



**Commissioner of Customs & Border Control v Exome Life
Science Kenya Limited (Income Tax Appeal E020 of 2023)
[2024] KEHC 5350 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E020 OF 2023
FG MUGAMBI, J
MAY 13, 2024**

**BETWEEN
COMMISSIONER OF CUSTOMS & BORDER CONTROL APPELLANT
AND
EXOME LIFE SCIENCE KENYA LIMITED RESPONDENT**

*(Being an appeal from the judgment of the Tax Appeals Tribunal
in TAT Appeal No. 222 of 2022 dated 13th January 2023)*

JUDGMENT

Background:

1. The dispute before the Court is one of classification of an imported product known as Super soil (the product) which the respondent declared as a miscellaneous chemical product and classified it as H.S 3824.99.90. The product had been declared by the respondent as fertilizer and classified as H.S 3101.00.00 under the East African Community Common External Tariff (EAC CET), which attracted 0% VAT.
2. As a result of the reclassification the appellant issued the respondent, a manufacturing company dealing with agricultural products, with a demand notice for KShs. 950,978/= as VAT and penalties.
3. Dissatisfied with the appellant's decision, the respondent successfully preferred an appeal at the Tax Appeals Tribunal (the Tribunal). Vide a judgment dated 13th January, 2023 the Tribunal found that the appellant had erred in re-classification of the fertilizer, allowed the appeal and set aside the appellant's decision dated 18th January, 2021. The Tribunal further allowed the respondent to initiate a claim for a refund of KShs. 950,978/=. It is this decision that has brought the appellant before this Court.



Analysis and determination

4. This Court has carefully considered the appeal, the statement of facts in opposition thereof and the written submissions presented by the parties.
5. Two issues arise for determination out of the four grounds of appeal in the Memorandum of Appeal:
 - i. Whether the appellant erred in classifying the respondent's imported goods under the tariff 38.99.90 instead of tariff code 3101.00.00
 - ii. Whether the respondent is entitled to pay the sum of Kshs. 950,978/= assessed as VAT and penalties by the appellant from the re-classification of the imported goods.

Whether the appellant erred in classifying the respondent's imported goods under the tariff 38.99.90 instead of tariff code 3101.00.00

6. The appellant contends that the classification of goods under the HS code is determined by the characteristics, composition and components of the Product as opposed to the name of the product and its uses. On that basis it is the appellant's case that the respondent misclassified the imported product super soil as a fertilizer and used the wrong tariff 3101 which attracts 0% VAT instead of tariff 38.99.90 which attracts 16% VAT.
7. The appellant's position is that the imported product was a super soil cleanser which is specified to be a fluid fertilizer containing humic acid from the humus soil, seaweed extract and trace elements of copper, potassium, iron and sulphur. It is used in agricultural applications and intended for the growth of the healthy microflora in the soil.
8. The appellant submits that for a product to be classified under Chapter 31 as purported by the respondent its intended purpose should be to add macronutrients to the soil and not improve the quality of the soil. The appellant submits further that while Chapter 31 provides for the classification of fertilizers, the general Chapter notes at the same time state that the Chapter does not cover products which improve rather than fertilize the soil.
9. The appellant also submits that the Tribunal erred in relying on the reports from KEPHIS and the Crop Nutrition Laboratory Services (Cropnuts) as opposed to using the Chapter notes and the General Rules of Interpretation (GRIs) in coming to a determination on the classification.
10. On the contrary, the respondent submits that the product was imported for agricultural use as a fertilizer to be used for enhancing growth, quality produce and root growth development. This was supported by the reports from KEPHIS and Cropnuts. The respondent therefore maintains that the correct classification of the product was under H.S. Code 3101.00.00 as opposed to 38.99.90.
11. The respondent further submits that the Chapter notes used by the appellant to classify the product under Chapter 38 are non-existent, inapplicable and inappropriate and thus there is no legal basis to exclude the product from the classification as a fertilizer under Chapter 31 of the *EACCET*. The respondent submits that the appellant erred in using a general description as opposed to a specific description.



12. Chapter 31 of the HS applies to:

“Animal or vegetable fertiliser, whether or not mixed together or chemically treated: fertilizer produced by the mixing or chemical treatment of animal or vegetable products.”

Whereas Chapter 38 covers:

“Prepared binders for foundry mould or covers, chemical products and preparation of the chemical products or allied industries including those consisting of mixtures of natural products not elsewhere specified or included.”

13. In aligning with the EAC CET framework, this Court is being asked to scrutinize the application of the six 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.
14. 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.
15. 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.
16. 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. Rule 3 aids in the classification of products when Rules 1 and 2 do not lead to a singular classification. It is divided into three parts, each providing a method to determine the correct heading when goods could potentially fall under two or more headings.
17. Turning to the question at hand, in alignment with Rule 3, the product has the potential to be classified under two different headings to wit 38.99.90 and 3101.00.00. Rule 3 suggests that classification should be based on the essential specific character of the product.
18. It is common ground that the product is used in agriculture to improve soil fertility. In as far as the product contains mixtures of chemicals, I would defer to Rule 3(a) which guides that:
- “Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.”
19. The bigger question is whether the product is a fertilizer classified under heading 31.01 or a product of the chemical and allied industry not elsewhere defined. The term fertilizer is defined in the Online Oxford Dictionary as a substance added to soil to make plants grow more successfully.



20. The function of the product as evident from the product data sheet was for enhancing plant growth, quality and enhancing root growth and development. This definition fits within the definition of a fertilizer. I also note that the product was described as a fluid fertilizer.
21. On its composition, both parties presented laboratory test results before the Tribunal, on which basis the Tribunal found that there were very minimal levels of chemicals to qualify the product under Chapter 38.24. The Tribunal further found that the larger percentage of the component was non-chemical.
22. This Court aligns with those findings. Since Chapter 38 applies to chemical products, I align myself with the finding of the Tribunal that the more specific classification of the product would be under Chapter 31 as a fertilizer produced by the mixing or chemical treatment of animal or vegetable products as opposed to a classification under Chapter 38 of the CET.
23. On the first issue this Court finds that the appellant erred in classifying the respondent's imported goods under the tariff 38.99.90 instead of tariff code 3101.00.00.

Whether the respondent is entitled to pay the sum of Kshs. 950,978/= assessed as VAT and penalties by the appellant from the re-classification of the imported goods.

24. On the second issue, having determined the correct tariff for the classification of super soil as H.S. code 3101.00.00, the classification under this tariff attracts 0% VAT. It is, therefore, the finding of this court that the appellant was misguided in levying VAT of Kshs. 950, 978/= on the product.

Disposition

25. In conclusion, this Court upholds the Tribunal's judgment dated 13th January, 2023. The appeal is without merit and is dismissed with no orders as to costs.

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

F. MUGAMBI

JUDGE

