



**Commissioner of Customs & Border Control v Mart (Income Tax Appeal E208 of 2022)
[2023] KEHC 21774 (KLR) (Commercial and Tax) (28 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E208 OF 2022
JWW MONG'ARE, J
AUGUST 28, 2023**

BETWEEN

COMMISSIONER OF CUSTOMS & BORDER CONTROL APPELLANT

AND

ROSHINA TIMBER MART RESPONDENT

(Appeal from part of the Judgement & Orders of the Tax Appeals Tribunal dated 5/11/2021)

JUDGMENT

1. The Appellant is an agency of the Kenya Revenue Authority with the mandate to collect and receive all customs revenue as provided by Section 5 of the [East African Community Customs Management Act 2004](#) (EACCMA) while the Respondent is a partnership business based in Mombasa and carries on the business of importation of tiles and ceramics.
2. A tax investigation was carried out on the Respondent's tax affairs relating to its operations, specifically two entries, namely, 2020MSA7596864 and 2020MSA7615706.
3. The Respondent stated that it imported a 1x40 container with 350 sets of Water Closet Suites (WC) under the first entry and 3x20 containers with 200 sets of WC Suites and 3456m squared of ceramic glazed floor tiles under the second entry and presented all the relevant importation declaration documents before the proper officer.
4. The Appellant stated that the documents produced by the Respondent could not support the transaction values and the two entries were undervalued which resulted in low revenue yield. The Appellant rejected the transaction values as they did not conform with similar goods within the market.



5. The Appellant filed its appeal before the Tax Appeals Tribunal (the Tribunal) vide a notice of appeal on 28/9/2020. The Tribunal rendered its decision and allowed the Respondent's appeal. The Tribunal set aside the additional assessments of Kshs.177,244/- and Kshs.206,893/- that were paid under protest.
6. Dissatisfied with the Tribunal's judgement, the Appellant appealed to this court on the following grounds of appeal:
 - a. " That the Honourable Tribunal erred in law and in fact by holding that the Respondent erred in relying on the price data that is two years old for goods in questions to determine the applicable customs transaction value.
 - b. That the Honourable Tribunal erred in law and in fact in failing to appreciate that the Respondent is not restricted by Legislation on the number of years to be relied on of the price data for the goods in question.
 - c. That the Tribunal's decision failed to take into consideration....
 - d. The Tribunal erred in fact and law in basing its entire decision..."
7. Based on the grounds above, the Appellant prayed to have this appeal allowed and the tribunal's judgement set aside.
8. The Respondent opposed the appeal through its Statement of Facts dated 5/7/2022. The Respondent contended that the Respondent imported certain goods into the country and furnished the full particulars and documentary evidence of the said goods to the Appellant in accordance with Section 34 of the EACCMA. That the Appellant failed to appreciate the value of customs valuation methods as prescribed in the fourth schedule of the EACCMA and used the Free on Board values of the Respondent's past entry No. 2020MSA 7022574 of 2018 for goods that had been cleared two years earlier and was the subject of a reference to the Tribunal in TAT No.360 of 2018 which had not been determined.
9. The Respondent argued that there is no clause in section 122 nor the Fourth schedule of the EACCMA that gives the Appellant discretionary power to raise FOB values arbitrarily. In addition to its statement of facts, the Respondent also filed a Reply to the Memorandum of Appeal dated 3/2/2023. The Respondent emphasised that the Tribunal was right in law and in fact in finding that the Appellant was wrong in using the price data that was two years old for goods in question to determine the applicable customs transaction value.
10. I have carefully considered the record of appeal, the pleadings and submissions by both parties. Although I do note that paragraph 3 and 4 of the Memorandum of Appeal are incomplete the grounds of appeal raised by the Appellant may be condensed into one issue for determination, to wit: "Whether the Appellant erred in law and in fact by adjusting the declared customs value leading to additional tax assessments of Kshs.177,244/- and Kshs.206,893/-."
11. It is the Appellant's case that the customs duty was adjusted upwards because the Respondent had understated the value of the goods and did not support the low value that he was presenting. Conversely the Respondent averred that the Appellant erroneously uplifted the customs value of the imported goods on the basis of an earlier import entry where the Respondent had imported similar goods in 2018.



12. The operative sections on calculating the duty payable are Section 122 of the [EACCMA](#) 2014 which provides that:-
- “ 1. 1.Where imported goods are liable to import duty ad valorem, then the value of the goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value.
 2. Upon written request, the importer shall be entitled to an explanation in writing from the proper officer as to how the customs value of the importer’s goods was determined.
 - 3 ...
 4. Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for custom valuation purposes.”
13. The Fourth Schedule of the [EACCMA](#) states that the customs value of imported goods shall be the transaction value which is the price actually paid or payable for the goods. The schedule goes on to state that where the transaction value of the imported goods cannot be determined, the customs value shall be the transaction value of identical goods and/or similar goods sold for export to the Partner State.
14. The provisions above give the Appellant the right to re-assess the duty payable in case of understatement of value or inaccuracy in the information availed for purposes of assessing customs duty.
15. The Appellant asserts that its assessments of the goods imported by the Respondent indicated that the declared customs value was below what it should have been. The Appellant raised the customs value of the goods based upon the Appellant’s previous imports that took place in 2018.
16. I note that the 2018 valuation is a matter of contention in the Tribunal in TAT Case No.306 of 2018. I note further that the Appellant relied on customs values from 2 years prior to the importation on record. Under section 3 and 4 of the Fourth Schedule, where the customs value is determined by the transaction value of identical or similar goods sold for export, the goods ought to be exported at or about the same time as the goods being valued.
17. In this case the Appellant referenced goods that had been valued and imported two years prior which is definitely not at or about the same time as the time of valuation of the goods in question. In the case of [Gira Enterprises v Commissioner of Customs](#) (Customs, Excise and gold Tribunal-Mumbai) the Tribunal held:-
- “...when the declared value is ridiculously low compared to the ordinary competitive price of comparable goods contemporaneously imported, such declared values cannot be adopted as customs values.”
18. The similar goods that the Appellant relied on ought to have been contemporaneously imported in order to give an accurate valuation of it. I find that it was flawed for the Defendant to rely on previously imported items by the Respondent that occurred 2 years prior to the importation in issue.



19. I therefore agree with the Tribunal's findings that although the Appellant was within its rights to challenge the declared customs value by the Respondent, it erred in adjusting the declared customs value based on values that were beyond the legally specified time frame.
20. In conclusion I find that the Appellant was not justified in adjusting the declared customs value leading to an additional tax of Kshs.177,244/- and Kshs.206,893/-. I therefore hold that the present appeal before lacks merit and I shall proceed to dismiss the same with costs awarded to the Respondent.

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

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Ms Chelangat for the Appellant.

Mr. Bunde holding brief for Mkan for the Respondent.

