



REPUBLIC OF KENYA



**KENYA LAW**  
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**Commissioner of Customs & Border Control v C&P Shoes Limited (Tax Appeal E153 of 2023) [2025] KEHC 2826 (KLR) (Commercial and Tax) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2826 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**TAX APPEAL E153 OF 2023**  
**JWW MONG'ARE, J**  
**MARCH 10, 2025**

**BETWEEN**

**COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... APPELLANT**

**AND**

**C&P SHOES LIMITED ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 4th August 2023 in Tax Appeals Tribunal Appeal No.520 of 2022)*

**JUDGMENT**

**Introduction and Background:-**

1. The Respondent is a company that deals in the manufacture of sports shoes, leather shoes, rain boots PVC coated fabrics, shoelaces and unit sole for the local and export market. Sometime in 2021, it imported among others a silicon emulsion which is a raw material used in a number of items manufactured by the Respondent. At the point of importation of this product, the Respondent requested the Appellant ("the Commissioner") to issue a tariff classification of the said product.
2. Following the request, the Appellant tested a sample of the product and issued the Respondent with a Tariff classification Ruling dated 25<sup>th</sup> October 2021. The Commissioner held that the declaration and classification of the product under Harmonised System (HS) Code 3910.00.00 by the Respondent was at variance with the Commissioner's findings that the product is considered to be an organic surface-active agent and ought to be classified under HS Code 3402.13.00.
3. The Respondent wrote to the Commissioner on 19<sup>th</sup> November 2021 objecting to both the classification under HS Code 3402.13.000 and an earlier demand from FFK CFS dated 11<sup>th</sup> November 2021 and further requested the Appellant to re-evaluate the classification of the product based on



- various grounds in support of the Respondent's preferred code. The Commissioner then conducted a Post-Clearance Audit of the Respondent's importation from the period 2017 to 2021 and issued a demand of Kshs.1,646,799/= on 3<sup>rd</sup> December 2021, arguing that the Respondent had misclassified Silicon Emulsion product during this time as under the Respondent's preferred HS Code 3910.00.00 the import duty rate is 0% with VAT chargeable at 16% as opposed to the Commissioner's HS Code 3402.12.00 which provides an import duty rate of 10% and VAT at 16%.
4. The Commissioner then responded to the Respondent's objection through the letter dated 8<sup>th</sup> December 2021 effectively reversing the earlier classification in the Ruling of 25<sup>th</sup> October 2021 and classifying the product under HS Code 3402.90.00. The Commissioner stated that this departure and reclassification was based on the additional information submitted. In a letter dated 9<sup>th</sup> December 2021, the Respondent responded to the demand letter of 3<sup>rd</sup> December 2021 restating the objections in its letter of 19<sup>th</sup> November 2021. On 20<sup>th</sup> December 2021, the Commissioner issued its Review Decision where it reiterated its classification of the product under HS Code 3402.90.00 and affirmed its earlier demand which had now been reviewed to Kshs.4,116,996.53/=.
  5. Aggrieved, the Respondent lodged an appeal with the Tax Appeals Tribunal ("the Tribunal") which after considering the pleadings and submissions of the parties rendered a judgment on 4<sup>th</sup> August 2023 (C&P Shoe Industries Ltd v Commissioner, Customs & Border Control [2023] KETAT 524 (KLR)). The Tribunal determined whether the Silicon Emulsion imported by the Respondent met the threshold of classification under HS Code 3910.00.00 as the Respondent had preferred and declared. The Tribunal held that based on the Rules of Interpretation (GIRs), and the Explanatory Notes to Heading 39.10, from the first Rule "Which is of the most specific description", the most specific description can be found in the laboratory analysis of the product. That in the instant case, the Certificate of Analysis from the manufacturer was attached by the Respondent and had all along been used to classify the Respondent's product under Heading 39.10 as opposed to the Commissioner's preferred Heading 34.02
  6. The Tribunal further noted that as provided for under GIR 1, nothing under Heading 34.02 describes the silicone product that were imported by the Respondent and consequently, the Tribunal found that the product is correctly classifiable under HS Code 3910.00.00. As such, the Respondent's appeal was allowed and the Commissioner's Review Decision was set aside.
  7. It is this decision that now forms the subject of the present appeal by the Commissioner that is grounded on amended Memorandum of Appeal dated 25<sup>th</sup> September 2024. The appeal has been responded to by the Respondent through its amended Statement of Facts dated 12<sup>th</sup> November 2024. The appeal was disposed by way of written submissions which are on record and I will make relevant references to the same in my analysis and determination below.

#### **Analysis and Determination:-**

8. 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*, (Chapter 469B of the Laws of Kenya) ("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". This means that an appeal such as the one before this court is limited to matters of law and 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, Independent Electoral and Boundaries Commission & Paul Musyimi Nzengu [2018] KEHC 8738 (KLR))
9. From its submissions the Commissioner crystallizes the following issues for the court's determination:-



1. Whether the Tribunal was proper in finding that the product is correctly classifiable under Tariff Code 3910.00.00.
  2. Whether the Tax Appeals Tribunal considered all the requisite documents including laboratory findings in confirming the tariff classification.
10. Before determining the issues above, I think it will be germane to briefly highlight the Coding/Tariff classification system currently in use in the country, for determining applicable tariffs for imported goods. This classification 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 30<sup>th</sup> November 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.
11. Whether the subject product ought to have been classified under Heading 39.10 as fronted by the Respondent, or 34.02 as preferred by the Commissioner, is a question of fact and was within the province of the Tribunal. As stated, the Tribunal held that the product fit the classification of Heading 39.10 based on the specification and description of the product as evidenced by the certificate of analysis from the Respondent's supplier Yung YI Company Ltd that was attached by the Respondent.
12. The Tribunal also stated that it had taken note of the fact that although the Commissioner stated that the product was re-tested and the laboratory findings captured in the Memorandum dated 6<sup>th</sup> December 2021 accordingly reclassifying product under HS code 3402.90.00, none of the laboratory test results or analysis results were attached for the benefit of the Tribunal. That the Commissioner only attached internal communication that advised that the product was to be classified under HS Code 3402.90.00. The Tribunal also went through the relevant GIRs and the Explanatory Notes to Heading 39.10, to find that the most specific description can be found in the laboratory analysis of the product, which evidence had been attached by the Respondent and not the Commissioner. The Tribunal further noted that as provided for under GIR 1, nothing under Heading 34.02 described the product.
13. Going through the record, I am inclined to agree with the Tribunal and I find no perversion of the law in the manner in which the Tribunal determined this matter to warrant the court's intervention for a number of reasons. First, 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 (see Commissioner of Customs and Border Control v Auto Industries Limited [2022] KEHC 15974 (KLR)). Second, the jurisdiction of this court can only be properly invoked if the question before it is one of law and this entails a review of the Tribunal's conclusion and determining whether it was able to correctly apprehend the evidence before it.
14. I am satisfied that the Tribunal rightly analysed the evidence on record and came to a conclusion that was supported by the CET, the GIRs and the Explanatory Notes and the evidence before it. Whereas I agree that under section 30 of the *Tax Appeals Tribunal Act* (Chapter 469A of the Laws of Kenya) and section 56 of the TPA, the burden is on the taxpayer, in this case the Respondent, to prove the Commissioner wrong, in this case, I find that the Respondent did exactly that. The Respondent provided primary evidence, that is, the certificate of analysis from its supplier that specifically described the product and placed it under Heading 39.10. As the Commissioner did not impeach the credibility



or competence of this analysis, I find that the Respondent met the minimum threshold of competent and relevant information and documentation necessary to support its position. It should not be lost that what the Respondent was required by law to establish was a prima facie case and that the Commissioner ought to have measured such evidence on a preponderance of probabilities (See Kenya Revenue Authority v Maluki Kitili Mwendwa [2021] KEHC 4148 (KLR)).

15. Third, I would also agree that the reliance by the Commissioner on an internal memo from its inspection and testing centre was not enough to upset the certificate of analysis presented by the Respondent which as I have stated constituted primary evidence and carried more weight as opposed to the Commissioner's internal memo.
16. Fourth, it is also for the above reasons that I find no basis for the Appellant's ground of appeal that the Tribunal did not consider all the requisite documents including the laboratory findings in confirming the tariff classification. The Tribunal's judgment is clear that it considered both sets of evidence and chose to go with that of the Respondent which I have stated, carried more evidentiary weight.
17. In sum, I find that the Tribunal came to conclusions that were consistent with the evidence before it and that a different tribunal sitting in its place would have come to the same conclusions.

**Conclusion and Disposition:-**

18. It is for this reason that I find that the Commissioner's Appeal lacks merit and it is hereby dismissed but with no orders as to costs. The Tribunal's decision dated 4<sup>th</sup> August 2023 is affirmed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH 2025**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Ms. Nyaringita holding brief for Mr. Kareithi for the Appellant.
2. No appearance for the Respondent.
3. Amos - Court Assistant

