Kenya Revenue Authority v Orb Energy Private Ltd (Income Tax Appeal E110, E019, E020, E098, E022, E025, E027, E033, E095 & E096 of 2023 (Consolidated)) [2025] KEHC 82 (KLR) (Commercial and Tax) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 82 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E110, E019, E020, E098, E022, E025, E027, E033, E095 & E096 OF 2023 (CONSOLIDATED)

A MABEYA, J

JANUARY 16, 2025

BETWEEN

KENYA REVENUE AUTHORITY ..... APPELLANT

AND

ORB ENERGY PRIVATE LTD ..... RESPONDENT

RULING

1. This ruling determines the appellant's application dated 19/9/2023. The same was brought under Article 159, sections 3A, 1A, 1B of the *Civil Procedure Act* Order 51 rule 1 of the Civil Procedure rules. Since there are similar application in the other files set out at the heading of this ruling, the parties agreed that the determination of this ruling shall apply to the other matters.

2. The application sought to introduce in the appeal, the decision of the Harmonized System Committee and further amendments made on the Harmonized Systems Compendium discussed on 71st session conducted in March 2023.

3. The application was premised on the grounds set out on its face and supported by the affidavit of Bernard Oyucho of even date. The applicant's case was that, the Harmonized System Committee deliberated on the classification for dual water systems and determined the HS Code for the same to be 8516.10.00.

4. That the decision came to the applicant's attention in September 2023 when the period to file review before the tribunal had lapsed. That the said decision was made under the auspices of World Customs Organization and the HS Convention which Kenya is party to and is binding on the applicant.

The deliberations of the HS Committee is intended to ensure uniformity in application of H.S Classification.

5. The applicant's case was that the decision offers conclusive guidance on the classification of the dual water systems and that the application was brought timeously.

6. The application was vehemently contested by the respondent tax payers as represented in the affidavits of Harun Kariuki, Stephanie Bogholi, Jason Horsey and Ken Mbiuki.

7. They contended that the documents sought to be introduced are not related to the appeal. That the parties had applied Classification HS Code 8419 by consensus with the appellant and that had been the practice between the appellant and stakeholders in the energy sector. That the appellant intends to apply the new classification retrospectively and to raise tax demand for shipments that date 5 years before the impugned classification.

8. That that intention would be prejudicial to the respondents and was unreasonable given that the new HS Classification code did not apply to the respondent's shipments. That the decagons of the compendium applied from July 2023 and applied prospectively. That the appeals related to audit period of between 2016-2021 and demands made in the year 2021. Further, that the cases were resolved on appeal in 2022. That legislation does not apply retrospectively unless the statute expresses itself as such.

9. The application was canvassed by way of written submissions which I have considered. It was submitted for the applicant that the appeal court has power to admit new evidence under Order 42 rule 27 of the Civil Procedure Rules and Rule 15 of the Tax Appeals Tribunal rules. Reliance was placed in the case of Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others SC Petition Nos. 7 & 8 of 2018; [2018 among others.

10. It was argued that the document would help the Court understand the dispute before it. That the appellant argued before the Tribunal that the fact that the water heaters were imported without electric components did not change their classification as dual. That the Classifications were reflected in the document intended to be adduced in evidence. That the respondents would not be prejudiced as they would also file a supplementary record of appeal to rebut the new evidence.

11. Finally, that the intended document is synonymous to the WCO HS Committee decision made on 3/11/2021 attached to the record of appeal with similar classification of HS 8516.10.00

12. For the respondents, it was submitted that the applicant had not satisfied the conditions for leave to adduce new evidence as settled in the case of Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others SC Petition Nos. 7 & 8 of 2018; [2018] eKLR. The cases of Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] and Tanganyika Farmers Association Ltd v Unyamwezi Development Corporation Ltd were also cited in support of that submission.

13. That the evidence sought to be introduced was not necessary for the determination of the appeals since the dispute predated the impugned decisions and cannot be cured by retrospective application of the law. That it was an attempt to patch up a weak case by introducing the WCO decision. Finally, that the decision to implement the new Classification was in breach of Article 47 of *the Constitution* and that the Commissioner's statutory power is subject to provisions of the *Fair Administrative Action Act*.

14. The contestations and the submissions of the parties have been considered. The issue for determination is whether leave should be granted to the applicant to introduce fresh and additional evidence in the concerned appeals. The new evidence sought to be introduced is the decision of the Harmonized

System Committee and further amendments made on the Harmonized Systems Compendium discussed on the 71st Session conducted in March 2023.

15. Section 78 of the *Civil Procedure Act* as read with Rule 15 of the Tax Appeals Procedure Rules gives Court the discretion to admit documents and/or additional evidence.

16. Section 78 provides: -

> "(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –
>
> ...
>
> (d) To take additional evidence or to require the evidence to be taken..."

17. The aforesaid Rule 15 of the Tax Appeals Procedure Rules provides that: -

> "The Court may, at the time of hearing of an appeal, admit other documentary or oral evidence not contained in the statement of facts of the appellant or respondent should it consider it necessary for determination of the appeal".

18. In Ocean (EA) Limited v Commissioner of Domestic Services [2018] eKLR, the court observed that where a party wishes to call additional evidence in a tax appeal, the latitude the court has under the rule should be more restrictive so as to avoid the process being used to re-litigate a case on altered parameters.

19. Further, the application is not an opportunity to patch up a weak case of for parties to introduce new aspects of a case. Such permissive and liberal approach can extend litigation. In Wanjie & another v Sakwa & others [1984] KLR 275; [1984] eKLR, the Court of Appeal held that the rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the week points in his case and fill up omissions in the appellate court.

20. The above then is the parameters within which the present application has to be considered.

21. The HS Committee compendium and deliberations were made in the year 2022 wherein it was agreed that the HS classification for dual water heater systems would be 8516:10. The Tribunal made its judgment on 12/5/2023

22. The respondents contended that the documents and classification would not be relevant to the audits and tax demands made for the years 2016 to 2021. The applicant must demonstrate that the additional document was directly relevant and it would influence the verdict. See Mohamed Abdi Mahamud – Vs- Ahmed Abdulahi Mohamed & 3 others; Ahmed Ali Muktar (interested Party) [2018] eKLR.

23. The fact that the decision refers to HS classification of goods discussed in the appeal is not sufficient ground to admit the same as evidence. The Classifications were implemented in the year 2022. The appeals before Court relate to audits for the tax periods of 2016 to 2021 before those Classifications were made. In this Court's view, the said Classifications would be irrelevant and unjustified to the imports subject to this appeal which preceded the classification.

24. The retrospective application of the impugned HS classification was vehemently contested by the respondents. In this Court's view, admitting the proposed evidence would be prejudicial as the Tribunal would not have pronounced itself on it. The Tribunal should have had the opportunity to pronounce itself on the issue of retrospective applicability first before this can attempt to do so.

25. In any event, retrospective applicability of legislation is frowned at unless the legislature expressly so states in the legislation itself. See Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR.

26. The documents sought to be introduced bear the deliberations of parties to the HS Convention and the final decision of the Harmonized System Committee on the classification of certain goods in July 2022. Of relevance to the appeals is the amendment on classification of dual solar heaters. A close reading of the same shows that the decision was intended to be progressive. It was to take effect from the date of the agreement and/or after its passage and not otherwise.

27. In view thereof, I find that the appellant has not satisfied the threshold for admitting additional evidence. Accordingly, the application is without merit and is hereby dismissed with costs.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE