



**Angelica Medical Supplies Limited v Commissioner of Customs and Border Control (Income Tax Appeal E012 of 2023) [2023] KEHC 26178 (KLR) (Commercial and Tax) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26178 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E012 OF 2023  
JWW MONG'ARE, J  
NOVEMBER 30, 2023**

**BETWEEN**

**ANGELICA MEDICAL SUPPLIES LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... RESPONDENT**

*(Being an Appeal from the Judgement of the Tax Appeals Tribunal dated 17th March 2023 in Tax Appeal No 258 of 2021)*

**JUDGMENT**

**Introduction and Background**

1. This appeal arises from the decision of the Tax Appeals Tribunal in which the tribunal confirmed a post-clearance audit of Kes 27,730,065/- against Angelica Medical Supplies Limited by the respondent. The appellant is a limited liability company incorporated in Kenya whose principal activity is the importation, sale, and distribution of medical supplies. The respondent is the principal officer appointed under and in accordance with section 13 of the *Kenya Revenue Authority Act*, charged with the responsibility of assessing and collecting of tax revenue on behalf of the government.
2. During the period between 2015 to 2018, the appellant imported a 'Dialyzer Diapes Steam' (the "Dialyzer"/ "Artificial Kidney") under HS Code "9018.39.00 -Other" of the East African Community Common External Tariff (EAC/CET). The respondent's post-clearance audit team conducted a desk audit of the appellant's import declarations for the 'Dialyzer' for the period from 2015 to 2018 and on February 16, 2018 issued a letter of findings stating that the appellant, using HS code 9018.39.00 had applied the incorrect EAC CET code, and that the correct code was 8421.29.00.



3. Based on the above finding on April 16, 2021, the respondent demanded payment of taxes amounting to Kes 27,730,065.00/- being import duty, VAT, and late payment interest. The appellant in its response on February 18, 2021 asserted it had used the correct tariff code 9018.39.00. Subsequently, the respondent responded *vide* a letter dated February 24, 2021 seeking substantive proof of the same failure to which taxes would be demanded. The appellant sent a response on February 25, 2021 reiterating the letter of February 18, 2021.
4. The respondent by its a letter dated April 16, 2021 issued a tax decision demanding payment of additional taxes amounting to Kes 27,730.065 being import duty, VAT and late payment interest of the period 2016 to 2018. Aggrieved by the tax decision, the appellant filed an appeal to the tribunal on June 14, 2021 arguing, *inter alia*, that the respondent had erred in determining that the correct classification code for the dialyzers was 8421.29.00. while it was the appellant's legitimate expectation that the dialyzers would be classified under tariff code 9018.39.00.
5. In its judgment delivered on March 17, 2023 the tribunal found in favour of the respondent and concluded that the respondent's classification of the appellant's dialyzers was similar to the classification that the tribunal had made for haemodialysis machines in an appeal filed before it being appeal number TAT 472 of 2020, *Solutions Medical Systems Limited v Commissioner of Customs and Border Control*. The tribunal went ahead to find there was no violation of the appellant's legitimate expectations.
6. Aggrieved by the judgment of the tribunal, the appellant filed the instant appeal by the memorandum of appeal dated May 12, 2023, citing 5 grounds as follows:-
  - i. The Tax Appeals Tribunal erred in law by failing to find and hold that the appellant's imported product called a "Dialyzer Diapes Steam" is in fact an artificial kidney justifying its classification under Tariff Code 9018.39.00 of the East African Community Common External Tariff (EAC CET)
  - ii. The Tax Appeals Tribunal erred in law by classifying the Artificial Kidney imported by the appellant under Tariff Code 8421.29.00 of the East African Community Common External Tariff thus failing to be guided by the General Interpretation Rules (GIR) under the EAC CET as well as the Explanatory Notes (EN) to the EAC CET.
  - iii. The Tax Appeals Tribunal erred in law by abdicating their statutory duty to analyze the appellant's evidence relating to the correct classification of a "Dialyzer Diapes Steam" and instead using their previous decision which was wholly inapplicable to the Appellant's case in order to unjustifiably tax the Appellant's product – an artificial kidney – under the incorrect EAC CET.
  - iv. The Tax Appeals Tribunal erred in law by wholly relying on its earlier decision in the case of *Solutions Medical Systems Limited v Commissioner of Customs and Border Control* TAT Appeal No 472 of 2020 where they classified a Haemodialysis apparatus which is neither similar to nor replaceable with an Artificial Kidney – the appellant's product in order to subject the appellant's product to taxation under an incorrect tax regime – HS Code 8421.29.00 of the EAC CET.
  - v. The Tax Appeals Tribunal erred in law by failing to find and hold that the appellant's legitimate expectation was violated by the respondent when the respondent, for approximately three (3) years classified the appellant's product, the "Dialyzer Diapes Steam" under HS 9018.39.00 of the EAC CET only to turn around and attempt to reclassify it several years later under HS 8421.29.00 of the EAC CET.



