



Hotpoint Appliances Limited v Commissioner of Customs & Border Control (Income Tax Appeal E152 of 2021) [2023] KEHC 1270 (KLR) (Commercial and Tax) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E152 OF 2021**

A MSHILA, J

FEBRUARY 24, 2023

BETWEEN

HOTPOINT APPLIANCES LIMITED APPELLANT

AND

THE COMMISSIONER OF CUSTOMS & BORDER CONTROL . RESPONDENT

JUDGMENT

Background

1. The Appeal was brought pursuant to Section 53 of the *Tax Procedures Act* No. 29 of 2015, Section 32(1) of the *Tax Appeal Tribunal Act* and Rule 3 of the *Tax Appeal Tribunal (Appeals to the High Court) Rules* 2015). The Appellant Appealed against the judgment of the Tax Appeals Tribunal made on 25th June 2021 arising from the assessment of the Respondent's Objection Decision dated 17th July, 2021 and the assessment in connection thereto dated 21st May 2020 in respect of Import Duty and Value Added Tax in the sum of Kshs.24,675,098 on the following grounds:
 - a. The Tribunal erred in law and in fact, in its finding that the goods were sold to Defence Forces Canteen Organization (DEFECO), whereas the evidence presented clearly showed that the Local Purchase Orders were issued by Defence Forces Organization (DEFECO) for the Ministry of Defence and further the Respondent had permitted the transfer of the said goods pursuant to Regulation 71 of the Customs and Excise Act from the Appellant's bonded warehouse to that of the Department of Defence.
 - b. The Tribunal erred in law by framing the issues to be whether DEFECO was exempted from tax, when as a matter of fact, what was before it was whether an order by Department of Defence through DEFECO is exempt from tax.



- c. It was not open in law for the Respondent to levy Customs Duty on the Appellant having permitted the transfer of ownership to Department of Defence under Regulation 71 through Form C16.
 - d. It was not open in law for the Tribunal to predicate its finding as to the owner of the dutiable goods on the interpretive provision of the *East African Community Customs Management Act*, 2004 when the Respondent had expressly permitted the ownership to be transferred on bond to the Department of Defence and not only acknowledged the declaration of the importation but further granted exemption to Department of Defence through DEFCO.
 - e. The Tribunal erred in finding the Appellant to be the owner of goods on the basis that it was the importer, when in fact the Respondent had allowed the said goods to be transferred on bond to the Department of Defence and further disregarding the provision on the definition of an owner requiring that such person has to hold himself or herself as the owner, or the person in possession of, or beneficially interested in, or having control of or power of disposition over the goods. In this case, the Department of Defence had held itself out as importer or consignee and applied for transfer of ownership duly acknowledged by the Respondent.
 - f. Without prejudice to the foregoing grounds of appeal, the Tribunal having found that supplies to and imports by DEFCO were not exempt, the Tribunal misapprehended the law and the facts by failing to find that either DEFCO or KDF were liable to pay taxes, and in place thereof shouldered the Appellant with the tax liability, contrary to the provisions of Section 130 and Section 146 (1) of *EACCMA*.
 - g. The Tribunal erred in failing to appreciate the place and the nature of a bonded warehouse as provided for under Sections 2 and 47 of the *EACCMA* and the definition thereof and the fact that no taxes are due and payable in relation to goods in bonded warehouse and that the same is only due at the point of releasing the goods either to the Consumer or to the Owner, as it was in this case. Accordingly, the Appellant being the bonded warehouse operator, it was not liable to pay taxes for goods belonging to the Owner and the Consignee, the DOD.
2. The Appellant sought the following orders:
 - a. The Judgment of the Tribunal dated 25th June 2021 be and is hereby set aside.
 - b. The Respondent to bear costs of the Appeal.
 - c. The Court makes further orders as it may deem fit and just.
 3. In response the Respondent filed its Statement of Facts dated 8th September 2021 stating that the Respondents Customs Post Clearance Audit team conducted an in-depth field audit of the operations of Hotpoint Appliances Limited between October 2014 to October 2019 pursuant to Sections 235 and 236 of the *East African Community Customs Management Act* 2004 (hereinafter *EACCMA*). The said audit review revealed that Hotpoint Appliances Limited supplied certain goods to Defence Forces Canteen Organizations (hereinafter DEFCO) on the premise that the said goods were eligible for tax exemption.
 4. According to the Respondent, the documents filed using the DOD's PIN were submitted for the importation of goods and services. The invoices for the same products and services were also submitted by the Defense Logistics Company and the same company was authorized to carry out the transactions. This is contrary to the provisions of the *EACCMA* 2004.



