



Commissioner of Customs and Border Control v Auto Industries Limited (Tax Appeal E008 of 2022) [2022] KEHC 15974 (KLR) (Commercial and Tax) (30 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15974 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E008 OF 2022
DAS MAJANJA, J
NOVEMBER 30, 2022**

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER CONTROL APPELLANT

AND

AUTO INDUSTRIES LIMITED RESPONDENT

(Being an appeal against the Judgment of the Tax Appeals Tribunal at Nairobi dated 12th November 2021 in Tax Appeal No. 21 of 2021))

JUDGMENT

Introduction and Background

1. The respondent is a company that deals in the assembly of and distribution of two wheelers including motorcycles and three wheeled vehicles and their spare parts imported in a Semi Knocked Down (SKD) form, commonly referred to as Tuk Tuks. At the material time the said imports were also covered by a duty remission under legal notice number EAC/58/2016 dated July 1, 2016. By a letter dated August 26, 2019, the respondent sought to review a decision by the appellant (“the commissioner”) to assess taxes on motorcycle units which the commissioner considered to be over and above the approved remission quantity.
2. The commissioner accepted the request by the letter dated January 20, 2020 stating that it would conduct a post clearance audit of the respondent’s books and records for the affected importations. It also stated that the audit was to facilitate the renewal of the respondent’s Authorised Economic Operators (AEO) license that had been held back due to the assessed tax liability. On February 27, 2020, the commissioner evinced its intention to carry out the post clearance audit for the period February 2015 to January 2020 focusing on compliance with customs legislation, valuation and commodity



tariff classification. The respondent was requested to provide all the relevant documentation required for the audit.

3. Following the audit, the commissioner, by the letter dated June 5, 2020, issued an audit report of April 2020 and a demand for extra duties and taxes amounting to Kshs 1,092,089,174.00. Germane to this appeal was the commissioner's finding on tariff classification. It observed that the tuk tuks imported during the audit period were classified under harmonised system (HS) Codes 8711.20.00, 8711.20.90, 8711.30.90 and 8711.90.00 all of which had a specific Excise duty. The commissioner stated that the General Interpretation Rules (GIR) as cited in the East Africa Community Common External Tariff (CET) govern classification of goods and according to GIR 1, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided the headings or notes do not require otherwise, according to GIR 2 through 6. That the HS Code explanatory notes constitute the official interpretation of the CET and provide the scope of each heading under the CET and Heading 87.11 covers motorcycles (including mopeds) and cycles fitted with an auxiliary, with or without side cars and side-cars.
4. The commissioner added that heading 87.03 covers motor cars and other motor vehicles principally designed for the transport of persons and the explanatory notes to heading 87.03 clarify that the heading also covers lightweight three-wheeled vehicles of simple construction such as those fitted with motorcycle engine, which, by virtue of their mechanical structure, possess the characteristics of conventional motor cars (i.e motor car type steering system or both reverse gear and differential). The same heading also covers those three-wheeled vehicles mounted on a t-shaped chassis whose two rear wheels are independently driven by separate battery- powered electric motors and are normally operated by means of a single control stick with which the driver can start, accelerate, brake, stop and reverse the vehicle as well as steer it to the right or left by applying a differential torque to the drive wheels or by turning the front wheel.
5. From the foregoing, the commissioner concluded that the tuk tuks are properly classifiable under HS Code 8703.21.90 attracting rate of 25%, excise duty at 20% and VAT at 16%. The commissioner further held that extra taxes, duties and interest in relation to the tariff misdeclaration had been assessed. On duty remission the commissioner noted that under the legal notice No EAC/58/2016 of July 1, 2016, the respondent as an importer was authorised to import 70,000 completely knocked down kits for motorcycles at a duty rate of 10% under the duty remission scheme up to June 30, 2017. However, the commissioner stated that an examination the respondent's import documents revealed that the actual quantity imported during this period was 78,948 Units, meaning that 8,948 units were imported over and above the gazette quantity and thus full taxes and duties ought to have been paid on the extra units. As such, duties, taxes and interest on the extra units were assessed.
6. The respondent responded to the audit report through its letter of June 12, 2020. On the tariff classification, the respondent admitted that there had been a tariff classification issue between the parties on the HS Code applicable to tuk tuks where the commissioner has maintained that the HS Code should be 8703.29.90 whereas the respondent has been using HS Code 8711.20.90 in accordance with the industry practice. The respondent stated that it started importing tuk tuks in 2012 using heading 87.11 as directed by the secretariat of the East African Community. The respondent maintained that a post clearance audit of 2014 mentioned clearly that there were no items that are wrongly described and misclassified thus confirming that heading 87.11 is the appropriate nomenclature to be used for tuk tuks. Further, that a KEBS document mentioned and confirmed heading 87.11 for the tuk tuks and that most of the containers for tuk tuks imported by the respondent go for full verification and at no point in time have customs officials raised concerns on heading 87.11.



7. The respondent thus stated that based on these facts and since there has never been a single contention from the commissioner on the HS code for the tuk tuks, it maintained that heading 87.11 was the correct tariff. The respondent also undertook to implement to the different tariff code should the commissioner give a ruling in writing, for future imports.
8. The commissioner made a decision on the respondent's application for review through its letter of July 15, 2020. On the issue of tariff classification for the tuk tuks, the commissioner maintained its earlier position that the same are classifiable under heading 87.03 and 87.04 therefore the extra taxes and interest payable of Kshs 333,183,052.00 remained due and payable.
9. The respondent responded to the commissioner's decision through its letter of November 25, 2020. On the issue of tariff classification of the tuk tuks, the respondent maintained that based upon the descriptions of motorcycles and two-wheeled scooters in the explanatory note of the heading 87.11 and the common characteristics of these articles in commerce, the following characteristics are found in various types of commercially sold motorcycles and two-wheeled scooters: handle bar steering mechanism; an accelerator located on the hand grip of the handle bars; a hand brake; a seat (either saddle seating or step through seating); automatic or manual transmission; driven by a chain or belt; and a motor (either gas or electric powered) that is under or behind the seat. The respondent averred that a tuk tuk also has none of the features listed as indicative of vehicles of heading 87.03, such as permanent seats with safety equipment, windows, doors, comfort features and the likes, thus it is not classified under that heading of 87.03.
10. The respondent further stated that if the commissioner would have informed it that the correct heading for tuk tuks is 87.03, it would have set up an assembly line and imported unassembled vehicles under HS Code 8703.21.10 as zero import duty and this would have denied any revenue to the commissioner and on the contrary would have created more jobs in Kenya. The respondent asserted that it started imports of tuk tuks since 2012 and Heading 87.11 is always used as directed by the secretariat of East African Community and that no concerns have ever been raised on this Code upon verification of the units. The respondent thus awaited the commissioner's response on the issues raised.
11. This response came through the commissioner's letter of December 10, 2020 and once again on the issue of tariff classification it maintained its previous positions that the explanatory notes under heading 87.03 indicate that the tuk tuks imported by the respondent are properly classifiable under heading 87.03, and more specifically in sub-heading 8703.21.90-petrol and 8703.31.90-diesel and not under heading 87.11, as declared by the respondent. That heading 87.04 also covers the three-wheeled vehicles described above if they are designed for the transport of goods and more specifically in sub-heading 8704.21.90 - diesel and 8704.31.90 - petrol. The commissioner thus stated that these correct tariff codes attract an import duty rate of 25%, excise duty rate of 20% and VAT rate of 16% and that India, the country of export of these units also classifies them at the headings stated and the respondent was advised to refer to the website of the central board of indirect taxes & customs of India. The commissioner held that total extra taxes and interest of Kshs 480,676,018.00 remained due and payable to it and that this was a final decision on the respondent's appeal to the commissioner, thus if the respondent was dissatisfied, it was at liberty to appeal the decision at the Tax Appeals Tribunal ("the Tribunal") pursuant to section 230 of the *East Africa Community Customs Management Act, 2004* ("the EACCMA").
12. The respondent lodged an appeal with the tribunal on January 6, 2021 where it mainly challenged the Commissioner's classification of the tuk tuks under heading 87.03 and 87.04 rather than heading 87.11. In its letter dated January 26, 2021, the respondent also sought a waiver of the Kshs 73,742,410.00 levied by the commissioner as interest on the excess units imported by the respondent