7. Based on the above grounds the appellant sought to have the judgment of Tax Appeals Tribunal Set aside and the court to make a finding that the “Dialyzer Diapes Steam” ought to be classified under the tariff code 9018.39.00 of the East African Community Common External Tariff (EAC/CET) which attracts 0% import Duty and is VAT exempt, and order that the appellant is entitled to a refund of Kes 3,605,006/= paid under protest.
8. The Respondent opposed the appeal through its statement of facts dated 22<sup>nd</sup> June 2023. It urged the court to dismiss the appeal and uphold the tribunal’s decision of 17<sup>th</sup> March 2023. The Respondent contends there was a tariff misclassification by the Appellant, The Respondent states the “Dialyzer Diapes Steam” falls within the tariff 8421.29. 00 which refers to Filtering or purifying Machinery apparatus for liquids: others, and attracts an import duty of 10% and VAT at 16% as opposed to the tariff 9018.39 which covers syringes, needles, catheters, canulae and the like: others, which is VAT exempt and attracts 0% import duty. It is argued that a dialyzer is a disposable filtering part that functions when the article is connected by means of tubes to a special appliance, an artificial kidney, which enables the blood and dialysate to circulate and toxic matter be evacuated, as such dialyzers being part of a dialysis machine are excluded from chapter 90, by application of note 2(a) to chapter 90.
9. The respondent argues that Kenya Customs is guided by the EAC/CET, 2022 in the classification of goods, while the classification is determined by the general interpretation rules (GIR) cited in EAC/CET. The dialyzer being a filtering and purifying machine for liquids in this case blood is classified under EAC/CET under tariff 8421.29 which attracts a standard rate of 10% VAT. The respondent being a member of World Customs Organization(WCO) relies on the guidance of WCO for valuation, origin and tariff determination. WCO classified Dialyzers under heading 8421 by the application of General Interpretation Rule 1 in the classification decision of 1999 and thus it is binding on the respondent.
10. Further, the respondent contended that the claim for legitimate expectation must fail as it does not override the law, as the demand for import duty and VAT, is anchored in law and cannot be said to be unilateral or unreasonable and the same was done in accordance to sections 235 and 236 of the *East African Community Customs Management Act 2004*, that allows the respondent to call for documents and to conduct a post clearance audit on the import and export operations of a taxpayer within a period of 5 years, from the date of importation or exportation.

### **Analysis and Determination**

11. I have considered the entire record of appeal, the submissions filed the parties, and note that the grounds of the appeal can be collapsed into two issues as follows:-
  - i. whether the tribunal erred in the classification “Dialyzer Diapes Steam” under tariff 84.21.19
  - ii. Whether dialyzer Diapes Steam is subject to VAT and import duty.
12. It is a well-established principle of law that those endowed with statutory authority and responsibility must exercise it in a reasonable and fair manner, and their discretion cannot be arbitrary or in opposition to the principles of natural justice. When discretion is applied arbitrarily, the court may intervene to correct the issue.
13. On the first issue the Appellant contends the respondent misclassified the dialyzer in the wrong tariff 8421.29 while it had on the previous occasion allowed the appellant to classify it under the tariff 9018 of the EAC CET which attracted 0% Import duty and was VAT exempt. The appellant further submitted that the Tribunal erred in relying on the *Solution’s case* to determine that the dialyzer was classified under the head 8421.29 and failed to distinguish and appreciate that the products imported



in the 2 cases were different and not comparable and that customs classification is done on a case-to-case basis. The appellant submitted that the tribunal erred in defining a hemodialyzer to mean “an apparatus designed to function together with an artificial kidney dialysis apparatus” but imported and sold differently.

14. The tribunal in making a finding on the best tariff to use relied on the case of TAT 472 of 2020 *Solutions Medical Systems Limited Vs Commissioner of Customs and Border Control* where the tribunal had previously determined-

“that a Hemodialysis is classified under tariff 84.21 in accordance with rule 1 and Note 2(a) to chapter 90 of the EAC CET subject to rule 1 note 90 “parts and accessories for machines, apparatus, instruments or articles of this chapter which are goods included in any of the headings of this chapter 84,85 or 91 (other than heading 84.85, 85.48 or 90.33) are all classes to be classified in their respective heads.”

