Highlands Drink Limited v Commissioner Customs and Border Control (Income Tax Appeal E014 of 2024) [2024] KEHC 14719 (KLR) (Commercial and Tax) (22 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14719 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E014 OF 2024

FG MUGAMBI, J

NOVEMBER 22, 2024

BETWEEN

HIGHLANDS DRINK LIMITED ..... APPELLANT

AND

THE COMMISSIONER CUSTOMS AND BORDER CONTROL . RESPONDENT

(Being an appeal from the judgment of the Tax Appeals Tribunal at Nairobi delivered on 20th December 2023 in the Tax Appeal Tribunal TAT No. 1364 of 2022)

JUDGMENT

Background and introduction

1. The facts giving rise to this appeal are that the respondent conducted a customs duty remission scheme compliance check of the appellant under sections 140, 235 and 236 of the East African Community Customs Management Act (EACCMA), 2004 and the EACCMA (Duty Remission) Regulations 2008. The focus of the compliance check was on sugar imported under the duty remission scheme for the years 2017 to 2021.

2. By a letter dated 14th June 2022, the respondent raised additional import duty and value-added tax for the importation of sugar, amounting to Kshs. 30,889,231/=. Subsequently, a demand letter was issued on 4th August 2022. The respondent asserted that the appellant had imported two batches of sugar outside the gazetted periods under consignment numbers 12817 and 12792, making them ineligible for the duty remission scheme (DRS).

3. The appellant applied for a review of the demand on 2nd September 2022, arguing that both imported consignments fell within the scope of the duty remission scheme (DRS), which had allowed it a 12-month period to import 4,000 metric tonnes of industrial sugar at a 10% duty rate. The respondent,

however, disagreed and, on 30th September 2022, confirmed the demand notice, upholding its assessment.

4. Aggrieved by the respondent's decision, the appellant lodged an appeal with the Tax Appeals Tribunal, seeking to nullify the respondent's compliance check findings and the subsequent tax demand. The appellant also sought to have the respondent estopped from demanding any additional import duty beyond the gazetted rate of 10%.

5. The Tribunal held that the arrival date of the consignment is crucial, as it determines the applicable duty rate. It found that the consignments in question arrived on 17th October 2019 and 2nd December 2019, both outside the remission period. In the absence of any evidence of an extension to the remission period, the Tribunal concluded that the appellant was obligated to pay the duty rate in effect at the time the goods entered the country. Accordingly, the Tribunal upheld the respondent's review decision dated 30th September 2022, leading to the present appeal.

6. The appellant's Memorandum of Appeal dated 23rd January, 2024 raises 8 grounds of appeal, the gist of which is to set aside the Tribunal's judgment and declare that the consignments in question were imported within the remission issued under Legal Notice No. EAC /143/2018.

Analysis and determination

7. The appeal was canvassed by way of written submissions which I have carefully considered alongside the pleadings and the Record of Appeal filed by the appellant. I have distilled the following issues for determination:

    i. Whether the Tribunal erred in the interpretation of sections 120 and 140 of the EACCM.

    ii. Whether the Tribunal erred in finding the respondent's action of demanding import duty 4 years after the consignment was in violation of the appellant's rights.

8. By dint of Section 140 (3) of the EACCMA, the appellant's sugar imports were published by the Council of Ministers on the East African Community Gazette through Legal Notice No. EAC/143/2018 on 9th October 2018. In line with Regulation 6(1) of the EACCMA (Duty Remission Regulations 2008), it is not in dispute that the remission was approved for one year, from 9th October 2018 to 8th October 2019.

9. The bone of contention is whether the 2 consignments in question were imported within this period. The appellant contends that it ordered the consignments within the remission period and was issued with invoices dated 27th August 2019 for the consignments in question. The National Treasury approved the importation of the sugar vide the Gazette Notice on the 5th and 12th of September 2019 which was within the remission period. The appellant's argument is that the remission period runs from the date of the gazette notice and that any importation that the manufacturer processes and is granted approval within the 12-month limit enjoys the remission of import duty.

10. The appellant relies on the definition of 'import' as per Section 2 of EACCMA which means to bring or cause to be brought. The appellant argues that the consignments had been imported during the remission period and the rate of import at the time was 10%.

11. The respondent disagrees arguing that the importation is only complete and hence the duty also payable at the time of entry of goods for home consumption. The question is therefore one of interpretation.

