



REPUBLIC OF KENYA



Commissioner Customs & Border Control v Jayraj Impex Limited (Income Tax Appeal E173 of 2021) [2023] KEHC 24318 (KLR) (Commercial and Tax) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E173 OF 2021**

A MABEYA, J

OCTOBER 31, 2023

BETWEEN

COMMISSIONER CUSTOMS & BORDER CONTROL APPELLANT

AND

JAYRAJ IMPEX LIMITED RESPONDENT

JUDGMENT

1. The respondent imported 480 bags of Sawaj Pandhaarpuri Tobacco which it declared as unmanufactured tobacco under HS Code 2401.20.00. The appellant issued a tariff ruling on 29/5/2018 wherein he concluded that the product was considered as chewing tobacco classified under HS Code 2403.99 of the *EAC Common External Tariff*.
2. The respondent appealed against the said decision to the Tax Appeals Tribunal which allowed the appeal on 23/7/2021. Being dissatisfied with that judgment, the appellant preferred an appeal to this Court vide a Memorandum of Appeal dated 21/9/2021 against the said decision citing 9 grounds of appeal.
3. The grounds can be summarized as follows: -
 - a. That the Tribunal erred in holding that the addition of additives would have qualified the tobacco to move from Heading 2401 to 2403.
 - b. That the Tribunal erred in holding that the tobacco was unprocessed as it did not contain additives as per the Government Chemists report dated 4/12/2017.
 - c. That the Tribunal erred in failing to appreciate that the tobaccos final product may contain additives on the application of heat and pressure.



- d. That the Tribunal erred in fact in the interpretation of HS Code 24.01 and HS Code 2403.
4. The appeal was not opposed as the respondent neither filed a statement of facts nor submissions.
 5. The appellant submitted that the applicable code for classifying the tobacco was code 2403.99.000 which relates to manufactured tobacco. According to the appellant, the respondent's goods would attract a different code based on where the product would be used. Counsel submitted that the classification of products under the HS code looked at the physical appearance as well as its industrial use. That for the respondent to succeed in having the consignment applied under tariff 2401, it should demonstrate how they intend to apply the product. Counsel further submitted that the Tribunal did not determine whether the process relating to the product moving from heading 2401 to 2403 involved a manufacturing process.
 6. I have considered the record of appeal and the submissions. From the grounds of appeal, the main issue for determination is whether the Tribunal erred in holding that the classification of the tobacco should have been under tariff number HS 2401 as unmanufactured tobacco.
 7. From the facts of the case, the appellant classified the tobacco under code 2403 of the harmonized code which relates to manufactured tobacco. According to the appellant, the tobacco was in its final form thus ready to use and it did not require any further processes. That any addition of additives was done by the final consumer and not the respondent. In this case, the appellant faulted the Tribunal for allowing the respondents classification of the product under code 2401.
 8. In its decision, the Tribunal opined that the tobacco was still considered to be unmanufactured even after undergoing processes such as stemming, stripping, fermenting and blending. It therefore held that the imported tobacco was unmanufactured as it contained no additives and was not fit for consumption without undergoing the process of adding additives.
 9. In *Commissioner of Customs and Border Control v Kenya Breweries Limited* (Tax Appeal E157 of 2021) [2022], the court observed that: -

“The Harmonized System comprises of 21 Sections divided into 99 Chapters and the arrangement of sections is based on three principles; articles made of same material, goods of the same use and the stage of processing or degree of manufacturing. It comprises a Tariff structure where a tariff number is identified by an eight-digit code e.g 3004.90.00 assigned to a good or service (HS code) and the tariff number is based on the general category that describes the item that is, use of the item or the materials making it.

The Harmonized System is also supported by inter alia Explanatory Notes which provide commentary on the intent and scope of provisions and as approved by the Customs Co-operation Council, they constitute the official interpretation of the Harmonized System at the International level and are an indispensable complement to the System. The EAC partner states have since developed a customized version, CET, which is currently applicable to the partner states including Kenya as a basis for classification of goods and services.”

10. Chapter 24 of the Harmonized Commodity Coding system states thus:

“2401: unmanufactured tobacco, tobacco refuse

2402: Cigars, cheroots, cigarillos and cigarettes of tobacco or tobacco substitutes



2403: Other manufactured tobacco and manufactured tobacco substitutes; homogenized or reconstituted tobacco; tobacco extracts and essences.”

11. The explanatory notes relating to HS Code 2401 provides: -

- “ 1) Unmanufactured tobacco in the form of whole plants or leaves in the natural state or as cured or fermented leaves, whole or stemmed/stripped, trimmed or untrimmed, broken or cut (including pieces cut to shape but not tobacco ready for smoking). Tobacco leaves, blended, stemmed/stripped and cased (soused or liquored) with a liquid appropriate composition mainly in order to prevent mould and drying and also to preserve the flavour are also covered in this heading.
2. Tobacco refuse e.g. waste resulting from the manipulation of tobacco leaves or from the manufacture of tobacco leaves, or from the manufacture of tobacco products (stalks, stems, midribs, trimmings, dust, etc.)’

12. The Explanatory Notes to Heading 2403, HS provides: -

- “ a) Smoking tobacco, whether containing tobacco substitutes in any proportion, for example, manufactured tobacco for use in pipes or for making cigarettes.
- b) Chewing tobacco
- c) Snuff
- d) Tobacco compressed or liquored for making snuff
- e) Manufactured tobacco substitutes
- f) Homogenized or reconstituted tobacco
- g) Tobacco extracts and essences.”

13. According to the Harmonized system of classification, the tariff number relevant in the classification of tobacco is based on the description of the product, the use of the product and the material making it. The Tribunal relied on the Strategy, Innovation and risk department memo which reported that the sample collected and tested comprised of unmanufactured tobacco. Further, there was a certificate of analysis issued by the Government chemist which stated that, the sample only contained nicotine and therefore had no additive.

14. From the foregoing, I am unable to agree with the appellant that the tobacco herein was manufactured as there was no evidence produced to show that there was addition of any additive or whether the product did not need to be processed further.

15. In *Commissioner of Customs and Border Control v Adula* (Tax Appeal E003 of 2021) [2022], the court stated: -

“Having examined the applicable provisions and evidence relied on by the Tribunal above, I am unable to fault the conclusion arrived at by the Tribunal. I agree that the Explanatory Notes in HS 2401, unmanufactured tobacco remains within the scope of H.S 2401 even after undergoing stemming, provided that it is not ready for smoking. It is clear from the evidence on record that the Consignment was not ready for smoking. The evidence also



shows that the Consignment did not contain any additives that could have made the tobacco chewable and thus changed the classification to the heading under HS 2403. I also affirm the position of the Tribunal that it is only after the addition of additives such as lime and grinding that could have qualified the Consignment to be treated as ‘manufactured’ and thus moving it from HS 2401 to HS 2403.”

16. In view of the foregoing, it is evident that the tobacco was unmanufactured and was not fit for consumption without adding additives. In this regard, based on the material making the tobacco the correct tariff for classification was HS 2401. The court finds no error in the decision of the Tribunal.
17. Accordingly, the court upholds the Tribunal's judgment dated 23rd July 2021 and finds the appeal to be without merit and dismisses the same. No order as to costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