The tribunal also relied on the opinion of the World Customs Organization which over the years has developed a common and harmonized classification system

15. It is a well-established principle of law that the burden of proof is vested with the respondent to prove that a particular item or goods are taxed in the manner claimed. In the Indian decisions in the case of *Union of India v Garware Nylons Ltd* 1996 10 SCC 413 par 15 the court held as follows:-

“in our view, the conclusions reached by the high court is fully in accord with the decisions of this court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item in question is taxable in the manner claimed by them...”

16. In determining this issue this court will adopt the definition of a dialyzer as defined in the *Cambridge Dictionary* to mean “a device containing a thin piece of material that filters (separates) waste substances from someone’s blood when their kidneys (organs that remove waste and produce urine) are unable to do so this is the way that they should... a dialyzer is also known as an artificial kidney.”

17. I do agree with the appellant that to get to the correct tariff one has to be guided by the general interpretation rules for the Classification of Goods. Rules 1 to 4 provide as follows:-

Rule 1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions:

Rule 2.

- (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.
- (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material



or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3

Rule 3 thereof provides: -

“When by application of rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- a. The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- b. Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
- c. When goods cannot be classified by reference to 3(a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.”

Rule 4 provides:

“goods which cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading appropriate to the goods to which they are most akin”

18. It is also important to note that rule 4 provides that where goods cannot be classified under rules 3(a) and 3(b) they shall be classified under the heading appropriate to the goods to which they are most akin.
19. Heading 84.21 of the EAC CET covers “centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases, while heading 90.18 covers “instruments and appliances used in medical, surgical, dental or veterinary science, including scintigraphy apparatus, other electro-medical apparatus and sight-testing instruments”
20. The appellant has urged the court to give the artificial kidney its plain and literal meaning before seeking to give its legal meaning since the statute has failed to give a definition of the same. It submits that going by rule 1 a dialyzer ought to be classified with other instruments and appliances used in the medical field by professionals.
21. Despite what the titles might imply, the words in the section and chapter titles are meant to be used as a guide to where the relevant Tariff Code of the product is to be classified and is likely to be found. As a result, a product may be included in or excluded from a section or chapter. it is important to note goods ought to be classified based on a heading with a more specific description of the goods in question, as opposed to that with a general heading. In *Dunlop India Ltd vs Union of India & others* Oct 6<sup>th</sup> 1975 SCC P. 254 para 35 the Supreme Court of India held “when articles have, by all standards, a reasonable claim to be classified under an enumerated item in the tariff schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. ...”



22. Based on the above rules and in particular rule 3(a) the court is of the opinion that the most specific description of a “Dialyzer Diapes Steam” considering the purpose or use is a purifying machine which purifies blood, would fall under the heading 90.18. It is also my considered opinion that courts are also to be guided by the explanatory notes to headings in determining the tariff in which a product falls. Therefore, this court notes that the explanatory notes to heading 90.18 and specifically (IJ) on other instruments and appliances for human medicine and surgery provide for an Artificial kidney dialysis apparatus, whereas the explanatory notes for heading 84.21 specifically excludes artificial kidney (dialysis) apparatus which is provided under 90.18 from being classified under the head 84.21.
23. Based on the above finding and having examined the applicable provisions, I do find fault in the determination of the tribunal. The Tribunal totally erred in classifying the dialyzer under the heading 84.21 while applying the holding in the solution’s case. This court finds that the tribunal disregarded the rules of interpretation in the classification of the dialyzer and arrived at a reasoning which is misconceived and untenable. Be that as it may, I am satisfied that the proper tariff to use in this case is the under the heading 90.18.
24. For the reasons set above, I hold that the appeal herein is merited. The same is allowed in the following terms:-
- i. The judgment of the Tax Appeals Tribunal dated March 17, 2023 is hereby set aside.
  - ii. The proper classification of the “Dialyzer Diapes Steam” is under the tariff code 90.18.39.00 of the East African Community Common External Tariff which attracts 0% import Duty and is VAT exempt.
  - iii. The respondent is ordered to refund to the appellant the sum of Kes 3,605,006/= paid under protest.
- It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**J.W.W. MONG’ARE**

**JUDGE**

**In the Presence of:-**

1. Ms. Mona Abdulahi for the Appellant.
2. No appearance for the Respondent.
3. Amos - Court Assistant