5. The Defense Department (DOD) is a legal entity that is separate from the DEFCO and the Government entities that are involved in matters related to the Armed Forces and Police. It has its own PIN and is exempted from the Fifth Schedule, item 2, EACCMA. DEFCO, on the other hand, is a trading organization that is contracted by the Kenya Defense Forces to provide services to its members. There is no provision in the law that allows DEFCO to avoid paying taxes.
6. The Respondent agreed with the Tribunal as stated in paragraph 104 of the Judgment dated 25th June 2021, where the Tribunal after examination of the wording of the impugned provisions on exemptions as against the goods imported, found that there was express intention to exempt goods imported for official use of the armed forces as institutions from payment of duty of customs.
7. This is distinct from goods for personal or household use by members of the armed forces especially goods of the kind that is subject to this dispute. The tribunal guided by the maxim cited above was of the view that the exemption intentionally omitted the expression

“for personal or household use of members of the armed forces”.
8. The importations/entries, which were lodged, using the PIN of DOD covering the period from 18th November 2016 to 13th July, 2018 generally constituted consumer/household electronics and entertainment goods. At the time of declaration, the applicable taxes in this case Import Duty and VAT were automatically removed once the exemption codes for DOD were input in the Simba system.
9. However, in the spirit of fairness and in light of the National Treasury letter ref: CONF 1/06 dated 15th December, 2016, the supplies to DEFCO for the period between 14th December, 2016 and 17th November, 2017 were all excluded from the additional tax assessment of Kshs. 24,675,098. In the said letter, the National Treasury sought to provide a clarification that as much as DEFCO is the welfare arm of the Kenya Defence Forces (KDF), its operations are an integral part of the operations of the KDF and directed that such supplies be considered as official supplies to KDF.
10. The Respondent therefore issued a Demand Notice ref: HQ/PCA/FA/065/2019 dated 21st May, 2020 pursuant to Secs. 135, 235 and 236 of the EACCMA demanding short levied Import Duty, VAT and Penalties of Kshs. 24,675,098.
11. The Tribunal at paragraph 116 of the Judgement dated 25th June 2021, found nothing in the EACCMA that prevented the Respondent from recovering unpaid duties from the Appellant as an owner and importer of the goods notwithstanding the fact that by the time the short-levied duties were assessed and demanded, it had already sold the goods to a third party
12. The Demand Notice was received by the Appellant and responded to on 19th June 2020. In the letter, the Appellant sought for review of the taxes demanded under Sec.229 of EACCMA appealing to the Respondent to withdraw the demand in its entirety on the basis that the supplies to DEFCO qualify for exemption under East African Community Customs Management Act, (EACCMA) 2004 and the VAT Act.
13. The Respondent reviewed the Appellants' application and stayed the earlier position on the exemption and communicated the same to the Appellant vide a letter dated 17th July 2020.

Appellant's Case

14. It was the Appellant's case that the Tribunal erred in failing to determine the ownership of the goods at the point of payment of Duty. The Appellant submitted that the owner of the goods was DOD right from the point of issuing the purchase orders up to the point when duty was due and payable



