Commissioner of Customs & Border Control v Bidco Oil Refineries Limited (Income Tax Appeal E011 of 2021) [2023] KEHC 21780 (KLR) (Commercial and Tax) (28 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21780 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E011 OF 2021

JWW MONG'ARE, J

AUGUST 28, 2023

BETWEEN

COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... APPELLANT

AND

BIDCO OIL REFINERIES LIMITED ..... RESPONDENT

(Being an appeal from the judgment of the Tax Appeals Tribunal dated 18/12/2020)

JUDGMENT

1. The Appellant is the Principal Officer appointed under the Kenya Revenue Authority Act, Cap 469 Laws of Kenya, with the mandate to collect, manage and account for Government revenue under the East African Community Customs Management Act 2004 (EACCMA). The Respondent is a limited liability company incorporated in Kenya carrying out the business of import, manufacture and refining of edible oils and related products.

2. By its letter dated 19/4/2012, the Appellant raised a demand from the Respondent of tax payments of Kshs.1,377,505,229.00/-, which amount included accrued interest and penalties. Being dissatisfied with the Appellant 's demand, the Respondent filed an appeal on 27/4/2012 before the defunct Customs and Excise Appeals Tribunal (the Tribunal).

3. The Tribunal delivered its judgment on the matter on 18/12/2020 where it annulled and set aside the Appellant ’s tax assessment vide its letter dated 19/4/2012 for the sum of Kshs.1,377,505,229.00/-.

4. The Appellant herein being dissatisfied entirely with the Tribunal's judgment appealed against it on the following ground:-

> " 1. The Honourable Tribunal erred in law by misinterpreting the provisions of Section 122 as read together with the Fourth Schedule to the East African Community Custom Management Act (EACCMA).
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> 2. That the Honourable Tribunal erred in law and in fact by misapplying the evidence by the Appellant placed before it and therefore arrived at the wrong determination.
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> 3. That the Honourable Tribunal erred in law and in fact in ignoring and/or failing to appreciate the evidence tendered by the Appellant and therefore arriving at the wrong determination.
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> 4. That the Honourable Tribunal erred in law and in fact by failing to appreciate and apply Decision 6.1 of 12th May 1995 made by the World Customs Organisation Committee on Customs Valuation, as adduced by the Appellant.
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> 5. That the Honourable Tribunal erred in law and in fact by finding that the Respondent presented objective and quantifiable evidence of the price actually paid of the goods subject to the Appeal herein contrary to clear evidence presented by the Appellant.
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> 6. That the Honourable Tribunal erred in law and in fact by finding that the Respondent's averments on the insurance on the goods subject to the dispute were in accordance with industry practice without any evidence by the Respondent to the existence of such industry practice.
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> 7. That the Honourable Tribunal erred in law and in fact by finding that the validity of the cost of insurance of the Respondent in respect of imported goods was not in question contrary to the evidence presented by the Appellant thereby arriving at a wrong determination.
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> 8. That the Honourable Tribunal erred in law and in fact by making a finding at paragraph 105 of the judgment that the customs value of the Respondent's goods should have been made using the price actually paid for the goods and not the sum assured, in clear contravention of the provisions of section 122 and paragraph 9(2) of the EACCMA and thereby arriving at a wrong determination.
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> 9. That the Honourable Tribunal erred in law and in fact by finding that the adjustments done by the Appellant on the price actually paid was not done on the basis of objective and quantifiable data as prescribed under the Fourth Schedule to the EACCMA.
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> 10. That the Honourable Tribunal erred in law and in fact by finding that the Appellant improperly applied the provisions of Section 122 and Fourth Schedule to the EACCMA."

5. Based on the grounds above, the Appellant urged the court allow to allow the appeal and set aside the Tribunal's decision dated 18/12/2020 and to have its assessment dated 19/4/2012 for the sum of Kshs.1,377,505,299.00/- upheld.

6. The Respondent opposed the appeal through its statement of facts dated 21/5/2021. The Respondent contended that Paragraph 2(1) of the Fourth Schedule to the EACCMA provided that the value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods in addition to the cost of transport to the port of importation (Freight), loading costs and cost of insurance as provided for under paragraph 9(1) & (2) of the Fourth Schedule; that instead of applying the Cost, Insurance and Freight (CIF) provided for under Section 122, Rule 2, with adjustments under Rule 9(1) & (2) of the Fourth Schedule to the EACCMA, the Appellant herein utilised the sums indicated on the Debit/ Credit Cards which was 110% of the transaction value declared by the Respondent herein which prompted the Respondent to Lodge an Appeal at the Tribunal.

7. The Respondent argued that the Tribunal did not err in its interpretation of the provisions of Section 122 of the EACCMA and the Fourth Schedule thereto rather the Appellant herein was the party at fault for its erroneous interpretation and failure to provide an objective and quantifiable justification for its failure to correctly apply the law.

8. The Respondent refuted the Appellant 's allegation that the Tribunal did not consider its evidence noting that the Appellant did not identify any proof that the Tribunal did not consider its evidence in its decision; that the World Customs Organization Committee on Customs Valuation Decision 6.1 of 12th May 1997 is not applicable as it applied solely to circumstances where there was no accurate and objective evidence to support a declaration.

9. The Respondent further emphasised that the Tribunal correctly interpreted and applied the law, considered all the documentary evidence and facts presented before it by both the Appellant and the Respondent in arriving at a well-reasoned and structured judgment. The Respondent prayed to have the appeal dismissed with costs.

10. I have carefully considered the pleadings and submissions of both parties and note that grounds of appeal can be condensed to the following issues:

> " (i) Whether the statutory provisions governing customs valuation of imported goods was properly applied by the Appellant and
>
> (ii) whether the Appellant is entitled to demand the extra revenue of Kshs.1,377,505,299.00/- from the Respondents or at all"

As the issues are co-related, I will analyse and determine them together.

11. I note that vide its letter dated 19/4/2012, the Appellant issued a demand for the outstanding taxes amounting to Ksh.1,377,505,299.00 from the Respondent. This was in accordance with its earlier demand letter of 22/1/2010. During the hearing of the appeal herein, the Appellant submitted that its tax audit culminating in the tax demand dated 19/4/2012 was carried out in accordance with the law and that its determination of the customs value of the goods imported by the Respondent was in accordance with the law.

12. The Appellant further submitted that the supplementary invoices that it had discovered during inspection were always 10% above the cost per unit as declared by the Respondent in the commercial invoices; that even though the Respondent had declared CIF values on its import documents, the insurance component declared by the Respondent related to the local insurance taken out by the

Respondent, as the buyer, on the imported goods and not the cost of insurance of the goods taken out by the seller in accordance with terms of contract.

13. For the above reasons the Appellant submitted that it doubted the accuracy of the information provided by the Respondent and could not rely on the values presented by it during self-assessment at importation. The Appellant contended that as a result of the doubts of the values declared by the Respondent, it made adjustments that resulted in extra charges in accordance with paragraph 3 of the 4th schedule which provides for transactional value of identical goods.

14. On the other hand, the Respondent submitted that the Tribunal was correct in affirming that the Appellant did not properly apply the provisions of section 122 and the Fourth schedule of the EACCMA in its assessment and demand for extra taxes. The Respondent contended that valuation of goods for the purpose of customs is embedded under section 122 and the Fourth schedule of the EACCMA and the WTO Agreement on Customs Valuation which states as follows:-

> Section 122 of the EACCMA states: " (1) Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value. "

Paragraph 2 of the Fourth schedule states:

> " The customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State adjusted in accordance with the provisions of Paragraph 9..."

15. The Fourth schedule explains the methods of determining customs value of imported goods. The first method as shown above is the transactional value, second method is the transactional value of identical goods, third is the transaction value of similar goods, the Fourth method is the deductive value method, fifth is the computed value method while the sixth is the fall-back value method.

16. The interpretative notes in part II of the Fourth schedule state that the methods above are to be applied in a sequential manner and imported goods are to be valued in accordance with the provisions of the subsequent methods only where the conditions and parameters in the preceding method have not been fulfilled. Therefore, the first step towards the determination of the customs value of imported goods is the determination of its transactional value which means the purchase price of the goods.

17. In addition, paragraph 9(2) of the Fourth schedule provides:-

> " In determining the value for duty purposes of any imported goods, there shall be added to the price actually paid or payable for the goods:-
>
> a. the cost of transport of the imported goods to the port or place of importation into the Partner State; provided that in case of imports by air no freight costs shall be added to the price paid or payable; (Freight)
>
> b. loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation into the Partner State; (part of Freight)
>
> c. the cost of insurance. (Insurance)."

18. In the case before me, I note that the Appellant rejected the transaction values declared by the Respondent on the basis that the debit and credit notes declared were 10% more and therefore the

Appellant adopted the latter. Further the Appellant rejected the value of insurance declared by the Respondent and loaded 1.5% as set out in the Customs Service's Operational Guidelines. In my view, the Appellant has not demonstrated to this court which valuation method, as envisaged under schedule 4, that it used in the adjustment of the customs value is in issue.

19. The Respondent illustrated to the Tribunal and to this court the actual value of the goods it imported. However, the Appellant rejected this value and proceeded to adopt the sum assured value which was more than the price actually paid for cost and freight adjusted for insurance. Having considered all the factors as elaborated above, I therefore agree with the finding of the Tribunal that the sum assured is not equivalent to the CIF and should not be deemed to be the customs value. The customs value of the Respondent's goods should have been made using the price actually paid for the goods and not the price insured as the goods had been over insured by 10% as agreed between the seller and the Appellant as per industry practice.

20. On the issue of insurance, the Respondent used the value of the local marine insurance it obtained for the imported goods in the computation of the customs value. The Appellant rejected this cost of insurance stating that "one cannot insure property that does not belong to them and expect to gain from its loss or otherwise." The Appellant therefore assessed the cost of insurance at 1.5% of the CFR.

21. Having heard the arguments put forward by both parties herein on the on the issue of the cost of insurance to be applied, I do not agree with the Appellant 's assertion that the respondent had no insurable interest in the goods and could therefore not claim the insurance it paid for the same on the CIF as argued above. In my view, the Respondent had an insurable interest in the imported goods once it made payment for them. Further it is a known position in the export business that the ownership of goods is supposed to change at the port of importation. I find therefore that there was no valid reason put forward by the Appellant in rejecting to consider the addition of the insurance obtained by the Respondent as part of the customs value on the Respondent's goods.

22. Having found that the Appellant 's adjustment of the customs value as declared by the Respondent was not in conformity to the provisions of Section 122 and the Fourth schedule to the ECCMA, I find that the statutory provisions governing customs valuation of imported goods was not properly applied by the Appellant in calculating the additional taxes and as a result, the Appellant demand the extra revenue amounting to Kshs.1,377,505,299.00/- from the Respondent is not warranted.

23. In conclusion I find and hold that appeal before me has no merit and is hereby dismissed with costs awarded to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF AUGUST 2023.

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J. W. W. MONG'ARE

JUDGE