



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

INCOME TAX APPEAL NO.8 OF 2015

EXPORT TRADING COMPANY LIMITED.....1ST APPELLANT

VERSUS

THE COMMISSIONER OF CUSTOMS AND EXCISE.....RESPONDENT

(Being an Appeal from the whole of the decision of the Tax Appeals Tribunal dated 30th June 2015)

IN THE CUSTOMS AND EXCISE TAX APPEAL

APPEAL NO.11/CEAT/2014

EXPORT TRADING COMPANY LIMITED.....APPELLANT

J U D G M E N T

I N T R O D U C T I O N

The Appellant being aggrieved by decision of Customs and Excise tax Appeals Tribunal delivered on 30th June 2015, appeal against entire decision of the Tribunal.

The Appellant's contention is that coconut coir pith should be classified under code 53.05 and not under the Heading 1404 Tariff no. 1404.900.00 as held by the Tribunal.

It is not disputed that coconut coir pith commonly known as coco peat was initially classified under heading 27.03.

Following complaints from taxpayers, Kenya Revenue Authority (KRA) being a member of World Customs Organization sought opinion on classification of the product in the year 2012. A sample of the product was sent to the organization for analysis. Upon obtaining opinion from WCO the Respondent classified the product under 14.04.

The Tribunal held that the most appropriate Heading Tariff is 14.04.

Heading 14.04 tariff applies to Vegetable Materials not elsewhere specified or included.

Heading 53.05 specifically applies to Coconut, abaca (Manila hemp or Musa textile's Nee), ramie and other vegetable textile fibres, not elsewhere specified or included, raw or processed but not spun; tow, noils and waste of these fibres (including yarn waste and garneted stock).

Parties herein are agreeable that coconut coir pith (coco peat) do not fall under heading 27.03.

The Appellant's contention is that the product is described under heading 53.05 and it should not therefore be place under heading 14.04, which provide for vegetable products, which are not specifically described in or included in other headings.

The appeal proceeded by way of written submissions. Counsels for the parties highlighted submissions on 9th July 2018.

Counsel for the Appellant submitted that the gist of this appeal is classification of coconut coir pith; that the classification is important under

East Africa tariffs and has been a source of complaints from importers. He submitted that the product's classification is under Heading 53.05 as opposed to Heading 14.04, which the Respondent rely on, and has insisted to levy the tax.

Counsel submitted that the Respondent erred in relying on opinion from World Custom Organization to classify the product under Heading 14.04, as WCO's opinion is not law.

Counsel further argued that, the principle word in the description of the product is coconut. That Heading 14.04 say products not described but this product is clearly described under Heading 53.05. He said the product is used to preserve power in flower production.

He submitted that the Appellant had suffered 6.7 Million at the time of filing submissions. He urged Court to uphold their classification.

Mr. Kiruga for the Respondent opposed the appeal and relied on statement of facts filed on 5th September 2016 plus submissions filed on 6th June 2018.

He confirmed that the claim is about classification of an imported product described as coconut coir pith loosely referred to as coco peat.

Counsel submitted that in the year 2007, the Respondent defined and classified coco peat under heading 27.03 and later in the year 2012 following opinion from World Customs Organization, the Respondent changed its classification to heading 14.04.09.

The Respondent shared the new classification on the website way before the Appellant's importation.

He submitted that the product's classification is based on scientific nomenclature, characteristic, composition and use of the product.

Counsel further submitted that in classification of the product, the Respondent relies on harmonized system of classification known as Harmonized commodity system; a system relied on world over for harmonization in description of goods and there are explanatory notes to the harmonized system.

He submitted that the classification heading 53.05 refer to products used in textile industry and that in the Tribunal, and in this Court, the Appellant was very clear that the imported product which is a waste product of coconut fibre is used in horticulture farming and not in textile industry.

He added that explanatory notes on 14.04 is other vegetable products.

That if coconut coir pith is used in its raw form it is classified under 14.04 but if it is added other products for use in textile then it falls under heading 53.05.

Counsel submitted that the subheadings guide in interpretation of classification and under chapter 53 the heading is for textile products and Rule 6 talk of subheadings to the chapters and products in the subheading should be comparable with the heading.

Counsel submitted that the Appellant is stuck with word coconut whereas the description of the subheading that are comparable are textile fibres.

He cited the case of **Enkasiti Flowers Growers Limited vs Kenya Revenue Authority [2010] eKLR** where the dispute concerned classification of raw coconut fibre imported by the Applicant under tariff 5305 instead of tariff index 27.03. The Court held that the coconut fibres is excluded from Tariff index TI 53.03 because it is used for oil improvement not as a textile.

He concluded that harmonized system is by World System Organization and the Respondents role is to interpret and administer and can only change the tariff; that in case of doubt, clarification can be sought from World System Organization. He urged Court to dismiss the appeal.

I have considered rival submissions by Counsels herein.

ISSUE FOR DETERMINATION

- 1. Whether correct classification of coconut coir pith(coco peat) is tariff heading 53.05 or 14.04*
- 2. Whether customs and Excise Tax Appeals Tribunal erred in upholding the Respondent's decision to classify coconut coir pith under heading 14.04.*

It is not disputed that Kenya is a member of World Customs Organization.

One of the organization's role is to develop Harmonized commodity description and coding system generally referred to as "Harmonized System" or simply "HS". It is an international standard classification system for commodities. Harmonization is crucial for fair international trade.

The role of a member state is to make the correct interpretation through its tax authority guided by General Interpretation Rules (GIR) of Harmonized Systems (HS); to ensure that correct classification of a product has been adopted.

In the event of doubt on classification of a commodity, the Respondent is at liberty to seek assistance from the World Customs Organization.

Parties are agreeable that coconut coir pith does not fall under heading 27.03 as per opinion given by WCO.

In the year 2012, the Respondent reclassified the product under heading 14.04 after sending a sample to WCO for analysis and opinion on its classification.

I note from documents attached to Memorandum of Appeal that importers have raised complaints to the effect that, there is variance on classification of the products by the Respondent's Officers at different checkpoints; that some accept heading 53.05, other 14.04 and 27.03. This creates confusion, as there is no uniformity in the classification.

Counsel for the Respondent has argued that coconut coir pith does not fall under heading 53.05 because it is in raw form not processed for use as textile; its use being horticulture. That heading 53.05 apply to vegetable fiber for textile use. Counsel for Respondent argues that the product is not comparable with products under heading 53.03.

It is not disputed that coconut coir pith is for horticulture use. This is evidenced by correspondences attached to the Memorandum of Appeal.

My understanding is that the heading gives general categorization of products. The subheadings provide a more specific description.

HS 53.05 read as follows:-

“53.05 specifically applies to Coconut, abaca (Manila hemp or Musa textile’s Nee), ramie and other vegetable textile fibres, not elsewhere specified or included, raw or processed but not spun; tow, noils and waste of these fibres (including yarn waste and garneted stock).”

What is the definition of coconut coir pith? From pleadings herein, I note that both parties agree that it is ***“brown fibrous waste obtained as a residue from process of cleaning coconut coir.”***

The subheading include wastes of the listed fibres. Coconut is listed.

Respondent argued that coconut coir has not been processed for textile use.

My understanding is that, Heading 53.05 apply to wastes to fibres listed, which include coconut. Coconut coir pith being fibrous waste of coconut is described under this heading.

Heading HS 14.04 apply to products not elsewhere specified or included.

From the foregoing, I find that the tribunal erred in upholding the Respondent's classification of coconut coir pith under 14.04.

FINAL ORDER

1. The appeal is allowed.
2. Customs and Excise tax Appeal Tribunal decision dated and delivered on 30th June 2015 is hereby quashed.
3. Coconut coir pith is specified or included under Heading 53.05 of East African Community Common External Tariff Version 2012 Nomenclature.

Judgment dated, signed and delivered at Nairobi this 18th day of October 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

CATHERINE: **COURT ASSISTANT**

KATILE H/B FOR JUMA: **COUNSEL FOR APPELLANT**

SEGA H/B FOR MS. CAROL BURUGU: **COUNSEL FOR RESPONDENT**