolly submitted that it was relevant to take into account the first and second row of seats. In other words, the driver's row of seats needed to be taken into account in the overall evaluation of the vehicle.

40 119. Therefore, Mr Conolly argued that the vehicles had two configurations. With the second row of seats in the vehicle, the conveyance of passengers was clearly the primary purpose. With the second row of seats removed from the vehicle (the second configuration), the vehicle was clearly more suited to the conveyance of goods. HMRC's primary case was that the default position was seats were in the vehicle and

that they were cumbersome to remove and inconvenient to store. When pressed on this point, Mr Conolly accepted that his argument was somewhat weaker on the Kombi 2 because there was the flexibility to have racking in the mid-section.

5 120. Mr Conolly's secondary submission, was that if the vehicles were indeed dual purpose (the mid-section could be used equally to carry goods or to carry passengers) then the Appellants needed to prove that the "default position" was that the seats would be kept out of the vehicles and that, therefore, the vehicles were primarily suited for the conveyance of goods. In other words, the burden of proof was on the Appellant's to establish that the primary suitability was to have the seats out of the  
10 vehicles. Mr Conolly argued that the evidence had not established such a default position. Whilst in the particular case of Coca-Cola the seats were taken out of the vehicles during the working week, that was simply one usage of the vehicles and the appeals could not be decided by reference only to Coca-Cola's particular use of the vehicles.

15 121. That was not, Mr Conolly contended, to deny that the issue before the Tribunal was a binary question of whether the vehicles were either of a construction primarily suited to carrying goods or not. HMRC's submission was that the vehicles had two configurations but one construction. The construction of the vehicles did not change when the seats were inserted or removed. In relation to the Vivaro, the seats were not  
20 easily removable and therefore in that case there was only one configuration. There was, said Mr Conolly, a dual use of the mid-section of the Vivaro, to a very limited extent, because there were storage racks behind the second row of seats.

25 122. Mr Conolly submitted that Mr Roberts' evidence was flawed because he listed features which he said were not typical for a car. He appeared to be referring to a "car" in a way which excluded a multi-purpose vehicle.

30 123. Mr Conolly noted that the vehicles, after modification, actually had less capacity for carrying goods than they did before. In addition, whilst the shape of the vehicle was similar to that of a panel van, it was also, in terms of size, shape and engine mounting, very similar to the VW Shuttle, a point which Mr Roberts accepted in his evidence.

124. In relation to Mr Roberts' argument that the vehicles were historically derived from panel vans, Mr Conolly argued that it was necessary to look only at the objective physical features of the vehicles and the historical and economic contexts were irrelevant.

35 125. Mr Conolly accepted, however, that the shape of the vehicles went beyond what was necessary purely for the purpose of carrying passengers and that one of the purposes of the Kombis was to carry goods.

40 126. Although Mr Conolly did not place great reliance on the VAT cases, he noted that in situations where a second row of seats had been added or could be used, there were three factors which the VAT Tribunal took into account. First, the Tribunal

considered the comfort of the seats, secondly, whether there were windows and, thirdly, whether the seats curtailed the use of load space in the loading area.

## Discussion

### *The principles*

5 127. I have traced the definition of “goods vehicle” in section 115(2) ITEPA back as far as section 72(5) Finance Act 1976, as regards the taxation of employment income, and it may well be that the antecedents of the provision are older than that (see e.g. section 37 Finance Act 1966 in relation to initial allowances). What is remarkable is that in over 40 years there have been very few cases on the meaning of this provision.

10 128. In *Morris and County Pharmacy Ltd v HMRC* [2006] STC 1593, Park J held at [11] that a motorhome did not fall within the exception provided for in section 168(5) (a) ICTA 1988 [the predecessor of section 115(2) ITEPA]. Whilst the motorhome could carry goods it could not possibly be said that the motorhome was constructed so that it was, as the taxpayer had optimistically argued, “primarily” suited for the  
15 conveyance of goods or burden of any description. This was a clear-cut case and, in my view, provides no assistance in relation to the questions raised by these appeals.

129. The most relevant authority was *Timothy Jones v HMRC* [2012] UKFTT 265 (TC) (Judge Brooks and Ms Clarke). In this case a Jaguar Land Rover Discovery was supplied to an employee of Jaguar Land Rover for use in his employment as a mobile  
20 technician. The vehicle had been specially modified to carry engine components and tools for his job. HMRC determined that the vehicle was a “car” within the meaning of section 115(1) ITEPA, but the taxpayer argued that it was a “goods vehicle” within the meaning of section 115(2) and, therefore, fell outside the definition of a “car”. The Tribunal described the vehicle as follows:

25 “6. The entire boot area of the Land Rover was filled with racking and tool boxes which are bolted to the structure of the vehicle. In addition, although the rear seats and seat belt fittings are in place the seats are impossible to use as extra tool boxes have been securely fixed over them. Mr Jones explained that when he was employed by Mondial it  
30 had been possible to use the rear seats of the Land Rover but extra tool boxes had been fitted to the vehicles provided by the AA. Although it was technically possible for these to be removed, he is not permitted to do so by his employer.

35 7. The modifications to the vehicle also include additional lighting, electrics and special control systems. Despite these modifications taking two days to fit using special lifting equipment and the services of trained electricians there is no fundamental alteration to the structure of the vehicle. This is because it has to be returned to Jaguar Land Rover for re-sale after one year when it is replaced by a new vehicle.”

40 130. The Tribunal then considered whether the vehicle was a “goods vehicle” for the purposes of section 115(2) ITEPA:

“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 [in the original text]).

5 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.

10 18. In the circumstances we are unable to find that the Land Rover Discovery is a “goods vehicle” within the definition of s 115(2) ITEPA....”

15 131. Thus the Tribunal considered that the “construction” of a vehicle could only be altered by modifications which amounted to a fundamental alteration to its structure. I note that the taxpayer had accepted that the modifications in question did not amount to such an alteration.

20 132. Although both Mr Ewart and Mr Conolly seemed content with the “fundamental alteration in structure” test set out in *Jones*, I am less so. With respect to the Tribunal, I have misgivings about the correctness of this test. The Tribunal did not explain why the word “construction” required a modification of the vehicle to constitute a fundamental alteration to its *structure*. 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. “Construction” is a noun derived from the Latin verb *construere*, which means “to pile up”, “to build” or “to put together.” It has the same meaning in English. The verb “construct” is given the following meaning in dictionaries: “Fit together, frame, build,” “build or make (something, typically a building, road, or machine)” and “build up, make by putting together”. The *Concise Oxford Dictionary* gives the meaning of “construction” as: “1. Act or mode of constructing; thing constructed,” and the *Penguin Concise English Dictionary* gives following meaning: “act or manner of constructing; thing constructed.” It seems to me, therefore, that when section 115(2) uses the word “construction” it simply refers to the manner or way in which the vehicle has been put together, assembled or built. “Construction” is an ordinary English word and does not, as I shall suggest, need over-elaboration by importing concepts of “structure”, “fundamental alteration” and “permanence.”

35 133. 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.

40



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.

136. The meaning to be given to a statutory word or phrase is, of course, not merely a matter of dictionary definitions. Words take their meaning from their context and must be construed purposively. Is there anything, therefore, in the statutory context or the legislative purpose which would suggest a different meaning from that which I have put forward?

137. Although it is not part of the immediate statutory context, a number of the cases cited to me concerned VAT and, in particular, the Value Added Tax (Cars) Order 1992 (SI 1992/3122) (“the Order”). The question of whether a vehicle is a “motor car” is important for VAT purposes for a number of different reasons: for example, it may determine whether input tax is “blocked” or it may determine whether a taxpayer can use the second hand VAT scheme. Paragraph 2 of the Order provides as follows:

““motor car” means any motor vehicle of a kind normally used on public roads which has three or more wheels and either—

(a) is *constructed or adapted* solely or mainly for the carriage of passengers; or

(b) has to the rear of the driver's seat roofed accommodation which is fitted with side windows or which is constructed or adapted for the fitting of side windows...” (Emphasis added)

138. It will be seen that the drafter has used the expression “is constructed or adapted”. Does this imply that subsequent modifications do not form part of the construction in section 115(2)? Obviously, these words are contained in a different legislative provision and in a different legislative context. I do not, therefore, consider the wording of the Order to be relevant to the interpretation of section 115(2). In particular, I do not think that it precludes an interpretation of the word “construction” in section 115(2) that includes modifications and adaptations to the original construction of the vehicle.

139. In reaching this conclusion, I have also borne in mind the language used by the drafter in section 115(2) in the definition of “design weight”. This provides:

““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...” (Emphasis added)

140. I do not consider that the words “or adapted” require me to alter my view of the correct interpretation of the word “construction” in the immediately following definition of “goods vehicle”. The definition of “design weight” would, without more, focus attention solely on the original design weight of the vehicle. Evidently, it was  
5 the drafter’s intention to avoid such a limited meaning. In my judgment, the word “construction” implies no such limitation – it is not inherent in the word “construction” that regard shall be had only to the original construction of the vehicle (i.e. the manner in which the vehicle was constructed by the original manufacturer).

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

142. At various stages in the argument before me, it was suggested that an adaptation or modification had to be “permanent”. For example, Mr Conolly argued that the second row of seats in the Vivaro were “sufficiently permanent”. Again, I think there is nothing to support this gloss on the statutory language. I consider that subsequent  
30 adaptations and modifications can be taken into account if they are part of the vehicle as I have explained above. In any event, adding a “permanence” test to the statutory language is a question-begging exercise: what does “permanent” mean in the context of the vehicle where most or many of its parts are detachable? Does it mean that something which is bolted to the body of the vehicle, but which could be detached  
35 with the use of tools, such as its wheels, is not permanent? Using Mr Conolly’s language, would such an attachment be “sufficiently permanent” – and what, for that matter, does “sufficient” mean? In my view, this is an unnecessary distraction from the statutory language.

143. Next, I observe that the word “primarily” in section 115(2) plainly envisages  
40 that a vehicle may have more than one potential use or, more correctly, suitability. It also requires that the taxpayer demonstrates that the predominant suitability of the vehicle in question is for the conveyance of goods or burden. These are important points to bear in mind in the present appeals where the vehicles concerned can be described as being, to some extent, “multi-purpose”.

144. Finally, it was common ground that the question whether a vehicle falls within the “goods vehicle” exception in section 115(2) is one which must be determined objectively, taking account of all the characteristics of the vehicle in question. It is essentially an evaluative exercise. In this connection, the actual use to which a vehicle is put by a particular employee or employer is not relevant.

*Application of the principles to the facts*

145. With the above principles in mind, I now turn to consider each of the three vehicles involved in these appeals.

*(a) The Vivaro*

146. Taking account of all the characteristics of the Vivaro summarised above, I have concluded that the Vivaro was a “goods vehicle” for the purposes of section 115(2). To be clear, I am reaching this conclusion based on the Vivaro as modified by the specialist third-party, but it would be even clearer in the Vivaro’s unmodified state.

147. In reaching this conclusion, I have taken account of the features listed in [15 (1)-(8)] above which were ones listed by Mr Roberts in his evidence. In taking account of the evidence of Mr Roberts, it was clear to me, as Mr Ewart correctly submitted, that Mr Roberts was not claiming that these features were exclusively those of goods-carrying commercial vehicles but rather that they were more typical of those vehicles than of vehicles primarily designed to carry passengers.

148. Thus, the Vivaro’s engine and transmission were mounted transversely and the driver’s position was set high, each in order to maximise the load area and load volume. The mechanical components (fuel tank, exhaust, rear suspension) were packaged to allow a large flat load space floor and the Vivaro’s height was designed to maximise the load area and load volume. The design and dimensions of the sliding door and the rear door facilitated loading. The suspension was designed to carry a 3000 kg GVW and the braking system and components were designed to operate effectively up to a maximum of 3000 kg GVW and whilst towing a braked trailer of up to 2000 kg. All these features seem to me to be more characteristic of a vehicle the construction of which was designed to carry goods and to be relevant in the overall assessment to be carried out with regard to section 115(2) ITEPA.

149. Mr Roberts’ evidence, as summarised in the preceding paragraph, placed considerable emphasis on the “original design functions” of the vehicles in question, which he concluded were primarily constructed for the carriage of goods. I do not, however, consider it sufficient to look merely at the original design functions of a vehicle but, instead, all the characteristics of the vehicle as it was provided to the employee must be taken into account. Even were those original design functions (as summarised in [148]) to be more typical of cargo-carrying vehicles, if other characteristics of the vehicle in question made it less suitable for the conveyance of goods then the significance of those original design functions would be diminished.

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<sup>3</sup> 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.

151. It is certainly true that, notwithstanding the presence of windows in the mid-section, the level of comfort for passengers would have been relatively basic, when taking account of the photographic evidence and the evidence of Mr Roberts in relation to noise insulation and flooring. Nonetheless, I do not consider this to be a major factor in the overall assessment.

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.

*(b)The Kombis 1 and 2*

153. I have decided that both versions of the Kombi were not constructed primarily to be suitable for the conveyance of goods or burden.

154. I accept Mr Roberts' evidence that the Kombis were primarily based on a panel van design. Therefore, the same type of original design features referred to in [148] are present *mutatis mutandis* in the Kombis. As I have indicated, those characteristics are relevant, but they are not sufficient to satisfy the test in section 115(2) if other features of the vehicles exist which indicate that the suitability of the vehicles was not primarily that of conveying goods.

