Commissioner of Customs & Border Control v Kim Fay Africa Limited (Customs Tax Appeal E011 of 2022) [2024] KEHC 8951 (KLR) (Commercial and Tax) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E011 OF 2022

WA OKWANY, J

JULY 11, 2024

BETWEEN

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

AND

KIM FAY AFRICA LIMITED ..... RESPONDENT

(Being an Appeal against the judgment of the Tax Appeals Tribunal at Nairobi delivered by the Honourable tribunal on 5th August, 2022)

JUDGMENT

The Parties

1. The Appellant herein, the Commissioner of Customs & Border Control, is an officer of the Kenya Revenue Authority ("KRA"), a public body duly established under the *Kenya Revenue Authority Act* (CAP 469) of the Laws of Kenya, whose primary mandate is the assessment and collection of Revenue on behalf of the Government of Kenya

2. The Respondent, Kim Fay East Africa Limited, is a limited liability company incorporated in Kenya under the *Companies Act* (Cap 486) under company registration number C.79482 and is located off Mombasa Road, behind Libra House, Nairobi Kenya.

3. The Respondent describes itself as a registered taxpayer and a provider of world class Home & Hygiene Essentials as well as a licensed manufacturer, marketer & distributor of products for Kimberly-Clark, Bio-oil, and Duracell.

Background

4. The dispute herein revolves around tariff classification of Respondent's product known as Kalle Sponge Clothe, also referred to as Cellulose sponge sheets.

5. The dispute arose following the Appellant's claim that the cellulose sponge sheets had been wrongly classified under HS Code 3921.14.10 which attracts a duty of 10% and VAT 16%, instead of 3926.90.90 which attracts import duty at 25% and VAT at 16%.

6. The Respondent challenged the Appellants proposed HS Code 3926.90.90 through the exchange of various correspondence and supporting documentation in which it implored the Appellant to reconsider its decision.

7. The Appellant however maintained its position that the correct code was 3926.90.90 after which it issued a Review Decision on 6th September 2021 reclassifying the cellulose sponge sheets under HS Code 4818.90.00 of the East African Community Common External Tariff (EAC/CET).

8. Aggrieved by the Appellant's Review Decision, the Respondent appealed to the Tax Appeals Tribunal (TAT) on 25th October 2021.

9. The Tribunal heard the appeal and rendered a verdict in favor of the Respondent on 5th August 2022. The Appellant was however dissatisfied with said judgment and preferred the instant appeal.

Appeal

10. The Appellant listed the following Grounds of Appeal in the Memorandum of Appeal dated 22nd November, 2022: -

    i. That the Honourable Tribunal erred in law and in fact in finding that the heading under HS Code 3921 are in the nature of cellular or polymers of styrene.

    ii. That the Honourable Tribunal erred in law and in fact in finding that the literal reading of the headings under HS Code 3926.90.90 and HS Code 4818.90.00 do not provide a specific description of the article under contention.

    iii. That the Honourable Tribunal erred in law and in fact in finding that the articles derived from cellulose and the classification code that deals with or embraces articles that are made up of cellulose would be the most appropriate classification code.

    iv. That the Honourable Tribunal erred in law and in fact in finding that the code relied on by the Appellant being HS Code 488.90.00 deals with "other products" and does not specifically deal with or cover regenerated cellulose which is a dominant element in the Kalle sponge.

    v. That the Honourable Tribunal erred in law and in fact in finding that an article whose essential character is made up of regenerated cellulose would fall under HS Code3921.14 and not HS Code 4818.90.

11. The Appellant seeks the following orders in the appeal: -

    a. That the Appeal be allowed.

    b. That the judgment of the Tax Appeals Tribunal delivered on 5th August 2022 in Tax Appeal No 714 of 2022 be set aside.

    c. That the cost of this Appeal be awarded to the Appellant

12. The Respondent filed its Statement of Facts dated 12th April, 2023 in which it explained the genesis of the dispute being the tariff classification of its, Kalle Sponge Clothe, which it had been importing and declaring as cellulose sponge sheets under the globally recognized tariff code 3921.14.00 of the East African Community Common External Tariff (EAC/CET).

13. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

14. The Appellant faulted the Tribunal for finding that the applicable tariff was under HS Code 3921 and submitted that in order to determine the correct code for particular goods, one has to look at the General Interpretation Rules (GIR) for the classification of goods, which sets out the principles of interpretation in conjunction with the various chapters describing the goods and the explanatory notes.

15. It was submitted that the Tribunal erred in finding that the heading under HS Code 3921 relates to products in the nature of cellular or polymers of styrene and argued that the purpose of classifying various goods is to ensure proper duty is paid by Taxpayers.

16. The Appellant referred to the Explanatory Notes to Chapter 3621 and submitted that the Respondent's imports of cellulose sponge are finished and ready for retail sale in assorted sizes which meant that the most applicable Tariff was 3926.90.90, which covers other articles of plastic and articles of other materials of heading 3901 to 3914.

17. The Appellant further submitted that the Respondent's product, by virtue of being sponge that is fully biodegradable, environmentally compatible and capable of rotting naturally autonomously placed the product to have essential characteristics of Chapter 48 as plastics are non-biodegradable environment friendly.

18. The Appellant submitted that the proper and most prudent classification of the Respondent's product was under Tariff HS Code 3926.90.90 instead of 3921.14.00 subject to items of chapter 48 specifically HS Code 4818.90.00 which attract import duty of 25%. The Appellant referred to the decision in *Republic v Commissioner General & another Exparte Awai Ltd* [2008] eKLR where the court stated as follows:-

> " In the end I must conclude that looking at the material placed before me and the submissions tendered by learned counsels...the Respondents had the statutory duty to impose duty according to the tariff classification provided by law under the Customs and Excise Act and under the Harmonized Community Description and Coding System provided by the World Custom Organization explanatory notes in which Kenya is a signatory."

19. The Appellant maintained that its decision to classify the Respondent's cellulose sponge under HS Tariff Code 4818.90.00 was proper and in conformity with the law. It cited the decision in *Diana Kilonzo and another v Independent Electoral and Boundaries Commission & 10 others* (2011) eKLR, where the High Court stated as follows when cautioning the Courts against interfering with decisions of other authorities: -

> " We note that the *Constitution* allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the *Constitution* so long as they comply with the *Constitution* and national legislation. These bodies and institutions should be allowed

to grow. The people of Kenya, in passing the *Constitution* found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not crossover to areas which Kenyans specifically reserved for other authorities."

20. It was submitted that classification of goods in Kenya is governed by the East African Community Common External Tariff (EAC/CET) which is the tariff system applicable to countries that belong to the East African Community.

21. It was the Appellant's position that Rule 3 of the GIR provides for the proper classification of goods or products by preference of the Heading Code that gives the most specific description and in this case being HS Code 3926.90.90 rather than HS Code 3921.14.00 subject to items of Chapter 48 specifically HS Code 4818.90.00.

22. The Appellant submitted that the Tribunal erred in failing to appreciate that the Respondent's product fell under the classification of HS Code 4818.90 as was shown in the Appellant's Statement of Facts, submissions and its review decision issued on 6th August 2021.

Respondent's Submissions

23. The Respondent submitted that its products, cellulose sponge sheets, possess the essential characteristics that qualify and enable its classification under heading 39.21 of the EAC/CET. It added that the Harmonized commodity description is an international standard classification created by the World Customs Organization and that countries who are parties to it are guided by the General Interpretation Rules which aim at ensuring fair international trade.

24. It was submitted that sub-headings under HS Code 4818 do not have regenerated cellulose as an item under it and further, that the specific Code the Appellant relied on, being HS Code 4818.90.00, deals with 'other' products. The Respondent noted that the said code does not specifically deal with and or cover regenerated cellulose which is the dominant element in its product, the kalle sponge. The Respondent added that the subheading 'other' cannot be interpreted to mean cellulose if there is a provision, within the Common External Tariff, that specifically deals with an article whose essential character is made up of cellulose.

25. The Respondent relied on the decision in *Commissioner of income Tax v Westmont Power (K) Ltd* Nairobi High Court Income Tax Appeal No 626 of 2002 where the Court, while citing *Inland Revenue v Scottish Central Electricity Company* [1931] 15TC761, expressed itself as follows:

> " taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens their property by imposing pecuniary burdens result in penal Consequences must be interpreted with precaution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity...such Law must be resolved in favor of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation."

26. The Respondent observed that the impugned judgment, by the TAT, adequately and sufficiently captured the correct classification of its product, cellulose sponge, as opposed to the Appellant's preferred tariff code which barely captured the nature and attributes of the products.

27. The words in the aforementioned cases are clear;

> " ...a subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."

28. The Respondent emphasized that it provided the Appellant with a 'Certificate of analysis and Origin' (Kalle certificate) on Kalle Sponge Cloth, which the Tribunal concurred, is sufficient evidence to resolve the classification dispute.

29. The Respondent drew the court's attention to the fact that the Appellant had previously considered and issued a ruling dated 21st December 2021 on the classification of the Kalle cellulose sponge under 3921.14.00 in relation to another importer from the same supplier company KALLE. It was the Respondent's case that the factors considered in the determination of the ruling do not differ from the facts of this case.

Analysis & Determination

30. I have considered the record of Appeal, the statement of facts and submissions by counsel. I find that the main issue for determination is whether the Tribunal made the correct decision on the tariff classification of the Respondent's product, Kalle cellulose sponge.

31. Section 5 of the *Excise Duty Act* (EDA), 2015 states as follows: -

> " Imposition of excise duty
>
> 1. Subject to this Act, a tax, to be known as excise duty, shall be charged in accordance with the provisions of this Act on—
>
> a. excisable goods manufactured in Kenya by a licensed manufacturer;
>
> b. excisable services supplied in Kenya by a licensed person; or
>
> c. excisable goods imported into Kenya."

32. Section 5(2) of the *EDA* stipulates as follows: -

> " (2) Excise duty shall be charged at the rate specified in the First Schedule for the excisable goods or services in force at the time the liability arises for excise duty as determined under section 6.
>
> 3. The excise duty payable—
>
> a. under subsection (1)(a), shall be payable by the licensed manufacturer;
>
> b. under subsection (1)(b), shall be payable by the licensed person making the supply: or
>
> c. under subsection(1)(c), shall be payable by the importer of the excisable goods."

33. In *Republic v Commissioner General & another ex-parte Awal Ltd* [2008] eKLR, which was quoted in the case of *Associated Battery Manufacturers Limited v Commissioner of Customs Services* [2020] eKLR, the court dealt with a similar dispute on product classification and held thus: -

> " In the end I must conclude that looking at the material placed before me and the submissions tendered by learned counsels, the Respondents had the statutory duty to impose duty according to the tariff classification provided by law under the Customs and Excise Act and under the Harmonised Commodity Description and Coding System provided by the World Custom Organization explanatory notes in which Kenya is a signatory."

34. I have perused the General Rules for the Interpretation of the Harmonized System which at Rule 1 ("GRI 1") provides that:

> " The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions, i.e.: GR 2 to 6."

35. Rule 3 (a) of the GIR provides:

> " 3. 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. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods."

36. This court is alive to the fact that the General Interpretative Rule 1 (GIR 1) is the foremost rule of classification as it determines the terms of the headings, the Section or Chapter Notes where relevant, and, if necessary and allowable, the other GIRs.

37. Section 4 (1) of the *East Africa Community Customs Management Act* (EACCMA) provides that: -

> The Directorate shall, in relation to management and administration of customs, coordinate and monitor (a) administration of common external tariff.

38. As I have already stated in this judgment, the main issue in contention is the tariff classification of the Respondent's product known as Kalle Sponge Clothe, which is also referred to as Cellulose sponge sheets. The Respondent imported the said product and declared it as cellulose sponge sheets used for cleaning impervious surfaces under the globally recognized tariff code 3921.14.00 of the East African Community Common External Tariff (EAC/CET).

39. The Appellant, on the other hand, took the position that the Respondent's kalle Sponge clothe was wrongly classified under tariff code 3921.14.00 which attracts duty of 10% and VAT of 16% as opposed to tariff code 3926.90.90 which attracts duty of 25% and VAT of 16%.

40. I note that the Respondent furnished the Appellant with a 'Certificate of analysis and Origin' (Kalle certificate) on Kalle Sponge Cloth, which the Tribunal concurred, was sufficient evidence to resolve the classification dispute. The Appellant did not deny that it was supplied with the said certificate and I therefore find that the certificate was a proper guide on the tariff code to be applied on the Respondent's product.

41. The Respondent also highlighted a similar case relating to another importer from the same supplier company KALLE where the Appellant issued a ruling dated 21st December 2021 on the classification of the Kalle cellulose sponge under 3921.14.00. The Respondent attached a copy of the said ruling as Appendix 1 to the Statement of Facts. The Appellant did not deny or controvert the Respondent's claim over the said ruling.

42. I have perused the Appellant's said Ruling of 21st December 2021 and I note that the description of the Kalle Sponge in the said case fits the description of the Respondent's product in this case. I therefore find that since the Appellant had in its own ruling classified the product under 3921.14.00, there is no justification for departing from the said classification in this matter.

43. I further find that the Appellant did not tender any material to support its reclassification of the Respondent's product. I therefore find no reason to upset the Judgment of the Tribunal.

44. In sum, I find that the instant appeal is not merited and I therefore dismiss it with no orders as to costs.

45. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 11TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE