



**Commissioner of Customs and Border Control v Emergency
Relief Supplies Ltd (Customs Tax Appeal E009 of 2023)
[2024] KEHC 5466 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E009 OF 2023
FG MUGAMBI, J
MAY 13, 2024**

**BETWEEN
COMMISSIONER OF CUSTOMS AND BORDER CONTROL APPELLANT
AND
EMERGENCY RELIEF SUPPLIES LTD RESPONDENT**

*(Being an appeal from the decision of the Tax Appeals Tribunal
of 10th February, 2023 in TAT appeal No. 108 of 2021)*

JUDGMENT

Background

1. The appeal before the Court arises from a tariff classification of an item christened Solarsack, which is a plastic water treatment, disinfection and purification equipment used for safe and reliable treatment and purification of water intended for drinking.
2. Solarsack is manufactured and distributed by Solarsack Aps, a Danish company. The respondent is the local agent of the said Solarsack Aps in Kenya.
3. Following an application for an advance ruling on Solarsack by the respondent, the appellant classified it under EAC/CET HS code 3926.90.90 (Articles of Plastic). The justification for this classification according to the appellant was that Solarsack is made of polyethene which was considered as other articles of plastics and further that it did not have any chemical or machinery to purify water.
4. The respondent sought a review of the classification and offered persuasive authorities that classified the Solarsack as a water purifier classified under H.S. Code 84.21.00. The appellant upheld its decision and anchored its classification on Rules 1 and 6 of the General Interpretation Rules (GIR).



5. Dissatisfied with the decision, the respondent appealed to the Tax Appeals Tribunal (the Tribunal). Upon considering comparative jurisdictions the Tribunal found that Solarsack was classified under H.S. code 8421.21.00 and consequently held that the appellant had erred in classifying it under H.S. Code 3926.90.90. On this ground the Tribunal set aside the appellant's classification, prompting the present appeal filed before this court on 5th April, 2023.
6. In response to the appeal the respondent filed their Statement of Facts dated 11th August 2023. The appeal was canvassed by way of oral and written submissions. The appellant's submissions are dated 27th November, 2023 while those of the respondent are dated 15th December, 2023.

Analysis and determination

7. This Court has carefully considered the entire record of appeal, the grounds of appeal and the oral and written submissions by the parties. One (1) issue that arises for determination out of the six (6) grounds of appeal in the Memorandum of Appeal is as to the appropriate classification of Solarsack within the framework of the East African Community (EAC) Common External Tariff (CET).
8. Both parties have alluded to the fact that the EAC CET was designed to promote economic integration by establishing a uniform tariff rate on goods imported from non-EAC countries into any EAC member state.
9. In aligning with this framework, this Court is being asked to scrutinize the application of the six General Rules of Interpretation (GRIs) under the CET. These are a set of principles which are designed to provide a systematic method for classifying goods in the customs nomenclature. The GRIs are part of the Harmonized System (HS) developed by the World Customs Organization (WCO) and are universally applied by all the countries that have adopted the HS for their customs tariffs, including the EAC member states under their CET framework.
10. The basic rules of classification using the GRIs provides for a systematic and sequential application of the rules in numerical order, starting with Rule 1 and moving through to Rule 6 as necessary. Each rule must be considered in the sequence provided, and a subsequent rule is applied only if the previous rules do not definitively classify the item. This fact has been alluded to by both parties.
11. The appellant however argues that the Tribunal erred in failing to consider GIR 1 and proceeded to classify Solarsack under GIR 4. In summary, Rule 1 deals with titles of sections, chapters, and subheadings. In addition to providing that these are provided for general guidance, it also states that classification should be determined according to the terms of the headings and any relative section or chapter notes, provided the items are not covered more specifically by another category.
12. For this reason, I am in concurrence that having found that Rule 1 advocates for specific classification as opposed to generic classification, the Tribunal was right in misapplying the rule as there were other more specific headings and chapters that would afford a more specific classification for Solarsack.
13. Rule 2 in turn provides guidance on how to classify products that are not explicitly mentioned in the HS nomenclature or that are incomplete or unfinished. Again, this Rule would not apply in the present circumstances. Rule 3 is relevant in so far as it aids in the classification of products when rules 1 and 2 do not lead to a singular classification.
14. It provides in part as follows:

“When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:



- a. The heading which provides the most specific description shall be preferred to headings providing a more general description.”
15. In alignment with Rule 3, it is acknowledged that Solarsack has the potential to be classified under two different headings to wit 3926 and 8421. Rule 3 suggests that classification should be based on the essential specific character of the product.
16. It is not controverted that Solarsack is made of a plastic material. Chapter 39 of the HS under which the appellant classified the Solarsack covers "plastics and articles thereof." This chapter generally includes goods made primarily of plastics, focusing on the material rather than the function of the product.
17. Chapter 84 where the respondent argues that Solarsacks is covered, classifies "Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof." This chapter is more focused on machinery and mechanical appliances, their parts, and apparatuses for specific functions, including, for example, equipment for filtering or purifying water.
18. When deciding which between these two chapters is the ideal classification, the key considerations are the material from which the product is made (plastic, in this case) and the product's primary function (water treatment, disinfection, and purification).
19. The Solarsack, despite being made of plastic, is designed for a specific function which is the treatment, disinfection and purification of drinking water. This suggests that its classification should emphasize its function over its material composition. Chapter 84 includes heading notes on filtering or purifying machinery and apparatus, for liquids or gases. This chapter would in my view be more appropriate for the Solarsack because it specifically relates to the product's purpose and operation.
20. I would disagree with the appellant's submission that for Solarsack to be classified under Chapter 84 it must be a machinery and a mechanical appliance noting that the said chapter refers to machinery and apparatus. The Advanced Online Oxford Dictionary defines apparatus as tools or other pieces of equipment that are needed for a particular activity or task bringing Solarsack squarely within the meaning of an apparatus.
21. Moreover, even if I was wrong on this approach, this Court notes and aligns with the observations of the Tribunal on the design characteristics of Solarsack which distinguishes the said product from a simple refillable water container made of plastic material used to fill up with water and place under the sun to kill bacteria in water.
22. This observation is premised on the expert analysis and reports by experts on the working of Solarsack, which were tabled before the Tribunal. It is also worth noting that the heading notes to heading 8421 is wide enough and encompasses 'filters and purifiers of all types'.
23. Also, at the center of the dispute before the Tribunal was the definition and difference between water filtration, sterilization and purification. The respondent had presented Solasack as a water purifier while the appellant maintained that it is not a water purifier but a sterilizer which utilizes heating using UV rays from the sun and therefore not classifiable under Chapter 84.
24. In answer to this and flowing from the English definitions of these terminologies as adopted by the Tribunal, I find no difficulty finding that these are all processes used to make water safer for consumption and use, the key difference being that they target different contaminants and operate through distinct mechanisms. Whether or not Solasack was a purifier or a sterilizer was not the issue; the point is that it is an apparatus used for filtering or purifying liquids or gases.



25. It is therefore my finding that the function of a product can be more determinative than the material, especially for items designed for specific applications. The Supreme Court of India in *Dunlop India Ltd V Union of India & Others*, Oct 6th 1975 SCC P. 254 para 35 emphasized this point when it held that:

“when an article has, by all standards, a reasonable claim to be classified under an enumerated item in the tariff schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. ...”

Disposition

26. In the circumstances this Court upholds the Tribunal’s classification of Solarsack under H.S. Code 84.21.00. Consequently, the appeal herein is bereft of merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