155. It is, in my view, necessary to look at the characteristics of the entire vehicle, including the front row of seats and I reject Mr Ewart's submission to the effect that the front row should be ignored on the basis that all vehicles had a front row of seats.

156. As I have said, it is necessary to look at all the characteristics of the vehicle to determine the question of the suitability of the construction for the conveyance of goods. Thus, the basic design characteristics (essentially the same structure and basic engineering) to which I have just referred were also mainly present in other vehicles manufactured by VW based on the original design for the VW Transporter T5 panel van such as the Shuttle and the Multivan – vehicles which were essentially minibuses designed to carry passengers. It is obvious to me that the Shuttle and the Multivan, notwithstanding the features of the type described in [148], are vehicles the construction of which was primarily suited to the carriage of passengers, even if the

original design characteristics may have made them somewhat “over-engineered” for that purpose. In other words, there were other features of the construction of those vehicles which outweighed the basic design characteristics and which had a more direct impact on the suitability for the carriage of goods.

5 157. Similarly, none of the modifications to the Kombis seemed to me to compel the  
conclusion that its construction, as modified, made it more suitable for the  
conveyance of goods. In particular, 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 from being injured by items flying  
10 forward from the cargo-section. It was, therefore, effectively a neutral feature in the  
present case.

158. The mid-section of both versions of the Kombi were supplied with seats which,  
when fitted, took up most of the space in that section. When the seats were removed  
almost the entire area of the mid-section was available for conveyance of goods.

15 159. In essence, therefore, the Kombis were both multi-purpose vehicles. The  
evidence was that the Kombis were intended to enable workmen to be taken to work  
and for goods to be carried. It seems to me that the features of the mid-section of the  
Kombis are consistent with such a multi-purpose role. I accept that the level of  
comfort (climate controls, power sockets and sound-proofing) in the mid-section may  
20 have been less than that which was standard for a vehicle designed specifically for  
passengers, but I do not think this is determinative and in any event from my own  
observation the mid-section in the Kombi 2 seemed relatively comfortable when all  
the seats were installed.

160. In relation to the Kombi 1, there were no third-party alterations to the mid-  
25 section. The seats could be taken out or left in and did not require tools to remove  
them. The mid-section in the Kombi could therefore be used either to carry passengers  
or to carry goods. It was equally suitable for either purpose.

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  
30 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  
35 goods and passengers and cannot, therefore, be regarded as a “goods vehicle”.

162. The Kombi 2 is a very similar vehicle to the Kombi 1. The main difference is  
that the Kombi 2 was modified to enable racking to be fitted to the mid-section. Thus,  
when the seats were wholly or partially removed, the mid-section could be used to  
carry racking which contained tools and goods. But even that modification does not,  
40 in my view, satisfy the “primarily suitable” test in section 115(2). Again, the mid-  
section seems to me to be suitable both for the carriage of passengers and the  
conveyance of goods. The seats can be removed and the racking installed, in which

5 case the vehicle becomes primarily suitable for the carriage of goods or, alternatively,  
the seats can be kept in place, in which case the vehicle becomes primarily suited for  
transport of passengers. It is a genuinely multi-purpose vehicle with no primary  
suitability. For that reason, looking at the characteristics of the vehicle as a whole, I  
10 have concluded that the Kombi 2 was also not of a construction which was primarily  
suitable for the conveyance of goods or burden.

### **Conclusion**

163. The burden of proof lies upon the Appellants to show that the construction of  
the Vivaro and the Kombis was primarily suitable for the conveyance of goods or  
10 burden. In my judgment, for the reasons given, that burden has been discharged in  
relation to the Vivaro but not in relation to the two versions of the Kombi.

164. Accordingly, I allow the appeal of the Third Appellant in so far as it relates to  
the Vivaro but dismiss that appeal to the extent that it relates to the Kombi 1. The  
appeals of the First Appellant and the Second Appellant, which relate to the Kombi 2,  
15 are dismissed.

165. This document contains full findings of fact and reasons for the decision. Any  
party dissatisfied with this decision has a right to apply for permission to appeal  
against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax  
Chamber) Rules 2009. The application must be received by this Tribunal not later  
20 than 56 days after this decision is sent to that party. The parties are referred to  
“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”  
which accompanies and forms part of this decision notice.

25

**GUY BRANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 30 AUGUST 2017**