- owing to the economic crisis occasioned by covid-19 pandemic and particularly that it would be punitive to also demand the same. It further stated that it was amenable to paying the principal taxes for the same amounting to Kshs 73,750,556 and the applicable VAT of Kshs 10,172,490.00 despite the fact that the commissioner created a legitimate expectation that all the unit quantities imported were approved.
13. The tribunal heard the appeal and rendered a judgment on November 12, 2021. It determined two issues. First, whether the appeal before it was valid and second, whether the commissioner erred in its classification of the tuk tuks. On the competence of the appeal, the commissioner argued that the respondent could not anchor its appeal on the decision dated December 10, 2020 but rather the decision of July 15, 2020 which effectively meant that the appeal had been lodged out of time and was therefore fatally incompetent as the decision of July 15, 2020 ought to have been appealed against within 45 days as per section 230 of the EACCMA.
 14. The tribunal examined the correspondence between the parties and in particular the commissioner's demand letter dated June 5, 2020 and the management report of the same date. The tribunal stated that by issuing these two documents, the commissioner was digging a trap for the respondent and that for good order, the audit report attached was not approved which was an indication that it was awaiting comments from the appellant before it was amended and finalised. The tribunal held that to issue a demand letter based on such a report was at best premature and the tribunal was reluctant to regard the letter as anything more than a statement of the findings of the audit.
 15. The tribunal found that the commissioner's letter of June 5, 2020 could not pass the test of procedural fairness and following subsequent events, the actual assessment was made on June 15, 2020 when the debt crystallised. The tribunal concluded that the letter of December 10, 2020 was the objection decision as it was unequivocal as to what constituted an appealable decision. The tribunal further impeached the credibility of the commissioner's witness on the subject and import of the letter dated December 10, 2020 terming him "unhelpful". The tribunal was of the view that the doctrine of *functus officio* could not apply to the commissioner's letter dated July 15, 2020 as the letter was effectively an assessment. That the letter was open to engagement and the parties continued to engage in the review process precipitating in the final decision in the letter dated December 10, 2020 and the doctrine could only apply to the commissioner's decision contained in the letter of December 10, 2020. As such, the tribunal determined that the appeal before it was valid in law.
 16. On the respondent's case that the commissioner had no issue with it declaring and the classification of tuk tuks under heading 87.11 in the past, the tribunal reiterated that the fact that the commissioner had accepted a declaration from a taxpayer in the past did not stop it him from reviewing that decision and issuing a fresh assessment as and when new facts on the imported goods emerge. It cited the case of *Tarmal Industries Ltd v Commissioner of Customs and Excise* [1968] EA 471 in support of this position.
 17. The tribunal noted that that from its submissions, the commissioner had relied on the tariff classification adopted by other members of World Customs Organization (WCO). The tribunal agreed with the commissioner that contracting parties to the hs convention are bound to follow the sequence of the harmonized system and apply the GIRs of all sections, chapters, and subheading notes in its customs tariff nomenclature. The tribunal was however of the view that the interpretation of the HS by a single contracting party, though persuasive did not form an official binding decision of the WCO. To that extent, the tribunal determined that the commissioner was not bound to apply a decision on the HS merely because it was made by another contracting party of the HS Convention. Furthermore, that the rulings attached by the commissioner from various customs administration do not settle on one HS Code.



18. From the written and oral submissions of both parties, the tribunal determined that the tuk tuks were potentially classifiable under headings 87.03, 87.04 and 87.11. Therefore, in determining the correct classification of the tuk tuks, the tribunal relied on the GIRs of the CET and the WCO explanatory notes to the harmonized system. The tribunal took into account GIR 4 to determine whether the Tuk Tuks were more akin to Heading 87.03 and 87.04 or more akin to motorcycles of Heading 87.11. It further took note of the classification decision of the WCO HS Committee in November 2011 where having considered headings 87.04 and 87.11 classified goods carrying three-wheelers under 87.04 and more specifically under 8704.21. It also took into account the explanatory notes that outlined the features that are indicative of the design characteristics generally applicable to vehicles that fall in heading 87.03 and 87.04 and the features of the tuk tuks imported and as submitted by the respondent.
19. The tribunal held that its analysis of the features described by the commissioner found nothing that excluded the tuk tuks from being classified under heading 87.11 and in fact, it was the respondent's submission that clearly distinguished the same from being classified under either heading 87.03 or 87.04. That for instance, the steering system consists of a handle bar more characteristic of vehicles of heading 87.11 than vehicles of 87.03 and 87.04 which consist of a steering wheel. Therefore, the tribunal stated that based on the facts before it and pursuant to GIR 3(c) and GIR 4, the Tuk Tuks imported by the respondent did not meet the design characteristics of vehicles under heading 87.03 and 87.04 and were most appropriately classifiable under heading 87.11.
20. In the tribunal's view, the type of vehicles imported by the respondent were not in doubt. They were tuk tuks which were properly documented in the import documents and correspondences between the parties. The foregoing notwithstanding, the tribunal stated that a significant factor in proceedings before it was that the commissioner's determinations of tax deficiencies are presumptively correct and that although the presumption was not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support its position. The tribunal restated that the taxpayer bears the ultimate burden of persuasion, which requires the party bearing the burden of proof to convince the court by providing sufficient evidence to satisfy the required standard of proof. In light of the foregoing, the tribunal determined that the appellant had discharged the burden of proving that the tuk tuks imported by it were of the type that is classifiable under heading 87.11. consequently, the tribunal found that the commissioner erred in classifying the tuk tuks under heading 87.03 and 87.04. The tribunal thus allowed the respondent's appeal and amended the objection decision of December 10, 2020 by striking out the assessments relating to tariff classification.
21. The commissioner is dissatisfied with the tribunal's decisions and appeals to this court on the grounds set out in the memorandum of appeal dated December 10, 2021. The respondent filed its statement of facts dated March 2, 2022. The appeal was argued by way of written submissions where the parties have regurgitated their positions I have already summarized above and do not wish to highlight again.

Analysis and Determination

22. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that is circumscribed by 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". 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 (see *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR). In *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* Nyr CA civil appeal Mo. 48 of 2013 [2013] eKLR the Court of Appeal stated that when a court that is limited to dealing with matters of law has a concern regarding factual issues, then the court will also be limited to re-evaluation of the lower court's conclusions and



if the conclusions are erroneous to the extent that they are not supported by the evidence and the law, the matter becomes a point of law.

23. The commissioner's appeal can be condensed to resolving two issues; first, whether the tribunal erred in finding that the appeal before it was valid and second, whether the tribunal erred in classifying the tuk tuks under heading 87.11 rather than 87.03 and 87.04.

Validity Of The Appeal

24. The commissioner's case was that the letter dated December 10, 2020 was not a review decision but a demand letter and that the letter of December 10, 2020 clearly acknowledged that the review decision was the one dated July 15, 2020. The commissioner submits that the letter dated December 10, 2020 does not have the character of an appealable decision and was written as a result of the commissioner being tired of engaging with the respondent over the tax dispute.
25. Under section 229(1) of the EACCMA, "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 or omission lodge an application for review for that decision or omission" and that under section 229(4), the commissioner is required to render a decision on the same within 30 days. Section 230 then goes to provide that a party dissatisfied with a decision rendered by the commissioner above may appeal to the tribunal within 45 days of the decision.
26. From the record, the commissioner communicated the findings of its post clearance audit through its letter dated June 5, 2020 adjusting and assessing taxes due and payable by the respondent at Kshs. 1,092,089,174.00 and making a demand on the same date. The respondent responded to these findings and demand by the commissioner through the letter dated June 12, 2020. Even though the respondent never expressly stated it, the commissioner interpreted this letter to be an application for review made pursuant to section 229 of the EACCMA as evidenced by the commissioner's letter dated June 15, 2020. In this letter, the commissioner also titled it as a decision on an application for review and revised the assessed taxes to Kshs. 512,815,342.00. This would mean that if the respondent was dissatisfied with this decision, then it was to lodge an appeal with the tribunal within 45 days of receipt of the decision.
27. The respondent, rather than appealing to the tribunal, wrote to the commissioner through the letter of November 25, 2020. The commissioner, in turn, responded by the letter dated December 10, 2020 where it confirmed its earlier position on the demanded taxes and informed the respondent as follows:

Kindly consider this a final decision on your appeal to the commissioner but if dissatisfied, you are at liberty to appeal the decision at the Tax Appeals Tribunal pursuant to section 230 of the East African Community Customs Management Act.
28. The tribunal held that the aforesaid statement contained in the letter was unequivocal as to what constituted an appealable decision as between the parties. The commissioner submits that this statement was made so as to stop the back and forth between the parties on the disputed taxes.
29. I have considered the record and I find that the respondent's letter dated June 12, 2020 was an application for review as it satisfied the conditions of such an application under section 229(2) of the EACMMA which provides that the same shall be "...in writing stating the grounds upon which it is lodged". The Commissioner rightfully rendered a decision within the thirty days demanded of section 229(4) of the EACMMA meaning that the respondent had to appeal this decision within 45 days of receipt of this decision. The respondent never made an appeal within the said 45 days but instead continued to engage the commissioner.



30. The commissioner also continued to engage the respondent and by the letter dated December 10, 2020, the commissioner made reference to the earlier decision and the respondent's grounds raised and actually made another 'decision' on the same confirming its earlier position and then advised the respondent to appeal to the tribunal if it is dissatisfied.
31. I find and hold that by advising the respondent to appeal to the tribunal if at all it was dissatisfied, the commissioner was estopped from claiming that the appeal was time barred once it continued engaging the respondent and rendered another decision on the application for review. I agree with the tribunal that this letter of December 10, 2020 is what constituted an appealable decision, which meant that the appeal was thus rightly before the tribunal. However, the result would have been different had the commissioner not rendered any other decision after the one of June 15, 2020.

Classification of the Tuk Tuks

32. The parties' dispute before the tribunal was whether the tuk tuks ought to have been classified under heading 87.11 as fronted by the respondent or 87.03 or 87.04 as averred by the commissioner.
33. The coding/tariff classification system currently in use in the country for determining applicable tariffs for imported goods is adopted from the said 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 November 30, 1999. The parties also agree that to ascertain what code is applicable to particular goods, one has to look at the GIRs which are rules that govern the classification of goods under the harmonized system and the explanatory notes which provide commentary on the intent and scope of provisions and as approved by the customs co-operation council and constitute the official interpretation of the harmonized system at the international level and are an indispensable complement to the system.
34. The commissioner maintains that the tuk tuks ought to be classified under heading 87.03; motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars or heading 87.04; motor vehicles for the transport of goods. The explanatory notes under heading 87.03 also provides for: Those fitted with motorcycle engines and wheels, etc. which by virtue of their mechanical structure, possess the characteristic of conventional motor cars, that is motorcar type steering system or both reverse gear and differential; Those mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate battery powered electric motors. They are normally operated by means of a single central control stick with which the driver can start, accelerate, brake, stop and reverse the vehicle as well as steer it to the right or to the left by applying a differential torque to the drive wheels or by turning the front wheel.
35. The explanatory notes under heading 87.04 are almost similar to those above and provide as follows: Those fitted with motorcycle engines and wheels, etc. which by virtue of their mechanical structure, possess the characteristic of conventional motor cars, that is motorcar type steering system or both reverse gear and differential; Those mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate battery powered electric motors. They are normally operated by means of a single central control stick with which the driver can start, accelerate, brake, stop and reverse the vehicle as well as steer it to the right or to the left by applying a differential torque to the drive wheels or by turning the front wheel. Three wheeled vehicles of the above-described character are classified in heading 87.03 if they are designed for the transport of persons
36. The respondent relied on heading 87.11; motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars; side-cars. The explanatory notes under this heading



provide as follows: This heading covers a group of two-wheeled motorized vehicles which are essentially designed for carrying persons. In addition to motorcycles of conventional type, the heading includes motor-scooters characterized by their small wheels and by a horizontal platform which joins the front and rear portions of the vehicles; mopeds, equipped with both a built-in engine and a pedal system; and cycles fitted with an auxiliary motor. This heading also covers two wheeled, electrically powered transportation devices, designed for carrying a single person, for use within low-speed areas such as pavements (sidewalks), paths, and bicycle lanes. Their technology allows the rider to stand upright while a system composed of gyroscope sensors and multiple onboard microprocessors maintains both the devices and rider's balance on two independent, non-tandem wheels. Motorcycles may be equipped to protect the driver against the weather or be fitted with a side car. Three-wheeled vehicles (e.g., the "delivery tricycle" type) are also classified here provided they do not have the character of motor vehicles of heading 87.03. The heading further covers sidecars of all kinds, a type of vehicle which is designed for the transport of passengers or goods, and which cannot be used independently. They are equipped with a wheel on one side, the other side bearing fittings enabling the sidecar to be attached to, and to travel alongside, a cycle or motorcycle.

37. I agree with the tribunal that under the GIRs, goods are classified in accordance with the heading appropriate to the goods to which they are most akin and that the heading which provides the most specific description shall be preferred to headings providing a more general description. I have gone through the record, more so the respondent's description of the tuk tuks imported as explained in its letters to the commissioner and submissions before the tribunal. I am in agreement with the tribunal that the respondent gave a description that clearly distinguished the tuk tuks from those vehicles imported under heading 87.03 and 87.04.
38. The respondent provided *prima facie* and un rebutted proof that the tuk tuks have a handle steering as opposed to the motor car type of steering system, they have a differential that is different from that of a motor car, they have a monocoque chassis as opposed to a t-type chassis and that they do not have a single central control stick as the gears are operated from the handle bar type of steering. These features are not characteristic of vehicles under heading 87.03 which as per the explanatory notes in heading 87.11 means that they fall under heading 87.11.
39. The tribunal rightly analysed the evidence on record and came to a conclusion that was also supported by the CET, the GIRs and the explanatory notes. The commissioner thus erred in classifying the tuk tuks imported by the respondent under heading 87.03 as opposed to the heading 87.11.

Disposition

40. It is for this reason that I find that the commissioner's appeal lacks merit and is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 30th day of NOVEMBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr John Marigi, Advocates instructed by the Kenya Revenue Authority for the Appellant.

Mr Mochere instructed by HMS Advocates LLP Advocates for the Respondent.