- if any. Relying on Section 130(1) of the [EACCMA](#), the Appellant argued that under this provision, duty is chargeable on the goods in respect of which duty is payable. That is, the owner has to be the person in possession, or having control or power to dispose of the goods in any capacity specified in Section 2 of the [EACCMA](#).
15. It was therefore the Appellant's contention that the Respondent could not in law find the Appellant liable as the owner of the goods contrary to the evidence that DOD stood as the lawful owner of the consignments through the C16 form and by its own endorsement through its agent DEFECO, had accepted all liability in relation to taxes and dues accruing thereon.
 16. The Appellant added that pursuant to the provisions of Section 2 of the [EACCMA](#), one is an owner of the goods either because they are or hold themselves out to be the owner; importer; exporter; consignee; agent; person in possession of the goods; beneficial owner of the goods; person having control of the goods; or is the person with power of disposition over the goods. In this case, DOD is the owner of the consignment having accepted the ownership of the goods in executing the certificate accepted in the C16 forms which acceptance was authorized and approved by the Respondent. According to the Applicant, it does not fit within the meaning of the owner of the goods and DOD remains the owner of the goods as prescribed under Section 2 of the [EACCMA](#).
 17. On whether the Tribunal erred in framing the issue as whether DEFECO was exempt from tax when what was before it was whether an order by DOD through DEFECO was exempt from tax; it was the Appellants submission that it was not open for the Tribunal to reframe the issue for determination and in departing from what was before it as pleaded by the parties and to proceed and make findings thereto. On this issue the Appellant relied on the case of [Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission](#) [2019] eKLR.

Respondent's Case

18. In response, the Respondent submitted that there was no exemption ever made or provided in statute exempting DEFECO from payment of tax thus the tax is payable as demanded by the Respondent and therefore the Tribunal did not err in upholding the Respondent's objection decision for the sum of Kshs.24, 675, 098.
19. There is no express legal provision exempting DEFECO from payment of taxes. Although the entries were lodged using the pin of DOD covering the period from 18th November 2016 to 13th July 2018, the items imported constituted consumer good for personal use of the KDF members and therefore not tax exempt.
20. The Respondent added that the importations/entries which were lodged, using the PIN of DOD covering the period from 18th November 2016 to 13th July, 2018 generally constituted consumer/household electronics and entertainment goods. At the time of declaration, the applicable taxes in this case Import Duty and VAT were automatically removed once the exemption codes for DOD were input in the Simba system.
21. Whereas the Local Purchase Orders were issued by (DEFECO) and invoices consigned to the same body, the Appellant's clearing agent, Escom Oil Limited un-procedurally lodged the said customs declaration documents (Entries) using Personal Identification Number (PIN-[particulars withheld]) of Department of Defence (DOD), contrary to Sec 203 (a) & (b) of the [East African Community Customs Management Act](#) (EACCMA) 2004. DOD being an exempt entity, the applicable taxes were automatically removed once the exemption codes were applied in the system. These entries ought to have been lodged using the PIN of DEFECO as the consignee of the goods supplied.



22. It was the Respondent's further contention that there is no legal provision exempting supplies to DEFECO from payment of taxes. The Fifth Schedule paragraph A, item 2 only provides for exemption from payment of taxes, all goods, including materials, supplies, equipment, machinery and motor vehicles for the official use of Partner States Armed Forces and Police.
23. Moreover, DOD in this case was not in any way an importer or the consignee therefore making the Appellant the importer hence liable for taxes in dispute. Further, the Appellants witness statement given by Crispine Dibo Otieno an employee of the Appellant where in paragraph 6 of his statement acknowledged that the Appellant was involved in importation of a number of appliances from various countries, including China. This outright confession by an employee of the firm, effectively supports the Applicant's position and that of the tribunal, that the Appellant is an owner of the goods for all intents and purposes and as defined as per section 2 that goes even further to specifically list an importer as an owner.
24. The Respondent refuted the Appellant's claim that it is a bonded warehouse operator hence not liable to pay taxes for goods belonging to the Owner and the Consignee, the DOD. In the case of *Killowen in Inland Revenue Commissioner v Duke of Westminster* [1936] AC 1 24 the court stated: -

“The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case.”
25. It was the Respondent's argument that tax legislation must be interpreted strictly and literally leaving no room for perceived intentions other than that which is expressly provided. Therefore, the goods imported by the Appellant and sold to DEFECO were not for official use of the Armed Forces and were therefore not exempt from duties of Customs under *EACCMA* as held by the Tribunal. In this case, the goods were for personal or household use of members of the armed forces, hence in the absence of express legislation exempting the goods, the Appellant ought to have paid taxes.

Issues for Determination

26. The Court has carefully considered the Appeal, Record of Appeal, Statement of facts and the written submissions by the parties and frames the following issues for determination;
 - a. Whether the Tribunal erred in law, in its finding that the supplies to and imports by Defence forces Canteen Organization (DEFECO) were not exempt from tax liability;
 - b. Whether the Judgment of the Tribunal dated 25th June 2021 should be set aside;

Analysis

a. Whether the Tribunal erred in law and in fact, in its finding that the supplies to and imports by Defence Forces Canteen Organization (DEFECO) were not exempt from tax liability;

27. The dispute herein relates to Excise duty/VAT exemption for DEFECO. In the present case is DEFECO exempt from paying taxes?
28. The Tribunal in its judgment at par. 104 held that after examination of the wording of the impugned provisions on exemptions as against the goods imported, found that there was express intention to exempt goods imported for official use of the armed forces as institutions from payment of duty of customs. This is distinct from goods for personal or household use by members of the armed forces especially goods of the kind that is subject to this dispute. The tribunal was of the view that the



exemption intentionally omitted the expression "for personal or household use of members of the armed forces".

29. The exemptions are granted under the 1st Schedule of the VAT Act (2013) and under Par. 2 of part A of the 5th Schedule of the EACCMA. The First Schedule, Section A, Paragraph 57 of the Value Added Tax Act, 2013 provides that the following are exempted from VAT:

“All goods including material supplies, equipment, machinery and motor vehicles, for official use by the Kenya Defence Forces and the National Police Service.”

30. The Second Schedule Section A Paragraph 11 of the Excise Duty Act, 2015 states that; -

“all goods including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defence Forces and the National Police Service.”

31. The Fifth Schedule Part A Paragraph 2 of EACCMA read together with Part X Section 114 states that:

“1) Duty shall not be charged on the goods listed in Part A of the Fifth Schedule to this Act, when imported, or purchased before clearance through the Customs, for use by the person named in that Part in accordance with any condition attached thereto as set out in that Part.”

“Partner States Armed Forces

All goods, including materials, supplies, equipment, machinery and motor vehicles for the official use of Partner States Armed Forces.”

32. A reading of the above-mentioned provisions clearly indicate that exemption is on goods meant for official use of the Kenya Defence Forces. The Tribunal in its judgment argued that any attempt purporting to exempt goods for personal or household use of members of the armed forces from payment of duty or any tax for that matter in the absence of an express legislation to that effect is a flagrant affront to the Constitution of Kenya, 2010. Not only should the exemption be claimed but it must be shown to indubitably to exist.

33. Which still begs the question as to whether the order by Department of Defence through DEFCO was exempt from tax and whether the goods were for personal use or official use; and this is addressed in the next issue.

b. Whether the Judgment of the Tribunal dated 25th June 2021 should be set aside;

34. The phrase "For official use"... Official use is not defined in the VAT Act, 2013 or EACCMA. Further, the provision

“All goods including material supplies, equipment, machinery and motor vehicles, for official use by the Kenya Defence Forces and the National Police Service.”

It is not clear what material supplies and equipment entail. Does this then mean that the electronics supplied by the Appellant can be regarded as equipment? This provision is not clear and leaves room for ambiguity.



35. This Court associates itself with the case of *Commissioner of Income Tax v Vestmont Power (K) Ltd* 2006 eKLR, where the court held thus: -

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity. Following the *Inland Revenue v Scottish Central Electricity Company case*, any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”

36. In *Vestey v Inland Revenue Commissioners* [1979] 3 ALL ER at 984;

“Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.”

37. The TAT erred in finding that the goods were for personal or household use by members of the armed forces yet it did not define what ‘personal use’ was or what ‘official use’ meant. In light of the above, the ambiguity must be resolved in favour of the taxpayer in this case the Appellant.

Findings and Determination

38. This court makes the following findings and determinations;

- i. This court finds that the Appeal has merit and it is hereby allowed.
- ii. The Judgment of the Tribunal dated 25th June 2021 arising from the assessment of the Respondent’s Objection Decision dated 17th July, 2021 and the assessment in connection thereto dated 21st May 2020 in respect of Import Duty and Value Added Tax in the sum of Kshs.24,675,098 is hereby set aside
- iii. Each party to bear its own costs.

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

HON. A. MSHILA

JUDGE

In the presence of:-

Nick Osoro for the Respondent

No appearance for the Applicant

Lucy - Court Assistant

