



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Commissioner of Customs and Border Control v Adula (Tax Appeal E003 of 2021)
[2022] KEHC 248 (KLR) (Commercial and Tax) (29 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E003 OF 2021
DAS MAJANJA, J
MARCH 29, 2022**

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER CONTROL APPELLANT

AND

ERIC OGOLA ADULA RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal at
Nairobi dated 20th November 2020 in Tax Appeal No. 266 of 2020)*

JUDGMENT

Introduction and Background

1. Sometime in February 2020, the Respondent imported 550 bags of tobacco from India which was entered on 13th March 2020 at the customs point as Entry No.2020ICD1931108 and declared as unmanufactured tobacco which is classified under the East Africa Community Common External Tariff (“EACCET”) as Heading System(H.S.) 2401.20.00 (“the Consignment”). The Respondent also paid import duty of KES. 1,264,648.00 as demanded by the Respondent (“the Commissioner”). As part of a clearance and verification process, a sample of the Consignment was taken for further laboratory analysis by the Commissioner whereupon the Commissioner concluded in a tariff ruling dated 23rd March 2020 that the Consignment was not unmanufactured tobacco as declared but manufactured chewing tobacco classifiable under H.S Code 2403.99.00 as the same was clarified as chewing tobacco after subjecting the tobacco to grinding and mixing it with lime. This meant that the Respondent was to pay additional import duty and VAT on the Consignment.
2. Dissatisfied, the Respondent appealed against this ruling with the Commissioner where he argued that the Consignment was inspected in the country of origin by the KEBS appointed inspectors who classified the same as raw material and that the supplier’s invoice and packing list also showed that he



purchased raw tobacco classified under the declared H.S Code. The Respondent further put forth that in previous consignments imported from India, the tobacco was entered as ‘unmanufactured’ under the declared HS Code 2401.20.00 and that there was a previous tariff ruling referenced as CUS/V&T/TARI/RUL/171/2019 which supported the Respondent’s position. After considering the appeal, the Commissioner, in its tariff ruling dated 9th April 2020 upheld its previous tariff ruling stating that the same was based on the material information provided and sample presented and that the tariff ruling referenced by the Respondent had since been revoked in April 2019.

3. Aggrieved by the ruling, the Respondent lodged a further appeal with the Commissioner dated 15th April 2020 reiterating his earlier grounds of appeal. He also insisted on being supplied with the laboratory sample used for analysis and the report as he doubted whether the samples used related to his Consignment. The Respondent also requested that the samples of the Consignment being held at the Inland Container Depot(ICD) be drawn in presence of both parties and that both parties test the same to confirm the nature of the Consignment for the right classification. He maintained that H.S Code 2401.20.00 was the correct tariff. In a further email of 28th April 2020, the Respondent disputed the description of the Consignment as being ‘Stemmed Tobacco’ or ‘Chewing Tobacco’ and once again sought a further laboratory test after drawing a sample from the Consignment to remove any ambiguity.
4. As a result of the appeal, the Respondent and the Commissioner held a meeting on 30th April 2020 where it was agreed that for there to be a reclassification, the Respondent was to table new evidence pertaining to the Consignment and that such evidence should answer the questions whether there was any value addition to the Consignment, the Respondent’s market supply and where its business premises is located. The Commissioner also declined to release the Consignment to the Respondent stating that the same was still a subject under dispute but allowed samples to be taken for a laboratory test disclaiming that this test would not determine the tariff classification since it is just a tool to aid in classification.
5. After the meeting and in response to the Respondent’s appeal of 15th April 2020, the Commissioner issued a detailed response dated 8th May 2020. It maintained that from the sample presented earlier, the Consignment contained ‘stemmed’ tobacco which fell within the definition of manufactured tobacco and that the certificate of conformity from KEBS and the laboratory test from India were noted but that tariff classification determination is based on the sample material presented and material information availed. The Commissioner further held that the sample used for the test was from the Respondent’s Consignment as confirmed by the Respondent’s agent during their meeting and that based on the information held by the Commissioner, the Respondent was required to show proof that the tobacco Consignment was not ready for smoking, otherwise the Commissioner upheld its earlier tariff ruling of 23rd March 2020.
6. The Respondent responded to the Commissioner by a letter dated 15th May 2020 where he reiterated that the tobacco in the Consignment was not stemmed at all, whether wholly or partly and agreed that tariff classification determination is based on the sample material presented and material information availed. However, he stated that where there is a doubt in determination of a description or classification of a product such as this case, the laboratory or any other professional body test/certification should be appreciated and used to support the area of challenge and that is why he presented the certificate from India, the KEBS certificate and also requested for the laboratory testing. The Respondent further admitted that the sample drawn and presented at the meeting of 30th April 2020 was his but that the description of stemmed/chewing/smoking tobacco did not represent the sample. The Respondent stated that he was confused with the Commissioner’s clarification and classification process as per the tariff ruling dated 23rd March 2020 as processed tobacco for chewing



cannot be used as smoking tobacco and vice versa and unmanufactured tobacco cannot be smoked without further processing.

7. The Respondent insisted that the tobacco in the Consignment cannot be rolled for smoking as the same has simply been harvested, dried (cured) and cut thus leaving it in an unmanufactured state. The Respondent thus maintained that the Consignment is unmanufactured tobacco and that is all it can be and that the classification of under HS. 2401.20.00 is correct.
8. Another meeting between the parties' representatives was held on 16th and 19th June 2020 whose agenda was determination of the applicable tariff classification of the sample Consignment. A Committee in the meeting deliberated on the submissions and also considered the laboratory findings of a further test which concluded that the Consignment was intended for direct consumption as chewing tobacco after addition of suitable additives and that the same was not leaves in their natural state but ready for use. The Committee added that the sample presented was also suitably prepared tobacco intended for direct consumption after addition of suitable additives classifiable under HS Code 2403.99.00 and that the Respondent should be communicated to and advised to pay the taxes due. This was communicated to the Respondent through the Commissioner's letters and ruling dated 16th June 2020 where it was also communicated that the Committee had resolved to visit the Respondent's premises to ascertain the process that the tobacco undergoes before it becomes a finished product.
9. After the ruling by the Commissioner, the Respondent was dissatisfied and proffered an appeal to the Tax Appeals Tribunal ("the Tribunal") where he sought orders that the Commissioner's ruling of 16th June 2020 be set aside, that the tobacco in the Consignment be found to be unmanufactured tobacco classified under HS Code 2401.20.00 and that the Consignment be released to the Respondent forthwith.
10. After considering the pleadings filed and rival submissions of the parties, the Tribunal framed only one issue for determination; whether the Commissioner erred in classifying the Consignment as manufactured tobacco under Tariff Number 2403.90.00. In determining this issue, the Tribunal relied on the Harmonized Commodity Coding System, the General Rules of Interpretation (GIR), EACCET, witness statements, laboratory reports and the sample of the tobacco Consignment.
11. The Tribunal held that based on the Explanatory Notes to heading 2401 of Chapter 24 of the Harmonized Commodity Coding System which covers tobacco and manufactured tobacco, unmanufactured tobacco remains within the scope of heading 2401 even after undergoing certain processes such as stemming, curing, fermenting, cutting or blending provided that it is not ready for smoking. That this tobacco is strong, rough and harsh and is unfit for ordinary smoking and cannot be smoked without a preliminary treatment by which their intense disagreeable taste is modified.
12. The Tribunal further held that based on the testimony of the Officer in Charge, Customs Laboratory who tested a sample of the Consignment and the Tribunal's own examination of a sample that was presented during the hearing, the tobacco in the Consignment were stemmed tobacco leaves which had been cut into irregular sizes and the expert testified that the sample presented to him did not have traces of any additives having been mixed with the tobacco. The Tribunal stated that there was no dispute that the impugned tobacco in its current condition was unfit for smoking or even chewing without undergoing a process of adding additives and that the parties agreed that the tobacco could be used as chewing tobacco after a process of grinding and addition of lime.
13. The Tribunal thus concluded that it is the addition of additives and grinding which would have qualified the tobacco to move from HS Code 2401 to 2403 and that the Consignment was unmanufactured tobacco of heading 2401 and most specifically subheading 2401.20.00, therefore the Commissioner erred in classifying the tobacco at Traffic Number 2403.99.00. The Tribunal further



opined that there was so much left to be desired from the evidence tendered on the part of the Commissioner as to the propriety of the process undertaken by the Commissioner in declassifying the Consignment subsequent to the Respondent effecting payment of the taxes found due following the appropriate declaration of the nature of the goods on the part of Respondent.

14. For the above reasons, the Tribunal made the dispositive orders that the Respondent's appeal was allowed, the Commissioner's Ruling dated 16th June 2020 was set aside, the Consignment was found to be unmanufactured tobacco and classified under HS Code 2401.20.00 and that the Consignment was to be released to the Respondent forthwith. The Tribunal further ordered that any customs warehouse charges accruing subsequent to the date when the Respondent effected payment of the taxes assessed upon declaration of the goods were to be waived entirely on the part of the Commissioner.
15. It is this decision that the Commissioner is dissatisfied with and forms the basis of the instant appeal which has been canvassed by way of written submissions where the parties have regurgitated their positions summarized above.

Analysis and Determination

16. In determining this appeal, I am in agreement with the submission of the Respondent that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the TPA which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". An appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. The Respondent has rightly cited the decision of the Court of Appeal in *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR which summarised what amounts to "matters of law" as follows:

(38) [T]he interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.

17. From the parties' submissions, the main issue for determination is similar to what the Tribunal dealt with, whether the Commissioner erred in classifying the Consignment as manufactured tobacco under Tariff Number H.S Code 2403.99.00.
18. It is not in dispute that the Coding/Tariff classification system currently in use in the country for determining applicable tariffs for imported goods is adopted from the Harmonized Commodity Description and Coding System ("the Harmonized System"), an internationally standardized system of names and numbers to classify traded products, that the EAC partner States agreed to adopt when they signed the Treaty for the establishment of the EAC on 30th November 1999. The parties also agree that to ascertain what code is applicable to particular goods, one has to look at the General Rules for the Interpretation of the Harmonized System Rules ("GIR") which are rules that govern the classification of goods under the Harmonized System.
19. It is also common ground that the EAC Common External Tariff, 2017 Version (EACCET) was applicable in this case at the material time where under Chapter 24, unmanufactured tobacco; tobacco refuse is classified as Heading No. 24.01. under H.S Codes/Tariff Numbers 2401.10.00,



2401.20.00 and 2401.30.00 in respect of Tobacco not stemmed/stripped, Tobacco partly or wholly stemmed/stripped and Tobacco refuse respectively. Heading No. 24.03 under H.S Codes/Tariff No.s. 2403.11.00, 2403.19.00, 2403.91.0 and 2403.99.00 deal with Other manufactured tobacco and manufactured tobacco substitutes; "homogenised" or "reconstituted" tobacco; tobacco extracts and essences and Smoking tobacco, whether or not containing tobacco substitutes in any proportion.

20. As stated in the introductory part, the parties' main point of departure is whether the Consignment comprised of unmanufactured tobacco under H.S Code 2401.20.00, Tobacco partly or wholly stemmed/stripped as declared by the Respondent or manufactured tobacco under H.S Code 2403.99.00 as held by the Commissioner. Under section 56 of the TPA, it was incumbent upon the Respondent to demonstrate that the Commissioner's classification was wrong and that the Consignment ought to be classified under H.S Code 2401.20.00 meaning that the tobacco was partly or wholly stemmed/stripped.
21. I do not think it can be disputed that the determination of whether the Consignment was unmanufactured tobacco or not is a matter of fact and evidence which was within jurisdiction of the Tribunal under section 30 of the [Tax Appeals Tribunal Act](#) and section 56 of the TPA. As stated earlier, this court only deals with matters of law and reviews the entirety of the facts and evidence before the Tribunal to ascertain and satisfy itself that the Tribunal came to a conclusion that was backed by the law, facts and evidence on record and that its findings were not perverse.
22. As stated before, in determining this issue, the Tribunal relied on the Harmonized System, the GIR, EACCET, witness statements, laboratory reports and the sample of the tobacco Consignment and I find no fault in its reliance of the same. The Tribunal cited Rule 1 of the GIR which provides that "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..."
23. The Tribunal further cited Chapter 24 of the Harmonized System which covers tobacco and manufactured tobacco substitutes that mirrors the provisions of the EACCET I had cited before and also relied on the Explanatory Notes to heading 2401, H.S which provides that "(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). Heading 2401 also covers tobacco leaves, blended, stemmed/stripped and "cased" ("sauced" or "liquored") with a liquid of appropriate composition mainly in order to prevent mould and drying and also to preserve the flavor".
24. The Tribunal called in aid The Glossary of Tobacco where 'Stemming' is defined as the process of removing stems from tobacco leaves; it can be done by hand, as it is for cigar wrappers, or by machine, as it is for cigarette tobaccos. Also known as stripping. The Tribunal also cited the Explanatory Notes to Heading 2403, H.S which covers:
 - 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
25. The Tribunal mentioned the 1911 *Encyclopaedia Britannica, Volume 26* which states that making of manufactured tobacco involves, damping raw tobacco in pure water or certain “sauces” which consist of mixtures of aromatic substances, sugar, liquorice, common salt and saltpetre (potassium nitrate), dissolved in water.
26. In addition to written sources, the Tribunal heard evidence of an expert witness, Mr Owiti, who conducted the laboratory test of the sample Consignment and concluded that the sample was stemmed tobacco as it was irregularly cut into small pieces and that the same was intended for use as chewing tobacco or even directly as smoking tobacco. He also testified that the sample tobacco is classified as chewing tobacco after addition of additives including lime and that in the first report dated 17th June 2020, the Consignment was classified as H.S Code 2401.20.00. When prodded further, Mr Owiti conceded that the sample met the criteria of the Explanatory Notes under heading 2401 above and that it is clear that an unmanufactured product can become manufactured later. Mr Owiti also admitted that the sample was not ready for smoking and that the classification changed from 2401 to 2403 in a subsequent report dated 19th June 2020 only after being advised that it was going to be directly sold at retail and no further manufacturing process was going to be conducted on it.
27. 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 H.S 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 H.S 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 H.S 2401 to H.S 2403. Looking at the totality of the evidence before the Tribunal including the expert evidence, I do not see how the Tribunal could have arrived at any other conclusion other than that the Consignment was unmanufactured and thus rightly within the scope of Heading 2401. I therefore find and hold that the Tribunal was correct in finding that the Commissioner erred in classifying the Consignment as H.S 2403.90.00.

Disposition

28. For the reasons I have set out above, the Commissioner’s appeal lacks merit and is therefore dismissed with costs to the Respondent. The Respondent Consignment shall be released to him forthwith.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2022.

A. MABEYA

JUDGE

Ms Sega Addah, Advocate instructed by Kenya Revenue Authority for the Appellant.

Mr Moturi instructed by Dennis Anyoka Moturi and Company Advocates for Respondent.

