



Commissioner of Customs and Border Patrol v Lachlan Kenya Limited (Income Tax Appeal E054 of 2021) [2022] KEHC 12109 (KLR) (Commercial and Tax) (12 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E054 OF 2021**

A MABEYA, J

AUGUST 12, 2022

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER PATROL APPELLANT

AND

LACHLAN KENYA LIMITED RESPONDENT

JUDGMENT

1. The appellant is a principal officer appointed under the Kenya Revenue Authority Act Cap 469 Laws of Kenya. He is in-charge of collecting custom duty.
2. The respondent is a company registered in Kenya. Its principal business is marketing and distribution of agricultural crop protection and soil enhancement products, chemical organic fertilisers and agricultural equipment.
3. The background of this matter is that the respondent imported Nitro Zinc fertiliser and declared it under Tariff Code 3102 90 00. The appellant subsequently issued a tariff ruling on 26/7/2018 declaring that the fertiliser was classifiable under Tariff Code 3824 90 90 and on 13/12/2018, he issued a demand letter for Ksh.1,133,385.00 being extra taxes resulting from the new classification. He his decision on 5/3/2019 and the respondent appealed against the same to the Tax Appeals Tribunal (“the Tribunal”).
4. The Tribunal rendered its judgment on 1/4/2021 in favour of the respondent. It held inter alia that the appellant erred in classifying Nitro Zinc fertiliser under HS Code 3824 99 00.
5. Being dissatisfied with that judgment, the appellant appealed to this Court against the said decision on the following grounds:-

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- “(i) The Tribunal erred in failing to consider and determine all relevant facts raised by the parties.
- (ii) The decision of 1st April 2021 took into consideration irrelevant facts to arrive at a flawed position devoid of any legal foundation.
- (iii) The Tribunal erred in failing to address itself to the fundamental questions on the requirements of Rule 3 (c) of the General Interpretation Rules for the Classification of Goods of the Harmonized System and its input on a tax assessment.
- (iv) The Tribunal erred in failing to appreciate sections 229, 230 & 231 of the EACCMA that make provision for the respondent to lodge an objection and further an appeal in the Tax Appeals Tribunal within statutory timelines.
- (v) The Tribunal erred in failing to appreciate Chapter 31 of the Harmonized Commodity Description and Coding Systems (H.S Code) that covers the classification of most products in general use as natural or artificial fertilisers to the exclusion of micronutrient preparations which are applied to seeds, to foliage or to soil to assist in seed germination and plant growth, products that improve rather than fertilise the soil.
- (vi) The Tribunal erred in finding that the Appellant erred in classifying Nitrozine under HS Code 3824 99 00 and that the Appeal had merit.
- (vii) The Tribunal erred in basing its entire decision on the composition of the product.
- (viii) The Tribunal erred in failing to appreciate that the Appellant's decision was informed by laboratory findings and technical information availed concerning the use of Nitrozine and the General Interpretation Rules of the Harmonized System Convention on Commodity and Description.
- (ix) The Tribunal erred in failing to appreciate section 135 (1) of EACCMA that the Appellant relied on to inform the respondent of the correct tariff classification and demand for payments of the duty, which was due and payable as per VAT Act 2013.
- (x) The Tribunal erred in failing to dispose of all the questions that were presented by the parties for determination and left those issues unresolved.

6. In opposition, the respondent filed its statement of facts dated 29/6/2021.

7. The respondent pleaded that the Tribunal had taken into consideration all facts pleaded by both parties and had consolidated the issues for determination into two main points and addressed them comprehensively in its judgment; that the tribunal relied on the provisions of the General Rules of Interpretation of the Harmonized System Convention on Commodity and Description to determine that nitrozinc fertiliser was potentially classifiable in two headings, chapter 31 and chapter 38; that it however could not be classified under chapter 38 on the basis of rule 3(3) since it had been specified elsewhere.

8. Further that its appeal before the Tribunal was lodged within the statutory period prescribed by section 230(2) of EACCMA which provides for a time limit of 45 days in which to appeal after being served with the appellant's objection decision.



9. That the Tribunal correctly determined that the classification of the nitro zinc fertiliser was under chapter 31 which covered natural or artificial fertilisers and its major component was nitrogen at 30%.
10. Lastly, the respondent pleaded that the first schedule to the VAT Act provided that fertilisers under chapter 31 are exempt from VAT hence no VAT was payable by the respondent.
11. The Court has considered entire record and the submissions of the parties.
12. The grounds of appeal can be collapsed into tree as follows:-
 - (i) Whether the respondent's appeal before the tribunal was time barred.
 - (ii) Whether the correct tariff classification was applied.
 - (iii) Whether Nitro Zinc fertiliser is subject to VAT.
13. On the first ground, the appellant contended that the Tribunal failed to appreciate that sections 229, 230 and 231 of the East Africa Community Customs Management Act (EACCMA) makes provision for timelines within which a tax payer is to lodge an objection and a further appeal to the Tribunal. The appellant submitted that the respondent had filed its objection outside the statutory timelines while the respondent submitted otherwise.
14. In paragraph 62 of its judgment, the Tribunal found that the respondent had exhausted the alternative internal appeal mechanisms prior to approaching the Tribunal.
15. Section 229 of EACCMA provides: -
 - “(1) A person directly affected by the decision or omission of the commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision lodge an application for review of that decision or omission.
 - (2) The application referred to under sub-section (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.”
16. Section 230 of EACCMA provides: -
 - “(1) A person dissatisfied with the decision of the Commissioner under Section 229 may appeal to a tax appeals tribunal established in accordance with section 231.
 - (2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision and shall serve a copy of the appeal on the Commissioner.”
17. Section 231 of EACCMA on its part provides: -

“Subject to any law in force in the Partner States with respect to tax appeals, each Partner State shall establish a tax appeals tribunal for the purposes of hearing appeals against the decisions of the Commissioner made under section 229.”
18. The forgoing provisions are clear on the required timelines. An appeal to the Tribunal ought to be lodged within 45 days after the Commissioner had rendered his decision on a any matter in dispute.



19. The record shows that the appellant issued a tariff ruling on 26/7/2018 after which there was correspondence between the parties whereby a final decision by the appellant affirming the tariff ruling was made on 5/3/2019.
20. The appeal before the tribunal was filed on 17/4/2019, 43 days after the appellant's decision. The appeal was therefore well within the statutory time frame. That ground is dismissed.
21. The second ground was whether the correct tariff was applied. The appellant contended that the respondent declared and misclassified the Nitro zinc fertiliser in the wrong Tariff No. 3105.20.00 instead of 3824.9.90. He submitted that the respondent intentionally classified its product under tariff heading H.S Code 3105.20.00 which attracts zero duty instead of under H.S Code 3824.99.90 attracting a VAT at 16%.
22. That since his decision was informed by laboratory findings, technical information availed on the use of Nitro zinc and the General Interpretation Rules (GIR) of the Harmonized System Convention on Commodity and Description and considered Nitro zinc to be a micronutrient preparation for correction of zinc deficiency in soil and not as a fertilizer classifiable under HS Code 3824.99.90, the Tribunal's decision was flawed.
23. Conversely, the respondent submitted that the classification of products under the East Africa Community Customs External Tariff is based on the major primary component and not the micronutrient content, which in this case was nitrogen at 30%; that the appellant's decision to classify similar products to Nitro zinc fertiliser under chapter 31 but the nitro zinc fertiliser under chapter 38 is unlawful not procedurally fair.
24. The appellant classified the Nitro zinc fertiliser under H.S. Code 3824 which is titled 'miscellaneous chemical products' while the respondent classified the same under H. S. Code 3105 which is titled 'fertilisers'.
25. It is not disputed that Nitro zinc fertiliser comprises about 30% nitrogen and 0.5% zinc among other micro ingredients. To get the correct tariff one has to be guided by the General Rules of Interpretation of the Harmonized Code (GIR). Rule 2 of GIR provides, inter alia, that where the classification of goods consists of more than one material or substance, it shall be in accordance with the principles of rule 3.
26. 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.”

27. From the foregoing and in particular rule 3(a), the Court is of the opinion that the most specific description is chapter 31 of the EAC CET at paragraph 3102.80.00 which states “Mineral or Chemical fertilizers, nitrogenous.”
28. Further, under rule 3(b), the Court is of the opinion that the material component which gives Nitro zinc fertiliser its essential component is nitrogen at 30% which falls under chapter 31 of the EAC CET.
29. Accordingly, the correct tariff for Nitro Zinc fertilizer is HS Code 3105.
30. On the third issue, the Court has found that Nitro zinc is classified as a fertiliser. Under the first schedule to the VAT Act, at paragraph 26, fertiliser is exempt from VAT.
31. I find therefore that the appellant was misguided in levying VAT of Ksh.1,133,385/- on the fertiliser as it is an exempt product.
32. Accordingly, the Court upholds the Tribunal’s judgment dated 1/4/2021 and finds the appeal to be without merit and dismisses the same with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

A. MABEYA, FCI Arb

JUDGE