12. Section 120 of EACCMA provides for the computation of duty on imported goods and states as follows:

> "(1) Subject to subsection (3) and section 94, import duty shall be paid at the rate in force at the time when the goods liable to such duty are entered for home consumption:
>
> Provided that in the case of goods imported overland, the time of entry of such goods for home consumption shall be deemed to be the time when the import duty on the goods is paid.
>
> (2) ...
>
> (3) Where goods are entered in accordance with section 34 before the arrival at the port of discharge of the aircraft or vessel in which such goods are imported, the import duty upon the goods shall be paid at the rate in force at the time of arrival of such aircraft or vessel at such port of discharge." (emphasis added)

13. A plain meaning of section 120(3) above is that the law allows for imported goods to be entered with customs before the ship or plane carrying them arrives at the port. In my understanding, such entry refers to the process of legally processing goods entering a country. It is not difficult to see why the law would provide for such a process, with a view to enabling importers to clear goods quickly after arrival.

14. Section 120(3) however clarifies that even if goods are pre-entered, the import duty rate will not be fixed at the time of pre-entry. Instead, it will be determined based on the rate in force when the ship or aircraft arrive. This reading of the law is in tandem with the finding of the Tribunal (at paragraph 100) that the key factor in determining the applicable import duty rate is the arrival time of the goods at the port of discharge, and not when the goods were ordered for or when an invoice was issued.

15. The question before the Court is, therefore, whether the appellant had a valid duty remission at the time the imported sugar entered for home consumption. In my view, the answer is in the negative.

16. This conclusion is based on the Gazette Notice a 12-month period from the date of gazettement indicates that the remission period applied to goods arriving in the country between 8th October 2018 and 8th October 2019. The consignments having arrived on 17th October 2019 and 2nd December 2019 means that the appellant was required to pay duty at the rate applicable then. On this issue I therefore find no reason to interfere with the finding of the Tribunal.

17. The appellant further objects to the respondent's decision to conduct a review four years after the product's importation. In response to this issue, I note that sections 235 and 236 of EACCMA empower the Commissioner to ensure compliance with the law, investigate, prevent, and suppress offences. These sections authorize the Commissioner to conduct inspections or audits as necessary to verify the accuracy and authenticity of declarations by examining relevant records held by concerned parties. These provisions state, in part, as follows:

> "235 (1) The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods–
>
> i. to produce all books, records and documents relating in any way to the goods; and
>
> ii. to answer any question in relation to the goods; and

iii. to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transhipment of the goods, as the proper officer may deem fit."

18. In my view, the five-year provision serves several practical and regulatory purposes, including allowing adequate time to conduct thorough investigations, particularly given the complexity of cross-border transactions. It is possible that some instances of non-compliance may only become apparent over time, and a five-year period enables the respondent to identify patterns of non-compliance that may not be immediately obvious. Additionally, this extended period promotes greater compliance, as businesses are aware that their records may be reviewed within this timeframe.

19. Section 236 grants the Commissioner the authority to verify the accuracy of goods entries or related documents. This includes examining books, records, computer-stored information, business systems, and all relevant customs and commercial documents associated with the goods. The Commissioner may also question any person directly or indirectly involved in the transaction, inspect the premises of the goods' owner or any other related location, and, where feasible, examine the goods themselves.

20. In this case, the period under review fell within the five-year timeframe prescribed by law. For that reason, I am not persuaded that the appellant's rights were violated by the respondent.

21. With respect to the argument on legitimate expectation, I find no basis for invoking this principle. In Keroche Industries Limited V Kenya Revenue Authority & 5 Others, [2007] 2 KLR 240, the Court explained that legitimate expectation arises, for example, when a member of the public, based on a promise or other conduct, expects to be treated in a certain way, but a public body treats him or her differently. The Court stated as follows:

> " Simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. I have not seen any evidence that the respondent or the Minister promised the applicant that the applicant would not pay VAT on the STBs or Decoders."

22. The principles set out in the case of Communications Commission of Kenya & 5 Others V Royal Media Services Limited & 5 Others, [2014] eKLR is that there cannot be a legitimate expectation based on an illegal or unconstitutional decision or representation.

23. I have not seen any evidence that the respondent or the Minister promised the appellant an exemption beyond the period of the Gazette Notice. The duty remission period was not a guarantee that the appellant would be exempt from paying the requisite duty after the twelve-month period expired. The respondent was therefore under a duty under the law to collect all taxes due outside of the stated period.

Disposition

24. Accordingly, the decision of the Tribunal dated 20th December 2023 is hereby upheld. The appeal is dismissed albeit with no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE