Commissioner of Customs and Border Control v Kenya Breweries Limited (Tax Appeal E157 of 2021) [2022] KEHC 14570 (KLR) (Commercial and Tax) (31 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14570 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E157 OF 2021

DAS MAJANJA, J

OCTOBER 31, 2022

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER CONTROL ..... APPELLANT

AND

KENYA BREWERIES LIMITED ..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 25th June 2021 in Tax Appeal No.282 of 2020)

JUDGMENT

Introduction and background

1. The Respondent is a well-known company carrying on the business of manufacturing and distributing both alcoholic and non-alcoholic beverages. Sometime in July 2019, the Respondent requested the opinion and ruling of the Appellant ("the Commissioner") on how the Respondent should classify the fermented apple concentrate ("the Apple Concentrate") it intended to import. The Commissioner, in a letter dated September 24, 2019, stated that a sample test of the Concentrate was found to be alcoholic apple concentrate with alcoholic strength by volume 14.06% and as such the same is considered to be fermented alcoholic concentrate made from apple fruit concentrate classified in HS Code 2206.00.90 of the EAC Common External Tariff, 2017 ("the CET").

2. The Respondent then formally applied for a tariff classification ruling with respect to the Concentrate through the letter dated January 17, 2020 where it opined that the Concentrate should be classified under the Harmonized System (HS) Code 2106.90.20 (Preparations of a kind used in manufacturing of beverages). The Respondent explained that the fermented apple compound is a clear brown liquid with an apple taste that is used as a raw material in the manufacture of ciders and that Cider, on the other hand, is an alcoholic beverage made from the fermented juice of apples. The

Respondent stated that the Concentrate contained, inter alia, alcoholic ferment of water, glucose syrup and appIe juice concentrate, fermented apple juice, water, acidifier (malic acid - E296), colour (sulphite ammonia caramel - E150d), natural flavouring, preservative (sodium benzoate - E211), acidifier (acetic acid - E260) and Preservative (sodium metabisulphite - E223). The Respondent further stated that in addition to the aforementioned, the Concentrate had the following physical and chemical characteristics; Density - 0.995 g/cm3, Ethanol content - 14.0 %- 15.0 % Vol, Refraction 9.6 brix Acidity – 1.0g/100g and that in general, concentrates are fruit juices with all their excess water removed from them. That they are widely used in industry in the manufacture of beverages as the removal of water reduces the costs of shipping, handling and storing and that in this particular case, the Apple Concentrate contained alcohol as prior to it being converted into a concentrate, the apple juice had undergone a fermentation process.

3. The Respondent further stated that under the General Interpretation Rules (GIR) for the classification of goods, before one classifies a product, one must first read through the Section and Chapter notes pertaining to that particular product in order to be certain that the product is either included or excluded from that particular Section. That in this case, the Apple Concentrate fell under Section IV of the CET (Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco) and that the Section notes therein do not exclude the Concentrate from the subsequent tariff headings. The Respondent added that GIR 6 provides that when classifying a product, you need to start with the Section, Chapter and Subchapter notes and then proceed to the Headings and Subheadings and that in this case, it is clear that the Concentrate would be classifiable in Section IV of the CET.

4. However, the Respondent stated that as the Apple Concentrate was not intended for consumption, it would automatically fall under Chapter 21 of the Nomenclature and the Respondent added that the same was not a beverage but a raw material for use in the production of alcoholic beverages and in particular, cider. That the Apple Concentrate undergoes a series of processes in order to convert it into a beverage and that in as much as one can consume the Concentrate as presented, this did not mean that it is a beverage and this was because consumption in this case did not represent the true test in determining whether or not a product is a beverage. In the Respondent's view therefore, the Concentrate was classifiable under HS Code 2106.90.20 (Preparations of a kind used in manufacturing of beverages). The Respondent also provided a sample of the Apple Concentrate to enable the Commissioner carry out a laboratory analysis to confirm its composition.

5. The Commissioner delivered a Tariff Ruling through its letter dated February 7, 2020 where it reiterated its previous position that the sample was tested at the Kenya Revenue Authority Inspection and Testing Centre and found to be an Apple Concentrate with alcoholic strength by volume of 14%. It stated that, "Fermented Apple Concentrate is specified to be alcoholic concentrate (with an alcoholic strength by volume of 14-15%), made from water, glucose syrup, apple juice concentrate, fermented apple juice, acidifier malic acid (E296), colour sulphite ammonia caramel, natural flavouring, preservative sodium benzoate (E211), Acidifier acetic acid and preservative sodium metabisulphate, intended for use in production of alcoholic beverages". The Commissions noted that Chapter 20 Note (d) expressly excludes fruit and vegetable juices of an alcoholic strength by volume exceeding 0.5% vol (Chapter 22) and Heading 22.06 covers the classification of other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included. The Commissioner further stated that the Heading includes the classification of cider, an alcoholic beverage obtained by fermenting the juice of apples and that the beverages remain classified in the Heading when fortified with added alcohol or when the alcohol content has been increased by further fermentation, provided they retain the character of the products falling in the Heading.

6. Based on the above information and reasoning, the Commissioner maintained that the sample tested was considered fermented alcoholic concentrate made from apple fruit classified in HS Code 2206.00.90 and in this regard, the declared HS Code 2206.00.90 was in agreement with the laboratory findings.

7. The Respondent objected and appealed against the Commissioner's findings and ruling through its letter dated March 5, 2020 where it reiterated its position aforementioned. The Respondent maintained that the Concentrate being used in the manufacture of beverages is not a beverage in itself, but a '...preparation of a kind used in manufacturing of beverages...' and therefore cannot be classified under Chapter 22 of the CET as advanced by the Commissioner and that Chapter 21 thereof is applicable on the basis of the intended use and chemical constitution of the fermented apple compound. The Respondent further stated that there was no Note(d) in the Section and Chapter Notes of Chapter 20 as stated by the Commissioner but that if the Commissioner meant Chapter Note 20(6), the said Heading 20.09 provides for classification of fruit and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter, which the Respondent stated was irrelevant to this case. Thus, the Respondent averred that the Commissioner's attempt to apply the wrong basis of classifying the Concentrate was erroneous and lacked legal and factual justification.

8. The Respondent further drew the Commissioner's attention to the World Customs Organization's ("WCO") Opinion Number 21069082 adopted in 2016 that classified powdered alcohol consisting of ethyl alcohol and dextrin under Heading 2106 stating that this decision was arrived at by the WCO by the use of GIR's 1 and 6. Thus, the Respondent was of the view that the Concentrate which is in powdered form, is a raw material used in the manufacture of alcoholic products(beverages) and it is indisputable that it has all its water removed for ease of transportation.

9. The Respondent further stated that the Concentrate is supplied to it by Döhler, which the Respondent claimed is a reputable global producer, marketer and provider of technology-driven natural ingredients, ingredient systems and integrated solutions for the food and beverage industry. That Döhler provided the Respondent with the product specifications which included inter alia the tariff classification of the Concentrate as having been under Heading 2106.

10. The Respondent relied on three decisions of the court; *R v Commissioner General & Another Ex-Parte AWAL Ltd* [2018] eKLR, *Enkasiti Flowers Growers Limited v Kenya Revenue Authority* [2010]eKLR and Commissioner of Customs and Excise v Export Trading Company Limited [2019] eKLR to advance that courts have not only placed importance on the specific descriptions of the products but also the ultimate intended usage of the product as the basis of determining their tariff codes. Further, that courts have also taken cognizance of the opinions of the WCO in determining such disputes. For the aforementioned reasons, the Respondent urged the Commissioner to set aside and reverse the Tariff Ruling of February 7, 2020 with a view of classifying it under the correct Tariff Heading and Code.

11. The Commissioner ruled on the Respondent's objection and appeal through its letter dated June 5, 2020 ("the Objection Decision"). The Commissioner maintained that based on the laboratory analysis of the Apple Concentrate, and Chapter 20 note (d) that excludes fruit or vegetable juices of an alcoholic strength by volume exceeding 0.5% vol and classifies such products in Chapter 22, it found that the Apple Concentrate is most specifically described in Chapter 22. The Commissioner reiterated that Heading 22.06 covers Other fermented beverages (for example, cider, perry, mead, sake); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included. That the Heading includes the classification of cider, an alcoholic beverage obtained by fermenting the juice of apples and that the beverages remain classified in the Heading

when fortified with added alcohol content or when the alcohol content has been increased by further fermentation, provided they retain the character of the products falling in the Heading. Based on the above information, the Commissioner held that the applicable subheading for the Apple Concentrate is 2206.00.90 of the CET. As such, the Commissioner upheld its Tariff Ruling of February 7, 2020.

12. The Respondent appealed to the Tax Appeals Tribunal ("the Tribunal") against the Objection Decision. In essence it sought to have the Apple Concentrate classified under HS Code 2106.90.20. In the alternative, the Respondent sought the Tribunal to direct the Commissioner to refer the question of classification of the Apple Concentrate to the WCO and that the parties be bound by the decision of the WCO.

13. In its judgment rendered on June 25, 2021, the Tribunal framed two issues for determination; Whether the Commissioner erred in classifying the Concentrate under HS Code 2206.90.20 and whether the Commissioner should be directed to refer the question of the classification of the Concentrate to the WCO.

14. On the first issue, the Tribunal was of the view that GIR 1 is the foremost rule of classification and for legal purposes, classification is determined by the terms of the Headings, Section or Chapter Notes where relevant and, if necessary and allowable, the other GIRs. The Tribunal relied on the Canadian case of *Puratos Canada Inc. v Canada* (Customs and Revenue) 2004 CANLII 57069(CA CITT) to hold that the Commissioner placed more emphasis on the Chapter title and related Chapter Notes and Explanatory Notes in the classification of the Concentrate and thus concluded the same was a beverage and was therefore within the ambit of Chapter 22 of CET. The Tribunal faulted the Commissioner's approach since the words in the Section and Chapter titles are to be used as a guide to where the appropriate Tariff Code of the product is to be classified and is likely to be found and that a product may therefore be included in or excluded from a Section or Chapter even though the titles might lead one to believe otherwise.

15. The Tribunal did not agree with the Commissioner that the Apple Concentrate constituted a beverage. It held that the Commissioner ought to have considered the purpose or use of the Concentrate before arriving at its decision. The Tribunal observed that it was not in dispute that Concentrate was used by the Respondent as a raw material in the manufacture of cider, an alcoholic beverage. As such, the Tribunal found that the Commissioner erred in classifying the Concentrate under HS Code 2206.00.90 and agreed with the Respondent that the correct classification is under HS Code 2106.90.20. The Tribunal further agreed with the Respondent's submissions that what was in dispute was the Apple Concentrate and not the Alcoholic Fermented Apple Plus imported earlier by the Respondent.

16. Having found that the correct classification for the Concentrate is HS Code 2106.90.20, the Tribunal considered the issue of referring the question of Tariff classification of the Apple Concentrate to WCO, moot. For these reasons, the Tribunal allowed the Respondent's appeal on the ground that the Concentrate fell under HS Code 2106.90.20 and set aside the Commissioner's Tariff Rulings of February 7, 2020 and June 5, 2020.

17. The Commissioner is dissatisfied with the Tribunal's decision and has challenged this decision based on the Memorandum of Appeal dated August 20, 2021. The Respondent filed its Statement of Facts dated September 21, 2021. The appeal has been canvassed by way of written and oral submissions where the parties regurgitated their positions before the Tribunal.

Analysis and Determination

18. The limits of this court's appellate jurisdiction are set out in section 56(2) of the *Tax Procedures Act* ("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". In *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018]eKLR , the Court of Appeal 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.

19. Turning to the appeal, the Commissioner submitted that while its appeal raised 11 grounds of appeal, those grounds could be summarized into one main issue which is the classification of the Apple Concentrate that is to be imported by the Respondent. It prays that its appeal be allowed, and the Tribunal judgment be set aside and its classification of the Concentrate under HS Code 2206.00.90 be upheld.

20. In my view, this court is required to determine whether the Tribunal arrived at the correct conclusion in its determination that the Concentrate ought to be classified under HS Code 2106.90.20 rather than HS Code 2206.00.90 as advanced by the Commissioner.

21. I do not think it is in dispute that that the world community, in an effort to facilitate international trade, have over the years developed a common and harmonized classification system as a means for a systematic naming or enumerating of all goods found in international trade along with international rules and interpretations. The classification system currently in use is called the Harmonized Commodity Description and Coding System ("the Harmonized System") and the EAC partner States agreed to adopt it when they signed the Treaty for the establishment of the EAC on November 30, 1999.

22. The Harmonized System comprises of 21 Sections divided into 99 Chapters and the arrangement of sections is based 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.

23. 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.

24. The Commissioner maintains that the Apple Concentrate ought to be classified under HS Code 2206.00.90 under the Heading, "Other fermented beverages (for example, cider, perry, mead, sake);

mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included" and under the Sub-Heading "Other". The Commissioner further relied on the Explanatory Notes of Chapter 20, more so General Note (d) which it stated was instructive that the Concentrate ought to be classified under Chapter 22. The said Note (d) provides that Chapter 20 did not cover "Fruit or vegetable juices of an alcoholic strength by volume exceeding 0.5% vol (Chapter 22)".

25. On its part, the Respondent maintains that the Apple Concentrate ought to be classified under HS Code 2106.90.20 under the Heading "Food preparations not elsewhere specified or included" and under the Sub-Heading "Preparations of a kind used in manufacturing of beverages". It submits that the Commissioner's argument is negated by the fact that the Apple Concentrate is not a beverage in the first place but a preparation used in manufacturing cider and that the issue of whether the Apple Concentrate was Fermented Apple Plus was not an issue in all of the Commissioner's opinions and Rulings or proceedings before the Tribunal.

26. I have gone through the record, more so the statement and testimony of the Respondent's witness and note that he is the one who introduced the issue of the Alcoholic Fermented Apple Plus which he stated the Commissioner sought to classify under HS Code 2206.00.90 and not under HS Code 3302.10.00. The Respondent's witness also sought to distinguish the Apple Concentrate from the Alcoholic Fermented Apple Plus in terms of its chemical composition and the Commissioner's counsel before the Tribunal cross-examined him on the same issue in detail. Thus, I reject the Respondent's submissions that the issue of the Fermented Apple Plus was never in issue before the Tribunal.

27. The Respondent's witness, in his statement and testimony, stated that the Alcoholic Fermented Apple Plus was imported for its use in the manufacture of its Cider brand, an alcoholic beverage. He further stated that the Commissioner demanded additional taxes of KES 71,500,646.00 with respect to the said Alcoholic Fermented Apple Plus which demand was predicated upon the Commissioner classifying the product under HS Code 2206.00.90. He admitted that the Respondent admitted liability and did not appeal against this ruling by the Commissioner owing to the fact the Respondent was running out of the product, that it wanted to reduce the then growing costs of demurrage and storage at the port and that the product had a short shelf life.

28. On the chemical composition of both the Apple Concentrate and the Alcoholic Fermented Apple Plus, the Respondent's witness admitted that they all had the same ethanol content of 14-15% and had the same appearance and ordinance. He further admitted that while the Apple Concentrate contains alcoholic fermenting water and other compounds which require additional processing to become suitable for human consumption, Alcoholic Fermented Apple Plus only contains alcoholic fermented water and other compounds and can be consumed even before. However, the Respondent's witness admitted that in the Respondent's letter dated January 17, 2020, the Respondent stated that in as much as the Apple Concentrate can be consumed as presented, the same did not mean that it was a beverage. The Respondent's witness further admitted that the Concentrate was tested by the Commissioner and found to have an alcoholic strength by volume of 14-15% and that this conformed with the Safety Data Sheet documents produced by the Respondent.

29. The Commissioner's witness admitted that the Apple Concentrate was a product to be used for production of alcoholic beverages and that one of the principle considerations for the classification was the laboratory analysis. The witness agreed that there was no application for classification under Chapter 20 and that the said Chapter 20 was not applicable to the Apple Concentrate as the same contained a volume of 14%. However, the witness stated in as much as there was no provision under Heading 2021 and 22 which dictate that alcoholic content be the basis of classification under

Chapter 22, the same was instructive and indicative from the Explanatory Note 20(d) found in the the Harmonized System rather than the CET.

30. The Commissioner's witness also admitted that the Apple Concentrate was found to be a "fruit concentrate" and that there was no provision dealing with concentrate either in Chapter 20 or Chapter 22 but that from the Explanatory Note (d) such concentrates should go to Chapter 22. She further admitted that under Chapter 21, there are miscellaneous edible preparations which are not provided for in Chapter 20 or Chapter 22 and that HS Code 2106.90.20 does not specify whether beverages have alcohol content or not and that there was no Note therein where alcohol content is a criterion for classification. That further, the classification under Heading 2106 covers a very wide area of preparations of a kind used in the making of beverages, alcoholic and non-alcoholic provided it is not elsewhere specified. She further admitted that the Explanatory Note (d) deals with juices and not concentrates and does not deal with any other thing other than juices.

31. It was incumbent upon the Respondent, under section 56 of the *TPA*, to demonstrate that the Commissioner's classification was wrong and that the Concentrate ought to be classified under HS Code 2106.90.20. From the record and evidence I have highlighted above, I find that the Respondent discharged its burden of proof by demonstrating that the Commissioner was wrong in its classification. The Respondent was able to demonstrate and the Commissioner agreed that the Apple Concentrate was a concentrate and not a juice and as such, neither Chapter 20 nor the Explanatory Note (d) therein which the Commissioner heavily relied on was applicable to the Apple Concentrate's classification as the same only dealt with juices. The Respondent further demonstrated that the alcoholic content volume was not relevant to the classification and that HS Code 2106.90.20 does not specify whether beverages have alcohol content or not and that there was no Explanatory Note therein where alcohol content was a factor for classification. Thus, the argument that since both the Apple Concentrate and the Alcoholic Fermented Apple Plus had the same alcoholic content volume then they both belonged to the same Tariff Code could not hold. It appears that other factors, other than the alcohol content, were to be considered in determining the Concentrate's classification and I agree with the Respondent that the Commissioner's witness also admitted that the alcohol volume specified in Chapter 22 was to distinguish between non-alcoholic and alcoholic beverages under the tariff.

32. I therefore find and hold that the Respondent's proposed classification of the Concentrate under HS 2106.90.20 (Food preparations not elsewhere specified or included, Preparations of a kind used in manufacturing of beverages) prima facie fell within the language of the Tariff Heading, Section and Chapter Notes and was within the interpretation rules of the GIR. Consequently, the Tribunal rightly concluded that the Concentrate fell within HS Code 2106.90.20. The Tribunal correctly analysed the provisions of the CET, the Explanatory Notes, GIRs and evidence on record to come to the conclusion that the Apple Concentrate was a raw material for the manufacture of cider, an alcoholic beverage. This conclusion was not perverse and was reflective of the material before the Tribunal.

Disposition

33. For the reasons I have set out above, I hold that the Commissioner's appeal lacks merit. It is accordingly dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango

Ms D. Almadi, Advocate instructed by Kenya Revenue Authority for the Commissioner of Customs and Border Control for the Appellant

Mr G. Oraro, SC with him Ms. R. Omondi instructed by Oraro and Company Advocates for the Respondent.